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

JERRY L. COBB,	)	No. C 06-6372 RMW (PR)
	)	
Plaintiff,	)	ORDER GRANTING
	)	DEFENDANTS' MOTION TO
v.	)	DISMISS
	)	
JEANNE WOODFORD, et al.,	)	
	)	
Defendants.	)	
_____	)	

On September 7, 2006, plaintiff, proceeding pro se, filed a federal civil rights complaint pursuant to 42 U.S.C. § 1983 in the Southern District of California. On October 11, 2006, the case was transferred to this court. On July 3, 2008, in its initial screening review, the court dismissed the complaint, and entered judgment the same day. On March 18, 2011, the Ninth Circuit vacated the order of dismissal and judgment and remanded. On August 29, 2011, plaintiff filed an amended complaint. On October 24, 2011, the court partially dismissed the amended complaint and ordered service upon named defendants.

On January 23, 2012, defendants filed a motion to dismiss and motion for summary judgment. Although given an opportunity, plaintiff has not filed an opposition.<sup>1</sup> After reviewing

<sup>1</sup> On July 31, 2012, the court offered plaintiff the opportunity to file a supplemental opposition, in light of *Woods v. Carey*, 684 F.3d 934, 939-41 (9th Cir. 2012). Plaintiff has not filed a supplemental opposition.

1 the pleadings, and for the reasons stated below, the court GRANTS defendants' motion to  
2 dismiss.

### 3 4 5 **BACKGROUND**

6 On August 21, 2003, prison staff received information that plaintiff, who was working as  
7 an "X-Wing movement clerk" was selling vacant bed spaces to inmates, who were waiting for  
8 available bed space, for \$10.00. (Am. Compl. at Ex. A.) Prison staff investigated the claim, and  
9 obtained three confidential sources corroborating the allegation that plaintiff was indeed offering  
10 available bed spaces for sale. (Id.) On September 11, 2003, a Rules Violation Report ("RVR")  
11 was written, charging plaintiff with extortion. (Id.) The RVR stated that Source #1 reported that  
12 plaintiff solicited him for a bed space if Source #1 would give plaintiff \$10.00 worth of canteen  
13 items or stamps. (Id.) Source #2 reported that he agreed to pay plaintiff items from the canteen,  
14 and, in return, plaintiff moved Source #2 out of X-Wing before other inmates, who had been  
15 waiting longer. (Id.) Source #3 reported that plaintiff was asking "white inmates" for \$10.00 in  
16 canteen items, in exchange for plaintiff moving them out of the wing, even before other inmates  
17 who had been waiting longer. (Id.)

18 On September 25, 2003, plaintiff was found guilty of extortion. (Id., Ex. C.) On October  
19 12, 2003, plaintiff filed an administrative appeal ("602") challenging the guilty finding. (Id., Ex.  
20 F.) Plaintiff complained that he was denied proper notice under the California rules. (Id.) He  
21 further argued that the confidential sources were not reliable or independent, and were vague in  
22 terms of their descriptions of what occurred. (Id.) Plaintiff also claimed that there was no  
23 evidence that he "obtained money from another," which was a required element of extortion.  
24 (Id.) Finally, plaintiff argued that he was not provided one of the staff member's statements, and  
25 refuted the hearing officer's findings as deficient. (Id.) The first level of review bypassed  
26 plaintiff's 602, and the second level of review denied it. (Id.) Plaintiff appealed that decision,  
27 arguing that the second level response failed to address several of plaintiff's issues. (Id., Ex. H.)  
28 At the Director's Level of Review, plaintiff's 602 was partially granted. (Id., Ex. I.) The

1 decision determined that extortion was not the appropriate charge, and, inter alia, ordered the  
2 RVR reissued and reheard with the charge of bribery rather than extortion, and directed the  
3 hearing officer to “carefully reevaluate the confidential memorandums and reliability of the  
4 sources.” (Id.)

5 On May 25 and June 13, 2004, plaintiff received his renewed RVR hearing on the charge  
6 of bribery. (Id., Ex. J.) Plaintiff was found not guilty of bribery, and the RVR was dismissed.  
7 (Id.)

## 8 DISCUSSION

9 In his federal complaint, plaintiff alleges that; (1) defendants targeted plaintiff for  
10 disciplinary action because they were motivated by racial factors, in violation of the Equal  
11 Protection Clause, and (2) defendants retaliated against plaintiff by transferring him to a more  
12 restrictive facility because he was pursuing his administrative remedies.

13 In their motion to dismiss, defendants argue that both of plaintiff’s claims are  
14 unexhausted. Defendants also argue that plaintiff’s equal protection clause fails to state a claim,  
15 that plaintiff’s claim against defendant Woodford in her official capacity must be dismissed, that  
16 plaintiff failed to establish supervisory liability against defendants Solis and Brown, and that all  
17 defendants are entitled to qualified immunity. Because the court grants defendants’ motion to  
18 dismiss based on the failure to exhaust, it will not address defendants’ other arguments.

### 19 A. Standard of Review

20 The Prison Litigation Reform Act (“PLRA”) provides that “[n]o action shall be brought  
21 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a  
22 prisoner confined in any jail, prison, or other correctional facility until such administrative  
23 remedies as are available are exhausted.” 28 U.S.C. § 1997e(a). Nonexhaustion under  
24 § 1997e(a) is an affirmative defense; that is, defendants have the burden of raising and proving  
25 the absence of exhaustion. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). In deciding  
26 a motion to dismiss for failure to exhaust administrative remedies, the court may look beyond the  
27 pleadings and decide disputed issues of fact. Id. at 1119-20. If the court concludes that the  
28 prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal without

1 prejudice. Id. at 1120.

2 The State of California provides its prisoners and parolees the right to appeal  
3 administratively “any policy, decision, action, condition, or omission by the department or its  
4 staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or  
5 her health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). In order to exhaust  
6 available administrative remedies within this system, a prisoner must proceed through several  
7 levels of appeal: (1) informal review, (2) first formal written appeal on a CDC 602 inmate appeal  
8 form, (3) second level appeal to the institution head or designee, and (4) third level appeal to the  
9 Director of the California Department of Corrections and Rehabilitation (“Director”). See Barry  
10 v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5).  
11 A final decision from the Director’s level of review satisfies the exhaustion requirement under  
12 Section 1997e(a). See Barry, 985 F. Supp. at 1237-38.

13 Defendants have the burden of raising and proving the absence of exhaustion, and  
14 inmates are not required to specifically plead or demonstrate exhaustion in their complaints.  
15 Jones v. Bock, 549 U.S. 199, 215-17 (2007). As there can be no absence of exhaustion unless  
16 some relief remains available, a movant claiming lack of exhaustion must demonstrate that  
17 pertinent relief remained available, whether at unexhausted levels or through awaiting the results  
18 of the relief already granted as a result of that process. Brown v. Valoff, 422 F.3d 926, 936-37  
19 (9th Cir. 2005).

20 B. Analysis

21 Compliance with prison grievance procedures is all that is required by the PLRA to  
22 “properly exhaust.” Jones, 549 U.S. at 217-18. In California, the regulation requires the  
23 prisoner “to lodge his administrative complaint on CDC form 602 and ‘to describe the problem  
24 and action requested.’” Morton v. Hall, 599 F.3d 942, 946 (9th Cir. 2010) (quoting Cal. Code  
25 Regs. tit. 15 § 3084.2(a)). Where a prison’s grievance procedures do not specify the requisite  
26 level of factual specificity required in the grievance, “a grievance suffices if it alerts the prison  
27 to the nature of the wrong for which redress is sought.” Griffin v. Arpaio, 557 F.3d 1117, 1120  
28 (9th Cir. 2009) (quoting Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)). The grievance

1 need not include legal terminology or legal theories unless they are needed to provide notice of  
2 the harm being grieved. Id. Nor must a grievance include every fact necessary to prove each  
3 element of an eventual legal claim. Id. The purpose of a grievance is to alert the prison to a  
4 problem and facilitate its resolution, not to lay groundwork for litigation. Id. The grievance  
5 should include sufficient information “to allow prison officials to take appropriate responsive  
6 measures.” Id. (citation and internal quotation omitted).

7 Here, plaintiff’s 602 complained that the confidential sources used to support a guilty  
8 finding for extortion were unreliable. (Am. Compl., Ex. F.) His 602 did not accuse defendants  
9 of targeting him for an RVR based on his race. In fact, plaintiff does not challenge defendants’  
10 motivation within his 602 appeal. (Id.) Rather, plaintiff’s 602 focuses on the trustworthiness of  
11 the confidential sources, the substance of the evidence, and the hearing itself. (Id.) Plaintiff’s  
12 602 failed to mention or theorize his federal claim that he believed he was charged with extortion  
13 because defendants engaged in racial discrimination. The only mention of race in plaintiff’s two  
14 to three page administrative appeal is when plaintiff claimed that defendant Crivello only  
15 questioned the “white inmates” and not the “black, mexican and other inmates” [sic] about  
16 whether plaintiff tried to sell them beds. (Am. Compl., Ex. F.) However, a full reading of the  
17 record demonstrates that it was initially reported by Source # 3 that plaintiff had solicited only  
18 “white inmates” with the offer to move them out of the wing before other inmates. (Am. Compl.  
19 Ex. B.)

20 Even liberally construed, this appeal cannot have alerted prison officials that plaintiff  
21 believed prison officials were targeting him for disciplinary action because they were motivated  
22 by racial factors, in violation of the Equal Protection Clause. See Griffin, 557 F.3d at 1120. In  
23 addition, the evidence shows that plaintiff filed no administrative appeals regarding an equal  
24 protection violation stemming from the extortion charge. (Decl. Pherigo at ¶ 4.) Because no 602  
25 appeal put prison officials on notice of plaintiff’s claim that defendants were violating plaintiff’s  
26 right to equal protection by targeting plaintiff based on his race, see Morton, 599 F.3d at 946,  
27 this claim is not exhausted.

28 Along similar lines, none of the allegations raised in plaintiff’s 602 relate to his

1 retaliation claim. Plaintiff's federal retaliation claim is that, on January 23, 2004, he was  
2 transferred from CTF Central to CTF North – allegedly a more secure facility – in retaliation for  
3 his 602 filings. However, the evidence shows that plaintiff had filed no administrative appeals  
4 regarding the January 23, 2004 transfer. (Decl. Pherigo at ¶ 5.) Accordingly, plaintiff has not  
5 exhausted his retaliation claim.

6 Plaintiff has provided no evidence to the contrary, nor does he argue that he is entitled  
7 to any exception to the exhaustion requirement. Thus, because plaintiff has failed to exhaust his  
8 administrative remedies prior to filing suit, defendants' motion to dismiss is GRANTED.

9 **CONCLUSION**

10 Defendants' motion to dismiss is GRANTED. Judgment shall be entered in favor of  
11 defendants. The clerk shall terminate all pending motions and close the file.

12 IT IS SO ORDERED.

13 DATED: \_\_\_\_\_

14   
RONALD M. WHYTE  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

JERRY LYNN COBB,  
Plaintiff,

Case Number: CV06-06372 RMW

**CERTIFICATE OF SERVICE**

v.

JEANNE WOODFORD et al,  
Defendant.

---

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

That on August 30, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by 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.

Jerry L. Cobb J57654  
Ironwood State Prison  
B1-104L  
P.O. Box 2199  
Blythe, CA 92226

Dated: August 30, 2012

Richard W. Wieking, Clerk  
By: Jackie Lynn Garcia, Deputy Clerk