

1 F.3d 1108, 1119 (9th Cir 2003) (noting that the burden of establishing nonexhaustion
2 falls on the defendants). It should be treated as a matter of abatement and brought in an
3 “unenumerated Rule 12(b) motion rather than [in] a motion for summary judgment.” *Id.*
4 (citations omitted). In deciding a motion to dismiss for failure to exhaust administrative
5 remedies under § 1997e(a), the court may look beyond the pleadings and decide disputed
6 issues of fact. *Id.* at 1119-20. If the court concludes that the prisoner has not exhausted
7 California’s prison administrative process, the proper remedy is dismissal without
8 prejudice. *Id.* at 1120.

9 **B. Analysis**

10 The Prison Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to provide
11 that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. §
12 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other
13 correctional facility until such administrative remedies as are available are exhausted.”
14 42 U.S.C. § 1997e(a). Exhaustion in prisoner cases is mandatory. *Porter v Nussle*, 122
15 S. Ct. 983, 988 (2002).

16 It is undisputed that in 2010, at the time the alleged constitutional violations took
17 place, the Contra Costa County Jail provided their inmates with procedures for filing
18 administrative grievances about the conditions of their confinement or any other aspect
19 of their treatment while in custody. (Evans Decl. ¶¶ 3-5, Exhs. A-B.) The first step for
20 inmates wanting to complain, as Plaintiff did, about medical care at the jail is to make an
21 “informal” verbal grievance with a staff member in their housing unit. (*Id.* Ex. A §
22 II(A)(1).) If that does not resolve the issue, the next step is for the inmate to write a
23 “formal” grievance on an “Inmate Request Form,” which must be submitted within 48
24 hours of the incident or condition that is the subject of the complaint. (*Id.* Ex. A §
25 II(B)(1)-(2).) If the inmate is dissatisfied with the Deputy’s response to the grievance,
26 the next step is to file a written appeal within five days to the Facility Commander “or
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1 designee.”¹ (*Id.* Exh. A § II(B)(7); Exh. B § I(A)(1).) The inmate then has the right to
2 file further appeals “until they have been satisfied or the detention division chain of
3 command has been exhausted,” including appeals to the Division Captain and finally to
4 the Facility Captain. (*Id.* Exh. B § I(A)(2(f).) The Facility Captain conducts the final
5 review of all grievance appeals. (*Id.*) Copies of all inmate grievances and appeals are
6 stored in an inmate’s booking file. (*Id.* Exh. B § I(A)(2)(g).) All inmates are shown a
7 video and given an orientation describing the policies and procedures for filing
8 administrative grievances each time they booked into custody at any Contra Costa
9 County Jail facility. (*Id.* at ¶ 7.) A written manual explaining these procedures is
10 available on all housing units. (*Id.* at ¶¶ 7-8.)

11 Plaintiff filed 26 written, or “formal,” grievances at the Contra Costa County Jail.
12 (Compl., Exs. 1-26.) Defendants show that there is no record of Plaintiff appealing the
13 responses to any of these grievances to the higher levels of administrative review that
14 were available to her, i.e. to the Facility Commander or designee, to the Division
15 Captain, or to the Facility Captain. (Evans Decl. ¶ 9.) Plaintiff states that the Deputies
16 she gave several of her grievances to did not respond to them, and that she submitted
17 others to the Facility Commander but did not receive a response to them. Plaintiff
18 presents no evidence of any appeals to the Facility Commander, and there were none in
19 her booking file, where copies of such appeals are kept. (*Id.*) Even if she did file such
20 appeals and did not receive a response, the grievance procedures allow inmates to file
21 appeals up the chain of command as long as they are not “satisfied” (*Id.* Exh. B §
22 I(A)(2)(f).) Thus, if she did not hear back from the Deputy or Facility Commander on
23 any of her grievances, she could have resubmitted it to the next higher level of review,
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27 ¹The designees are not identified in the jail policy manual, but Defendants state and
28 Plaintiff does not dispute that the designees are the “Detention Division Commander” and the
“Custody Services Bureau Commander.” (*See* Evans Decl. Exh. B § I(A)(1); Mot. to Dism. at
5.)

1 including to the Division Captain, and finally the Facility Captain. Plaintiff presents no
2 evidence that she did so or explanation why she did not.

3 The PLRA required Plaintiff to submit her grievance to the highest available level
4 of administrative review, in this case to the Facility Captain. There is no evidence that
5 she ever did so, nor has Plaintiff presented grounds for excusing this obligation.
6 Accordingly, the complaint will be dismissed without prejudice to refiling after all
7 available administrative remedies are exhausted.


8 CONCLUSION

9 For the foregoing reasons, Defendants' motion to dismiss is GRANTED (docket
10 number 22), and Plaintiff's complaint is DISMISSED without prejudice. The motion to
11 amend the complaint, which contains nothing that shows that Plaintiff has properly
12 exhausted her claims, is DENIED (docket number 33). The motion for appointment of
13 counsel (docket number 35) is DENIED.

14 The Clerk shall enter judgment and close the file.

15 IT IS SO ORDERED.

16 DATED: December 12, 2011

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18 JEFFREY S. WHITE
19 United States District Judge
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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 MARY LEE GAINES,
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7 Plaintiff,

Case Number: CV10-04615 JSW

CERTIFICATE OF SERVICE

8 v.

9 CONTRA COSTA COUNTY et al,
10 Defendant.
11

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
Court, Northern District of California.

13 That on December 12, 2011, I SERVED a true and correct copy(ies) of the attached, by placing
14 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
15 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office
delivery receptacle located in the Clerk's office.

16
17 Mary Lee Gaines
18 WA2486
19 P.O. Box 92
Chowchilla, CA 93610

20 Dated: December 12, 2011



Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk