

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 BRYON A. DOUGLAS,

No. C 09-00950 CW (PR)

5 Plaintiff,

ORDER OF DISMISSAL

6 v.

7 WARDEN, SAN QUENTIN STATE PRISON,
8 et al.,

9 Defendants.
_____ /

10
11 Plaintiff, a state prisoner, has filed a pro se complaint
12 under 42 U.S.C. § 1983. He also seeks leave to proceed in forma
13 pauperis under 28 U.S.C. § 1915. Plaintiff did not exhaust his
14 administrative remedies prior to filing this action, however.

15 The Prison Litigation Reform Act of 1995 (PLRA) amended 42
16 U.S.C. § 1997e to provide that "[n]o action shall be brought with
17 respect to prison conditions under [42 U.S.C. § 1983], or any other
18 Federal law, by a prisoner confined in any jail, prison, or other
19 correctional facility until such administrative remedies as are
20 available are exhausted." 42 U.S.C. § 1997e(a). Although once
21 within the discretion of the district court, exhaustion in prisoner
22 cases covered by § 1997e(a) is now mandatory. Porter v. Nussle,
23 534 U.S. 516, 524 (2002). All available remedies must now be
24 exhausted; those remedies "need not meet federal standards, nor
25 must they be 'plain, speedy, and effective.'" Id. (citation
26 omitted). Even when the prisoner seeks relief not available in
27 grievance proceedings, notably money damages, exhaustion is a
28 prerequisite to suit. Id.; Booth v. Churner, 532 U.S. 731, 741
(2001). Similarly, exhaustion is a prerequisite to all prisoner

1 suits about prison life, whether they involve general circumstances
2 or particular episodes, and whether they allege excessive force or
3 some other wrong. Porter, 534 U.S. at 532. PLRA's exhaustion
4 requirement requires "proper exhaustion" of available
5 administrative remedies. Woodford v. Ngo, 548 U.S. 81, 94 (2006).

6 The State of California provides its prisoners the right to
7 appeal administratively "any departmental decision, action,
8 condition or policy perceived by those individuals as adversely
9 affecting their welfare." Cal. Code Regs. tit. 15, § 3084.1(a).
10 It also provides them the right to file appeals alleging misconduct
11 by correctional officers and officials. Id. § 3084.1(e). In order
12 to exhaust available administrative remedies within this system, a
13 prisoner must proceed through several levels of appeal:

14 (1) informal resolution; (2) formal written appeal on a CDC 602
15 inmate appeal form; (3) second level appeal to the institution head
16 or designee; and (4) third level appeal to the Director of the
17 California Department of Corrections and Rehabilitation. Barry v.
18 Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code
19 Regs. tit. 15, § 3084.5). A final decision from the Director's
20 level of review satisfies the exhaustion requirement under
21 § 1997e(a). Id. at 1237-38.

22 Non-exhaustion under § 1997e(a) is an affirmative defense
23 which should be brought by defendants in an unenumerated motion to
24 dismiss under Federal Rule of Civil Procedure 12(b). Wyatt v.
25 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). However, a complaint
26 may be dismissed by the court for failure to exhaust if a prisoner
27 "conce[des] to nonexhaustion" and "no exception to exhaustion
28 applies." Id. at 1120. Here, Plaintiff conceded that he had not

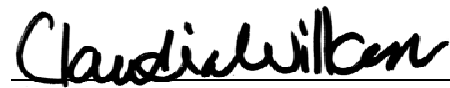
1 exhausted his administrative remedies at the time he filed his
2 original complaint. Plaintiff has since filed an amended
3 complaint, in which he states that he has exhausted his available
4 administrative remedies by filing a 602 inmate appeal relating to
5 his claims. However, the Director's Level Decision on this inmate
6 appeal was not issued until April 20, 2009, after this action had
7 been filed on March 4, 2009. An action must be dismissed unless
8 the prisoner exhausted his available administrative remedies before
9 he filed suit, even if the prisoner fully exhausts while the suit
10 is pending. McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir.
11 2002); see Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006)
12 (where administrative remedies are not exhausted before the
13 prisoner sends his complaint to the court it will be dismissed even
14 if exhaustion is completed by the time the complaint is actually
15 filed). Therefore, this inmate appeal that concluded after the
16 action was filed did not exhaust any claim in this action.

17 Accordingly, the complaint is DISMISSED without prejudice to
18 refiling his exhausted claims in a new action. See McKinney, 311
19 F.3d at 1199-1201.

20 Plaintiff's request to proceed in forma pauperis is GRANTED.
21 The Clerk of the Court shall enter judgment in accordance with this
22 Order, terminate all pending motions, and close the file.

23 IT IS SO ORDERED.

24 Dated: 7/1/09



CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

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1 UNITED STATES DISTRICT COURT
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4 BRYON A. DOUGLAS,

5 Plaintiff,

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8 Defendant.

Case Number: CV09-00950 CW

CERTIFICATE OF SERVICE

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

11 That on July 1, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
14 in the Clerk's office.

15 Bryan Anthony Douglas G44753
16 Mule Creek State Prison
17 P.O. Box 409020
18 Ione, CA 95640

19 Dated: July 1, 2009

20 Richard W. Wieking, Clerk
21 By: Sheilah Cahill, Deputy Clerk