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2
3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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6
7 LORENZO STEWART,

No. C 10-02376 CW (PR)

8 Plaintiff,

ORDER OF DISMISSAL

9 v.

10 SHERIFF WARREN E. RUPF, et al.,

11 Defendants.
_____ /

12 Plaintiff, a state prisoner, has filed a pro se complaint
13 under 42 U.S.C. § 1983, alleging constitutional violations that
14 occurred while he was housed at the Martinez Detention Facility.
15 He has been granted leave to proceed in forma pauperis. Plaintiff
16 has not exhausted California's prison administrative process,
17 however.

18 The Prison Litigation Reform Act of 1995 (PLRA) amended 42
19 U.S.C. § 1997e to provide that "[n]o action shall be brought with
20 respect to prison conditions under [42 U.S.C. § 1983], or any other
21 Federal law, by a prisoner confined in any jail, prison, or other
22 correctional facility until such administrative remedies as are
23 available are exhausted." 42 U.S.C. § 1997e(a). Under this
24 section, an action must be dismissed unless the prisoner exhausted
25 his available administrative remedies before he filed suit, even if
26 the prisoner fully exhausts while the suit is pending. See
27 McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002). "[T]he
28 PLRA's exhaustion requirement applies to all inmate suits about

1 prison life, whether they involve general circumstances or
2 particular episodes, and whether they allege excessive force or
3 some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002).
4 Exhaustion of all "available" remedies is mandatory; those remedies
5 need not meet federal standards, nor must they be "plain, speedy
6 and effective." Id. at 524; Booth v. Churner, 532 U.S. 731, 739-40
7 & n.5 (2001). Even when the prisoner seeks relief not available in
8 grievance proceedings, notably money damages, exhaustion is a
9 prerequisite to suit. Id. at 741. PLRA's exhaustion requirement
10 requires "proper exhaustion" of available administrative remedies.
11 Woodford v. Ngo, 548 U.S. 81, 94 (2006). The purposes of the
12 exhaustion requirement include allowing the prison or jail to take
13 responsive action, filtering out frivolous cases and creating an
14 administrative record. See Porter, 534 U.S. at 525.

15 Section 1073 of Title 15 of the California Code of Regulations
16 provides county jail inmates with a right to "appeal and have
17 resolved grievances" relating to their confinement. Cal. Code
18 Regs. tit. 15, § 1073.

19 Non-exhaustion under § 1997e(a) is an affirmative defense
20 which should be brought by defendants in an unenumerated motion to
21 dismiss under Federal Rule of Civil Procedure 12(b). Wyatt v.
22 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). However, a complaint
23 may be dismissed by the court for failure to exhaust if a prisoner
24 "conce[des] to nonexhaustion" and "no exception to exhaustion
25 applies." Id. at 1120. Here, Plaintiff concedes he has not
26 exhausted his administrative remedies. He alleges that he
27 "submitted three complaints against staff misconduct" after the
28 alleged incident involving the violation of his constitutional

1 rights on March 2, 2010; however, he claims he has not yet received
2 a response. (Compl. at 2.) Instead of waiting for a response to
3 his grievances, Plaintiff filed the present civil rights action on
4 May 5, 2010. Plaintiff has not presented any extraordinary
5 circumstances which might permit him to be excused from complying
6 with PLRA's exhaustion requirement. Cf. Booth, 532 U.S. at 741 n.6
7 (courts should not read "futility or other exceptions" into
8 § 1997e(a)).

9 Accordingly, the complaint is DISMISSED without prejudice to
10 refiling after exhausting California's prison administrative
11 process. See McKinney, 311 F.3d at 1199-1201.

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

14 IT IS SO ORDERED.

15 Dated: 10/12/2010



CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

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8 Defendant.

Case Number: CV10-02376 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 October 12, 2010, 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 Lorenzo Stewart CC09BL509
16 Contra Costa County Jail Martinez
17 901 Court Street
18 Martinez, CA 94553

Dated: October 12, 2010

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