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NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN ROBY,	)	No. C 08-01113 JF (PR)
	)	
Plaintiff,	)	ORDER GRANTING MOTION TO
	)	DISMISS
vs.	)	
	)	
T. STEWART, et al.,	)	
	)	
Defendants.	)	(Docket No. 11)

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Plaintiff, a California prisoner incarcerated at Pelican Bay State Prison (“PBSP”) and proceeding pro se, filed the instant civil rights action pursuant to 42 U.S.C. § 1983 against PBSP prison officials. Finding the complaint, liberally construed, stated two cognizable claims, the Court ordered service upon Defendants S. Wheeler, T. Lucarelli, and S. Trujillo at PBSP. Defendants filed a motion to dismiss the complaint, (Docket No. 11), for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a). Plaintiff filed opposition, and Defendants filed a reply.

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1 **DISCUSSION**

2 A. Standard of Review

3 The Prison Litigation Reform Act of 1995 (“PLRA”) amended 42 U.S.C. § 1997e  
4 to provide that “[n]o action shall be brought with respect to prison conditions under [42  
5 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or  
6 other correctional facility until such administrative remedies as are available are  
7 exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and no longer left to the  
8 discretion of the district court. Woodford v. Ngo, 548 U.S. 81, 84 (2006) (citing Booth  
9 v. Churner, 532 U.S. 731, 739 (2001)). “Prisoners must now exhaust all ‘available’  
10 remedies, not just those that meet federal standards.” Id. Even when the relief sought  
11 cannot be granted by the administrative process, i.e., monetary damages, a prisoner must  
12 still exhaust administrative remedies. Id. at 85-86 (citing Booth, 532 U.S. at 734).

13 The PLRA’s exhaustion requirement requires “proper exhaustion” of available  
14 administrative remedies. Id. at 93. This requirement cannot be satisfied “by filing an  
15 untimely or otherwise procedurally defective administrative grievance or appeal.” Id. at  
16 84. “The text of 42 U.S.C. § 1997e(a) strongly suggests that the PLRA uses the term  
17 ‘exhausted’ to mean what the term means in administrative law, where exhaustion means  
18 proper exhaustion.” Id. at 92. Therefore, the PLRA exhaustion requirement requires  
19 proper exhaustion. Id. “Proper exhaustion demands compliance with an agency’s  
20 deadlines and other critical procedural rules because no adjudicative system can function  
21 effectively without imposing some orderly structure on the course of its proceedings.” Id.  
22 at 90-91 (footnote omitted). Accordingly, the filing of an untimely grievance or appeal is  
23 not proper exhaustion. See id. at 92. A prisoner must complete the administrative review  
24 process in accordance with the applicable procedural rules, including deadlines, as a  
25 precondition to bringing suit in federal court. See id. at 87; see also Johnson v. Meadows,  
26 418 F.3d 1152, 1159 (11th Cir. 2005) (holding that, to exhaust remedies, a prisoner must  
27 file appeals in the place, and at the time, the prison's administrative rules require); Ross v.  
28 County of Bernalillo, 365 F.3d 1181, 1185-86 (10th Cir. 2005) (same).

1 The State of California provides its inmates and parolees the right to appeal  
2 administratively “any departmental decision, action, condition, or policy which they can  
3 demonstrate as having an adverse effect upon their welfare.” Cal. Code Regs. tit. 15,  
4 § 3084.1(a). It also provides its inmates the right to file administrative appeals alleging  
5 misconduct by correctional officers. See id. § 3084.1(e). In order to exhaust available  
6 administrative remedies within this system, a prisoner must proceed through several  
7 levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate  
8 appeal form, (3) second level appeal to the institution head or designee, and (4) third level  
9 appeal to the Director of the California Department of Corrections and Rehabilitation. Id.  
10 § 3084.5; Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). This satisfies the  
11 administrative remedies exhaustion requirement under § 1997e(a). Id. at 1237-38.

12 Nonexhaustion under § 1997e(a) is an affirmative defense. Jones v. Bock,  
13 127 S. Ct. 910, 922-23 (2007); Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003).  
14 Defendants have the burden of raising and proving the absence of exhaustion, and  
15 inmates are not required to specifically plead or demonstrate exhaustion in their  
16 complaints. Jones, 127 S. Ct. at 921-22. As there can be no absence of exhaustion unless  
17 some relief remains available, a movant claiming lack of exhaustion must demonstrate  
18 that pertinent relief remained available, whether at unexhausted levels or through  
19 awaiting the results of the relief already granted as a result of that process. Brown v.  
20 Valoff, 422 F.3d 926, 936-37 (9th Cir. 2005).

21 A nonexhaustion claim should be raised in an unenumerated Rule 12(b) motion  
22 rather than in a motion for summary judgment. Wyatt, 315 F.3d at 1119. In deciding  
23 such a motion – a motion to dismiss for failure to exhaust nonjudicial remedies – the  
24 court may look beyond the pleadings and decide disputed issues of fact. Id. at 1119-20.  
25 If the court concludes that the prisoner has not exhausted nonjudicial remedies, the proper  
26 remedy is dismissal without prejudice. Id. at 1120.

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1 B. Legal Claims

2 Petitioner alleges that Defendants Wheeler, Lucarelli violated his Eighth  
3 Amendment right to be free from cruel and unusual punishment and his First Amendment  
4 right to free exercise of religion when they double-celled him on August 25, 2005, with  
5 an Evangelical Christian, who posed a threat to and ultimately attacked Plaintiff because  
6 Plaintiff was a Satanist

7 Defendants argue that between August 25, 2005, the date of the alleged injury,  
8 and February 25, 2008, the date when Plaintiff filed the instant complaint, Plaintiff failed  
9 to exhaust any inmate appeals grieving the claims herein. (Defs.' Mot. at 5.) Defendants  
10 have provided the declarations of C. Wilber, the Inmate Appeals Coordinator at PBSP,  
11 and T. Emigh, the Assistant Chief of the Inmate Appeals Branch, sufficient to show that  
12 Plaintiff exhausted only one inmate appeal during the period in question, *i.e.*, log no.  
13 PBSP-07-1290, which concerned allegations of insufficient access to the SHU's law  
14 library. (See Emigh Decl. Ex. A & B.) Furthermore, the evidence shows that Plaintiff  
15 submitted eleven appeals between August 25, 2005 and February 25, 2008, and that none  
16 of these appeals are related to the claims in the instant complaint. (See Wilber Decl. at 2-  
17 3, Ex. A.)

18 Plaintiff does not dispute that he did not exhaust administrative remedies. Rather,  
19 Plaintiff claims that he was "precluded from exhausting administrative remedies" because  
20 of "Defendants' own actions." (Oppo. at 5.) According to Plaintiff, Defendants failed to  
21 either single cell him or to house him with another Satanist in accordance with a promise  
22 by the Unit Classification Committee. (Id. at 3.) Plaintiff also claims that Defendants  
23 unreasonably delayed in responding to his inmate appeal in which he complained of the  
24 Defendants' failure to honor the promise. (Id. at 4-5.)

25 The Court concludes that Plaintiff has failed to establish that he properly exhausted  
26 his administrative remedies regarding his claims in the instant complaint prior to filing  
27 this suit. Even accepting Plaintiff's allegations of Defendants' actions as true, there is no  
28 evidence to show that Plaintiff attempted to properly file an inmate appeal to exhaust his

1 claims. Plaintiff submits PBSP-02-03309, which complained of the revocation of single-  
2 cell status. (Oppo. Ex. A-1.) However, that grievance, which was filed on November 20,  
3 2002, cannot be said to exhaust claims for an injury arising from an incident that occurred  
4 on August 25, 2005. Plaintiff also provides a copy of an inmate appeal filed on August 7,  
5 2005, which was before the attack on August 25, 2005 occurred. (Id., Ex. A-5.) Lastly,  
6 Plaintiff submits a copy of an inmate grievance filed on June 19, 2007, which was  
7 rejected because it was duplicative and as untimely. (Id., Ex. B-5.) This appeal was not  
8 properly exhausted as the PLRA's exhaustion requirement cannot be satisfied "by filing  
9 an untimely or otherwise procedurally defective administrative grievance or appeal."  
10 Ngo, 548 U.S. at 84. "Proper exhaustion demands compliance with an agency's deadlines  
11 and other critical procedural rules because no adjudicative system can function effectively  
12 without imposing some orderly structure on the course of its proceedings." Id. at 90-91  
13 (footnote omitted). Furthermore, the obligation to exhaust persists as long as some  
14 remedy is available; when that is no longer the case, the prisoner need not further pursue  
15 the grievance. Brown v. Valoff, 422 F.3d 926, 934-35 (9th Cir. 2005). Plaintiff's  
16 obligation to exhaust continued after his appeal was rejected at the initial screening  
17 because he was clearly informed on the form that he could still pursue an appeal: "This  
18 screening decision may not be appealed unless you can support an argument that the  
19 above is inaccurate. In such a case, please return this form to the Appeals Office with the  
20 necessary supporting information." (Oppo., Ex. B-5 at 1.) It is clear that Plaintiff failed  
21 to properly exhaust his administrative remedies with respect to the claims in the instant  
22 complaint. Accordingly, Defendants' motion to dismiss will be GRANTED.


23 Because Plaintiff failed to exhaust his administrative remedies with respect to his  
24 First and Eighth Amendment claims arising out of injuries incurred on August 25, 2005,  
25 Defendants' motion to dismiss the complaint (Docket No. 11) is GRANTED. See 42  
26 U.S.C. § 1997e(a). This action is DISMISSED without prejudice to Plaintiff refiling after  
27 all available administrative remedies have been properly exhausted. Wyatt, 315 F.3d at  
28 1120.

1 **CONCLUSION**

2 For the foregoing reasons, the motion to dismiss by Defendants Wheeler,  
3 Lucarelli, and Trujillo for failure to exhaust administrative remedies (Docket No. 11) is  
4 GRANTED. The claims against them are **DISMISSED** without prejudice.

5 IT IS SO ORDERED.

6 DATED: 3/13/09

7   
8 JEREMY FOGEL  
9 United States District Judge