

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

3  
4 GREGORY L. MOURLAND, JR.,

No. C 12-05892 YGR (PR)

5 Plaintiff,

**ORDER OF DISMISSAL**

6 vs.

7 OFFICER E. MARTINEZ,

8 Defendant.

9 \_\_\_\_\_  
10 Plaintiff, a state prisoner, has filed a *pro se* complaint under 42 U.S.C. § 1983. He also seeks  
11 leave to proceed *in forma pauperis* under 28 U.S.C. § 1915. Plaintiff has not exhausted California's  
12 prison administrative process, however.

13 The Prison Litigation Reform Act of 1995 (PLRA) amended 42 U.S.C. § 1997e to provide  
14 that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any  
15 other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such  
16 administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Although once  
17 within the discretion of the district court, exhaustion in prisoner cases covered by § 1997e(a) is now  
18 mandatory. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). All available remedies must now be  
19 exhausted; those remedies "need not meet federal standards, nor must they be 'plain, speedy, and  
20 effective.'" *Id.* (citation omitted). Even when the prisoner seeks relief not available in grievance  
21 proceedings, notably money damages, exhaustion is a prerequisite to suit. *Id.*; *Booth v. Churner*,  
22 532 U.S. 731, 741 (2001). Similarly, exhaustion is a prerequisite to all prisoner suits about prison  
23 life, whether they involve general circumstances or particular episodes, and whether they allege  
24 excessive force or some other wrong. *Porter*, 534 U.S. at 532. PLRA's exhaustion requirement  
25 requires "proper exhaustion" of available administrative remedies. *Woodford v. Ngo*, 548 U.S. 81,  
26 94 (2006).

27 The State of California provides its prisoners the right to appeal administratively "any  
28 departmental decision, action, condition or policy perceived by those individuals as adversely

1 affecting their welfare." Cal. Code Regs. tit. 15, § 3084.1(a). It also provides them the right to file  
2 appeals alleging misconduct by correctional officers/officials. *Id.* § 3084.1(e). In order to exhaust  
3 available administrative remedies within this system, a prisoner must proceed through several levels  
4 of appeal: (1) informal resolution; (2) formal written appeal on a CDC 602 inmate appeal form;  
5 (3) second level appeal to the institution head or designee; and (4) third level appeal to the Director  
6 of the California Department of Corrections and Rehabilitation. *Barry v. Ratelle*, 985 F. Supp. 1235,  
7 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A final decision from the Director's  
8 level of review satisfies the exhaustion requirement under § 1997e(a). *Id.* at 1237-38.


9 Non-exhaustion under § 1997e(a) is an affirmative defense which should be brought by  
10 defendants in an unenumerated motion to dismiss under Federal Rule of Civil Procedure 12(b).  
11 *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). However, a complaint may be dismissed by  
12 the court for failure to exhaust if a prisoner "conce[des] to nonexhaustion" and "no exception to  
13 exhaustion applies." *Id.* at 1120. Here, Plaintiff concedes he has not exhausted his administrative  
14 remedies. Plaintiff has not presented any extraordinary circumstances which might compel that he  
15 be excused from complying with PLRA's exhaustion requirement. *Cf. Booth*, 532 U.S. at 741 n.6  
16 (courts should not read "futility or other exceptions" into § 1997e(a)).

17 Accordingly, Plaintiff's request to proceed *in forma pauperis* is DENIED, and the complaint  
18 is DISMISSED without prejudice to refile after exhausting California's prison administrative  
19 process. *See McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (action must be  
20 dismissed without prejudice unless prisoner exhausted available administrative remedies before he  
21 filed suit, even if prisoner fully exhausts while the suit is pending).

22 The Clerk of the Court shall enter judgment, terminate any pending motions, and close the  
23 file.

24 IT IS SO ORDERED.

25 DATED: April 8, 2013

  
YVONNE GONZALEZ ROGERS  
UNITED STATES DISTRICT COURT JUDGE

28