

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

3 JEFF J. HANCOCK,

No. C 09-06082 CW (PR)

4 Plaintiff,

ORDER OF DISMISSAL AND
ADDRESSING PENDING MOTION

5 v.

6 CHIEF OF CORRECTION EDWARD C.
7 FLORES, et al.,

8 Defendants.
_____ /

9
10 Plaintiff, a state prisoner currently incarcerated at the
11 California Training Facility, has filed a pro se complaint under 42
12 U.S.C. § 1983 alleging that jail officials at the Santa Clara
13 County Jail were deliberately indifferent to his serious medical
14 needs.

15 In an Order dated November 30, 2010, the Court reviewed his
16 complaint and dismissed it with leave to file an amended complaint
17 within thirty days. Plaintiff was instructed to amend his claims
18 to correct various deficiencies, including his apparent failure to
19 exhaust all administrative remedies. The Court stated:

20 Plaintiff states that administrative remedies were
21 "unavailable due to [his] transfer to state prison."
22 (Compl. at 2.) He also claims that he "didn't know [he]
23 suffered a permanent injury while [he] was incarcerated
24 in county jail." (Id.) He "requested a grievance from
25 the county while in prison, [but] they said you have to
26 be currently in custody in the Santa Clara County Jail."
27 (Id.) It thus appears from the face of the complaint
28 that he has not exhausted his administrative remedies as
required by 42 U.S.C. § 1997e(a). Therefore, his claims
are subject to dismissal. If Plaintiff did exhaust his
administrative remedies with respect to his claims
before filing this action, he may amend his complaint to
so allege, as set forth below. Otherwise, the action
will be dismissed without prejudice to refile after
exhausting his administrative remedies. See McKinney,
311 F.3d at 1199-1201.

(Nov. 30, 2010 Order at 7.)

1 Plaintiff then filed a document entitled, "Ex Parte
2 Application for Enlargement of Time," in which he states that he
3 has "made multiple attempts to obtain a county jail grievance form
4 in order to exhaust administrative remedies prior to filing this
5 civil matter." (Pl.'s Dec. 17, 2010 Mot. at 1.) Specifically, he
6 states that he "made three previous requests for a county jail
7 grievance form in order to exhaust administrative remedies, to no
8 avail." (Id. at 2.) He further states that he "needs time to
9 obtain the identities of the above mentioned Doe Defendants and the
10 county grievance form" (Id.) He claims that he "will
11 again attempt to obtain the grievance form along with the names of
12 the DOE Defendants named above, possibly by filing a FRCP 37(a)
13 motion with this Court." (Id. at 1.)

14 The Prison Litigation Reform Act of 1995 (PLRA) amended 42
15 U.S.C. § 1997e to provide that "[n]o action shall be brought with
16 respect to prison conditions under [42 U.S.C. § 1983], or any other
17 Federal law, by a prisoner confined in any jail, prison, or other
18 correctional facility until such administrative remedies as are
19 available are exhausted." 42 U.S.C. § 1997e(a). Although once
20 within the discretion of the district court, exhaustion in prisoner
21 cases covered by § 1997e(a) is now mandatory. Porter v. Nussle,
22 534 U.S. 516, 524 (2002). All available remedies must now be
23 exhausted; those remedies "need not meet federal standards, nor
24 must they be 'plain, speedy, and effective.'" Id. (citation
25 omitted). Even when the prisoner seeks relief not available in
26 grievance proceedings, notably money damages, exhaustion is a
27 prerequisite to suit. Id.; Booth v. Churner, 532 U.S. 731, 741
28 (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 Section 1073 of Title 15 of the California Code of Regulations
7 provides county jail inmates with a right to "appeal and have
8 resolved grievances" relating to their confinement.

9 Non-exhaustion under § 1997e(a) is an affirmative defense
10 which should be brought by defendants in an unenumerated motion to
11 dismiss under Federal Rule of Civil Procedure 12(b). Wyatt v.
12 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). However, a complaint
13 may be dismissed by the court for failure to exhaust if a prisoner
14 "conce[des] to nonexhaustion" and "no exception to exhaustion
15 applies." Id. at 1120.

16 Here, instead of submitting proof that he exhausted his
17 administrative remedies with respect to his claims before filing
18 this action, Plaintiff requests an extension of time to exhaust his
19 claims. Thus, Plaintiff has conceded that he had not exhausted his
20 administrative remedies at the time he filed his original
21 complaint. Plaintiff has not presented any extraordinary
22 circumstances which might permit him to be excused from complying
23 with PLRA's exhaustion requirement. Cf. Booth, 532 U.S. at 741 n.6
24 (courts should not read "futility or other exceptions" into
25 § 1997e(a)). Accordingly, Plaintiff's "Ex Parte Application for
26 Enlargement of Time" (docket no. 14) is DENIED, and the complaint
27 is DISMISSED without prejudice to refile after exhausting his
28 administrative remedies. See McKinney v. Carey, 311 F.3d 1198,

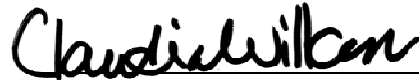
1 1199-1201 (9th Cir. 2002) (action must be dismissed without
2 prejudice unless prisoner exhausted available administrative
3 remedies before he filed suit, even if prisoner fully exhausts
4 while the suit is pending).

5 The Clerk of the Court shall enter judgment in accordance with
6 this Order, terminate all pending motions and close the file.

7 This Order terminates Docket no. 14.

8 IT IS SO ORDERED.

9 Dated: 1/7/2011



CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

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

4 JEFF J HANCOCK,

5 Plaintiff,

6 v.

7 SANTA CLARA COUNTY et al,

8 Defendant.

Case Number: CV09-06082 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 January 7, 2011, 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
13 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery
14 receptacle located in the Clerk's office.

15 Jeff J. Hancock
16 V-49474
17 CTF North - LB - 111L
18 P.O. Box 705
19 Soledad, CA 93960

20 Dated: January 7, 2011

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk