

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JOYCE MARIE SIMMONS,
Plaintiff,
v.
T. MISCHEL, et al.,
Defendants.

Case No. [18-cv-02193-VKD](#)

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT; GRANTING LEAVE TO
FILE AMENDED COMPLAINT**

Re: Dkt. No. 29

In this action, pro se plaintiff Joyce Marie Simmons, a federal prisoner confined at the Federal Correctional Institution in Dublin, California (“FCI-Dublin”), claims that several prison officials have violated her constitutional rights. Dkt. No. 1. Ms. Simmons filed a verified complaint asserting the following claims: (1) use of excessive force and failure to protect her from excessive force, in violation of the Eighth Amendment, (2) placement in administrative detention in retaliation for filing a lawsuit, in violation of the First Amendment, and (3) denial of due process of law in connection with her administrative detention, in violation of the Fifth Amendment.¹ See id. at ECF p.13. Ms. Simmons asserts all of these claims against all defendants. She seeks declaratory relief, injunctive relief, compensatory damages, and punitive damages against all defendants. Id. All parties have consented to magistrate judge jurisdiction. Dkt. Nos. 2, 26.

¹ Ms. Simmons relies on the Fourteenth Amendment, which applies only to the states. The Court construes this claim as a claim for violation of the Fifth Amendment, which applies to the federal government.

1 Defendants Tamara Mischel, Kimberly Luke, Ashley Phillips, Gordon Castillo, Timothy
2 Brosnan, and W.Z. Jenkins, II move to dismiss all of Ms. Simmons’s claims pursuant to Federal
3 Rule of Civil Procedure 12(b)(6) on the ground that she cannot state a claim for damages against
4 any defendant, as such a claim would constitute an unwarranted extension of the Bivens remedy²
5 under *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). Dkt. No. 29. Alternatively, defendants move for
6 summary judgment on the following grounds: (1) Ms. Simmons failed to exhaust her
7 administrative remedies; (2) defendants did not violate Ms. Simmons’s constitutional rights; and
8 (3) defendants are entitled to qualified immunity. *Id.* For the reasons discussed below, the Court
9 grants defendants’ summary judgment motion based on Ms. Simmons’ failure to exhaust her
10 administrative remedies. See *infra* Section III.A. As such, the Court need not address defendants’
11 Rule 12(b)(6) motion.

12 **I. BACKGROUND**

13 The following facts are undisputed unless otherwise noted³:

14 **A. Parties**

15 Ms. Simmons is serving a prison sentence following her conviction on six counts of
16 preparing false tax returns in violation of 26 U.S.C. § 7206(2). Dkt. No. 29-1 ¶ 2, Attach. 1. Ms.
17 Simmons has been incarcerated at FCI-Dublin since October 24, 2016 and is expected to complete
18 her sentence in February 2025. *Id.* ¶ 4, Attach. 3. FCI-Dublin is a low-security Federal
19 Correctional Institution, with an adjacent, minimum-security Satellite Prison Camp (“SPC”),
20 located in Dublin, California. Dkt. No. 29-14 ¶ 2. FCI-Dublin houses over 1,200 female
21 prisoners. *Id.* Approximately 200 of these prisoners are housed at the minimum-security SPC.
22 *Id.* Ms. Simmons was housed at the SPC from October 24, 2016 to November 15, 2017, when she
23

24 _____
25 ² Although Ms. Simmons filed her complaint as an action under 42 U.S.C. § 1983, the Court has
26 construed the complaint as an action arising under *Bivens v. Six Unknown Fed. Narcotics Agents*,
27 403 U.S. 388 (1971). Dkt. No. 28 at 2.

28 ³ As Ms. Simmons has filed a verified complaint, the Court may rely on statements of fact in the
complaint that she is competent to assert as if they were made by declaration. *Schroeder v.*
McDonald, 55 F.3d 545, 460 (9th Cir. 1995) (“A verified complaint may be used as an opposing
affidavit under Rule 56 [if it is] based on personal knowledge and set[s] forth specific facts
admissible in evidence.”) (internal citation omitted).

1 was transferred to the low-security facilities of FCI-Dublin. Id. ¶ 10.

2 Defendant Kimberly Luke is a Unit Manager at FCI-Dublin. Id. ¶ 1. She was the Unit
3 Manager at the SPC from July 2016 to June 2018 during the time Ms. Simmons was housed there.
4 Id. ¶ 2.

5 Defendant Ashley Phillips is a Correctional Officer at FCI-Dublin. Dkt. No. 29-20 ¶ 1.
6 She was the Unit Officer for the SPC from June 11, 2017 to September 9, 2017 during a portion of
7 the time Ms. Simmons was housed there. Id.

8 Defendant Gordon Castillo was the Captain at FCI-Dublin from August 2014 to June 2018.
9 Dkt. No. 29-24 ¶ 1.

10 Defendant Timothy Brosnan was a Lieutenant at FCI-Dublin from approximately July
11 2016 to July 2018. See Dkt. No. 29-26 ¶ 1. He worked at the Special Housing Unit (“SHU”) at
12 FCI-Dublin for approximately one year during that time. Id.

13 Defendant Tamara Mischel is the Associate Warden at FCI-Dublin, a position she has held
14 since March 2017. Dkt. No. 29-29 ¶ 1. For some period of time, including during the fall of
15 2017, Ms. Mischel served as Acting Warden of FCI-Dublin. Id. ¶ 3.

16 Defendant W.Z. Jenkins, II is the Warden of FCI-Dublin, a position he has held since
17 November 6, 2017. Dkt. No. 29-31 ¶ 1.

18 **B. Cell Door Incident on August 15, 2017 and Claimed Knee Injury**

19 As Unit Officer at the SPC, Ms. Phillips was responsible for direct supervision of
20 prisoners, including Ms. Simmons. Dkt. No. 1 at ECF p.7; Dkt. No. 29-20 ¶ 2. Ms. Phillips’s
21 responsibilities included supervision of prisoner work assignments. Dkt. No. 29-20 ¶ 2.

22 On August 15, 2017, Ms. Phillips paged Ms. Simmons to the Officer’s Station at 7:10 a.m.
23 Dkt. No. 1 at ECF p.7. Ms. Simmons says that Ms. Phillips assigned her extra duties, and that Ms.
24 Simmons objected to that assignment as it was Ms. Simmons’s day off of work. Id. Ms. Simmons
25 says that Ms. Phillips “became irate and immediately ordered me to leave her sight.” Id. Ms.
26 Luke, who observed the interaction but does not recall specific details, calls it a “disagreement”
27 and denies that Ms. Phillips acted in a threatening or abusive manner toward Ms. Simmons. Dkt.
28 No. 29-14 ¶ 5. Ms. Phillips offers no testimony about the interaction. See Dkt. No. 29-20.

1 Shortly after her dispute with Ms. Phillips at the Officer’s Station, Ms. Simmons returned
2 to her cell. Dkt. No. 1 at ECF p.8. Ms. Simmons says that Ms. Phillips kicked the cell door open
3 and struck Ms. Simmons, who was seated on the toilet just inside the door at that time, on her right
4 knee. Id. Ms. Simmons says that Ms. Phillips knew she was in her cell and seated on the toilet
5 because Ms. Simmons had placed a piece of paper on the door window indicating that the cell was
6 occupied and the toilet was in use. Id.; Dkt. No. 35 at 3; Dkt. No. 29-12⁴ at 49. Ms. Simmons
7 also says that when she called out that her knee had been struck, Ms. Phillips laughed at her and
8 said, “I don’t give a f—k. I have the f—king right to come in whenever I want. Now what about
9 that.” Dkt. No. 1 at ECF p.8

10 Ms. Phillips describes the event differently. She says that she knocked on Ms. Simmons’s
11 door, but there was no response, so she opened it to place a roll of toilet paper inside. Dkt. No.
12 29-20 ¶ 3. Ms. Phillips denies kicking the cell door and says she did not know Ms. Simmons was
13 in her cell. Id. ¶ 4. Ms. Phillips also says she did not see the door strike Ms. Simmons and that
14 Ms. Simmons did not tell her that it did. Id. Ms. Phillips acknowledges that she “shouted in
15 surprise,” but does not say what words she shouted. Id. ¶ 3. She does not deny that she used the
16 words Ms. Simmons recounts. Id.

17 Ms. Simmons reported the cell door incident to a case manager named “Chavez” and a
18 second shift officer named “Vasquez” on August 15, 2017, but she did not seek medical attention
19 that day. Dkt. No. 1 at ECF p.9. According to Ms. Simmons, no medical attention was available
20 to prisoners on the following day, August 16, 2017 (a Wednesday). Id. On the morning of August
21 17, 2017, Ms. Simmons went to the prison’s health services department, complaining of pain in
22 her right knee. Id.; Dkt. No. 29-12 at 49. The medical provider’s record indicates that [REDACTED]

23 [REDACTED]

24 _____
25 ⁴ Defendants filed an administrative motion to seal Attachment 11 to the declaration of Jacquelyn
26 Herrera (Dkt. No. 29-12) in its entirety. Dkt. No. 31. However, defendants did not file an
27 unredacted version of Attachment 11 on the docket as required by Civil Local Rule 79-5, but
28 instead provided the Court only with a physical copy of Attachment 11. The Court addresses
defendants’ administrative motion by a separate concurrent order, in which the Court directs
defendants to file an unredacted version of Attachment 11 in compliance with Civil Local Rule
79-5. The Court cites her to the public version of Attachment 11 that defendants filed with their
original motion.

1 [REDACTED] Dkt. No. 29-
2 12 at 49. [REDACTED]

3 [REDACTED]
4 Id. Ms. Simmons was [REDACTED] and advised to use over-the-
5 counter pain/inflammation medication and to do knee exercises. Id.; Dkt. No. 1 at ECF p.9.

6 Later on August 17, 2017, Ms. Simmons sent an electronic message to Ms. Luke, the Unit
7 Manager, in which she referred to the dispute with Ms. Phillips on August 15, 2017 and described
8 the cell door incident that followed. Dkt. No. 29-15 ¶ 5, Attach. 1. Because she was not Ms.
9 Phillips’s supervisor, Ms. Luke forwarded the message to Captain Castillo and notified Ms.
10 Simmons that she had done so. Id. ¶ 6, Attach. 1. On August 19, 2017, Mr. Castillo forwarded
11 Ms. Luke’s message to two lieutenants for further review and investigation of the incident. Dkt.
12 No. 29-24 ¶ 4, Attach. 1. The record does not reflect the outcome of that review and investigation
13 and what action, if any, was taken as a result.

14 Defendants submit medical records showing that on June 15, 2017, approximately two
15 months before the cell door incident, [REDACTED]
16 [REDACTED].
17 Dkt. 29-12 at 54. [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]. Id. at 1–40.

23 **C. Ms. Simmons’s Placement in SHU and Transfer to FCI-Dublin**

24 Beginning in September 2017, other prisoners at the SPC reported to Ms. Luke that Ms.
25 Simmons was bullying them, coming into their cells to threaten them, and causing disruption
26 within the SPC. Dkt. No. 29-14 ¶ 8, Attach. 2. Ms. Luke, in consultation with her supervisor,
27 decided to place Ms. Simmons into administrative detention in the SHU to avoid conflicts with
28 other prisoners while they investigated the complaints against Ms. Simmons. Id. Ms. Simmons

1 was moved to the SHU on October 11, 2017. *Id.*, Attach. 3.

2 On October 25, 2017, Ms. Luke recommended that Ms. Simmons be transferred from the
3 minimum-security SPC to a low-security facility. Dkt. No. 29-14 ¶ 9, Attach. 4. As reflected in
4 the transfer request, Ms. Luke recommended transfer for the following reasons:

5 Inmate Simmons has not demonstrated appropriate interactions with
6 staff and peers since she arrived to [SPC] Dublin. She has been
7 counseled multiple times by staff in regards to her negative
8 interactions with peers in her unit. Specifically, she bullied
9 vulnerable inmates over the use of common areas such as the TV
10 room, laundry room, and lobby areas. Consequently, she is not
appropriate for placement at a minimum security institution. As
such, the Unit Team is requesting the Greater Security Management
Variable be applied and she be transferred to a low security level
institution other than FCI Dublin, due to her familiarity of the
institutional grounds.

11 *Id.*

12 Associate Warden Tamara Mischel, who was then serving as Acting Warden, reviewed and
13 approved the transfer request on October 25, 2017. *Id.* ¶ 9; Dkt. No. 29-29 ¶ 3, Attach. 1.

14 Thereafter, the Designation and Sentence Computation Center also approved the transfer. Dkt.
15 No. 29-14 ¶ 10. On November 13, 2017, Warden W.Z. Jenkins, II, the new Warden of FCI-
16 Dublin, signed the Transfer Order. *Id.* ¶ 10, Attach. 5; Dkt. No. 29-31 ¶ 5, Attach. 1. On
17 November 15, 2017, Ms. Simmons was transferred from the SHU to the low-security facility at
18 FCI-Dublin.⁵ Dkt. No. 29-14 ¶ 10, Attach. 3.

19 Ms. Simmons was in the SHU from October 11, 2017 to November 15, 2017. *Id.* ¶ 10,
20 Attach. 3. As the SHU Lieutenant during that time, Timothy Brosnan was responsible for
21 ensuring that each prisoner received appropriate attention and care while in the SHU. Dkt. No.
22 29-16 ¶ 4. Mr. Brosnan was required to conduct periodic record reviews and in-person reviews to
23 ensure each prisoner's placement in the SHU remained appropriate. *Id.*

24 Mr. Brosnan does not recall any specific interactions with Ms. Simmons, although he does
25 recall, generally, that she was in the SHU and that he spoke with her at her cell about her SHU
26 placement. *Id.* Consistent with what he says is his standard practice, the prison's records reflect

27 _____
28 ⁵ The record does not reflect why, contrary to the initial recommendation, Ms. Simmons was
transferred to the low-security facility at FCI-Dublin instead of to a different low-security facility.

1 that Mr. Brosnan reviewed Ms. Simmons’s SHU placement on October 17, 23, 30 and November
2 5, 2017. Id. ¶¶ 5-6, Attach. 2. Mr. Brosnan does not explain how these records were created or
3 who created them; he says only that they are “maintained and used by the Bureau of Prisons in the
4 ordinary course of its operations.” Id. ¶ 2.

5 Ms. Simmons says that while she was in the SHU, no executive staff member, including
6 Mr. Brosnan, came to visit or speak with her about her placement in the SHU. Dkt. No. 1 at ECF
7 p.11; Dkt. No. 35 at 7. Ms. Simmons relies on the supporting declarations of two fellow SHU
8 prisoners, both of whom say that they never saw Mr. Brosnan or any other executive staff visit
9 Ms. Simmons. Dkt. No. 35, Ex. H. Ms. Simmons says that on November 11, 2017, while still in
10 the SHU, she sent Mr. Castillo a written request seeking information about why she was placed in
11 the SHU and why she had not yet been advised of the reasons for her detention. See Dkt No. 1 at
12 ECF p.12, Ex. K. She says that she sent an electronic message to Mr. Castillo on November 16,
13 2017 (after she was transferred to the low-security facility) containing the same request. Dkt No.
14 35, Ex. G. Ms. Simmons says she never received a response to either request. See Dkt. No. 1 at
15 ECF p.12, Ex. K; Dkt. No. 35 at 7–8. Mr. Castillo says he has no recollection of receiving these
16 requests from Ms. Simmons, although he does not dispute that the electronic message was sent to
17 his correct email address. Dkt. No. 29-24 ¶ 5. Defendants cite no evidence that Ms. Simmons was
18 ever given a written explanation for her placement in the SHU prior to or during her time in
19 administrative detention.

20 **D. Administrative Remedy Requests**

21 Since arriving at FCI-Dublin on October 24, 2016, defendants say that Ms. Simmons has
22 filed 16 administrative remedy requests or appeals. Dkt. No. 29-1 ¶ 5, Attachs. 5-12. Defendants
23 assert—and Ms. Simmons does not dispute—that three of those requests possibly concern matters
24 at issue in this action:

- 25 1. Remedy ID #908715-F1, submitted on July 6, 2017, regarding Ms. Simmons’s
26 allegations that Officer Phillips harassed her about her work assignments;
- 27 2. Remedy ID #919931-F1, submitted on October 13, 2017, regarding Ms. Simmons’s
28 request that no inmate be shown favoritism or preference; and

1 3. Remedy ID #920132-F1, submitted on October 24, 2017, regarding Ms. Simmons’s
2 allegations that Unit Manager Luke discriminated and retaliated against her in
3 conducting an investigation.

4 Id. ¶ 11, Attachs. 5, 8, 9. The Warden responded to each of these requests, and defendants
5 assert—and Ms. Simmons again does not dispute—that Ms. Simmons did not appeal the Warden’s
6 responses. Id. ¶ 11.

7 **E. Administrative Tort Claim**

8 On November 30, 2017, Ms. Simmons sent an administrative tort claim for injury and
9 damages to the Western Regional Office of the Bureau of Prisons, which the Western Regional
10 Office acknowledged by letter dated December 7, 2017. Id. ¶ 14, Attach. 12. In her
11 administrative claim, Ms. Simmons recounted the cell door incident that occurred on August 15,
12 2017. She claimed that her injury was “constant sharp excruciating pain of right knee/leg” and
13 asked for \$50,000 in compensation for personal injury. Id. The Bureau of Prisons denied Ms.
14 Simmons’s claim on February 15, 2018. Id., Attach. 12 at ECF p.5.

15 **II. LEGAL STANDARD**

16 A party may move for summary judgment on a “claim or defense” or “part of . . . a claim
17 or defense.” Fed. R. Civ. P. 56(a). Summary judgment is appropriate when, after adequate
18 discovery, there is no genuine issue as to any material facts and the moving party is entitled to
19 judgment as a matter of law. Id.; see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).
20 Material facts are those that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*,
21 477 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if there is sufficient
22 evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

23 A party seeking summary judgment bears the initial burden of informing the Court of the
24 basis for its motion, and of identifying those portions of the pleadings and discovery responses
25 that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Where
26 the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no
27 reasonable trier of fact could find other than for the moving party. *S. Calif. Gas. Co. v. City of*
28 *Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).

1 On an issue where the nonmoving party will bear the burden of proof at trial, the moving
2 party may discharge its burden of production either (1) by “produc[ing] evidence negating an
3 essential element of the nonmoving party’s case” or (2) after suitable discovery, by “show[ing]
4 that the nonmoving party does not have enough evidence of an essential element of its claim or
5 defense to discharge its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co.,
6 Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000); see also *Celotex*, 477 U.S. at 324–25.

7 Once the moving party meets its initial burden, the opposing party must then set forth
8 specific facts showing that there is some genuine issue for trial in order to defeat the motion. See
9 Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 250. “A party opposing summary judgment may not
10 simply question the credibility of the movant to foreclose summary judgment.” *Anderson*, 477
11 U.S. at 254. “Instead, the non-moving party must go beyond the pleadings and by its own
12 evidence set forth specific facts showing that there is a genuine issue for trial.” *Far Out Prods.,
13 Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001) (citations and quotations omitted). The non-
14 moving party must produce “specific evidence, through affidavits or admissible discovery
15 material, to show that the dispute exists.” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th
16 Cir. 1991). Conclusory or speculative testimony in affidavits and moving papers is insufficient to
17 raise a genuine issue of material fact to defeat summary judgment. *Thornhill Publ’g Co., Inc. v.
18 Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

19 **III. DISCUSSION**

20 **A. Failure to Exhaust Administrative Remedies**

21 The Prison Litigation Reform Act of 1995 (“PLRA”) requires that a prisoner challenging
22 conditions of confinement first exhaust prison grievance remedies before filing an action in federal
23 court. 42 U.S.C. § 1997e(a) (“No action shall be brought with respect to prison conditions under
24 [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other
25 correctional facility until such administrative remedies as are available are exhausted.”); *Woodford
26 v. Ngo*, 548 U.S. 81, 88 (2006). The exhaustion requirement applies to “all inmate suits about
27 prison life, whether they involve general circumstances or particular episodes, and whether they
28 allege excessive force or some other wrong.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

1 Accordingly, a prisoner who is confined in a federal prison, such as Ms. Simmons, must exhaust
2 all available administrative remedies with the Bureau of Prisons (“BOP”) before filing a Bivens
3 action in federal court asserting constitutional violations. *Id.* at 524–25.

4 Failure to exhaust administrative remedies is an affirmative defense to a Bivens claim
5 under the PLRA. *Jones v. Bock*, 549 U.S. 199, 216 (2007). To properly exhaust administrative
6 remedies, a federal prisoner must comply with the BOP’s deadlines and other critical procedural
7 rules. *Woodford*, 548 U.S. at 90–91. Exhaustion is mandatory under the PLRA unless a prisoner
8 can demonstrate that the administrative remedies were effectively unavailable. *Porter*, 534 U.S. at
9 524; *Sapp v. Kimbrell*, 623 F.3d 813, 821–24 (9th Cir. 2010) (describing limited circumstances in
10 which remedies are deemed unavailable or exhaustion is otherwise excused); *Nunez v. Duncan*,
11 591 F.3d 1217, 1224–25 (9th Cir. 2010). “Exhaustion should be decided, if feasible, before
12 reaching the merits of a prisoner’s claim.” *Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014)
13 (en banc). A motion for summary judgment under Rule 56 is the appropriate procedure to
14 determine, if the record permits, whether administrative remedies have been exhausted under the
15 PLRA. *Id.* at 1168.

16 Whether the exhaustion requirement is met depends on compliance with the applicable
17 prison grievance program. *Jones*, 549 U.S. at 218. The BOP has established an administrative
18 remedies program for prisoners in federal custody. 28 C.F.R. §§ 542.10-542.16. BOP regulations
19 set out the following grievance process for prisoners seeking administrative remedies relating to
20 conditions of their confinement: A prisoner normally must present her complaint informally (BP-
21 8 form) to prison staff. 28 C.F.R. § 542.13. If the informal complaint does not resolve the matter,
22 the prisoner may make an “Administrative Remedy Request” (BP-9 form) to the prison Warden
23 within 20 calendar days of the incident giving rise to the request, unless that deadline is extended.
24 28 C.F.R. § 542.14. If a prisoner is dissatisfied with the Warden’s response to her complaint, she
25 may appeal to the Regional Director (BP-10 form) within 20 calendar days of receiving the
26 Warden’s response, absent an extension of time. 28 C.F.R. § 542.15. If the prisoner is dissatisfied
27 with the Regional Director’s response, she may appeal to the BOP’s General Counsel (BP-11
28 form) within 30 calendar days of receiving the Regional Director’s response, absent an extension

1 of time. *Id.* The regulations provide time limits for the Warden, the Regional Director, and the
2 General Counsel to respond to prisoner complaints. 28 C.F.R. § 542.18. If the prisoner does not
3 receive a timely response to her request or any appeals, the absence of a response may be deemed
4 a denial, and the prisoner may proceed to the next step of the process. *Id.*

5 In considering defendants’ motion for summary judgment that Ms. Simmons failed to
6 exhaust available administrative remedies before filing this action, the Court considers the
7 evidence in the light most favorable to Ms. Simmons. *Beard v. Banks*, 548 U.S. 521, 529 (2006).
8 Ms. Simmons does not dispute that she filed only three administrative remedy requests (BP-9
9 forms) that concern matters relating to this action. See *supra* Section I.D. Ms. Simmons also does
10 not dispute that she was advised of the Warden’s response to each request, and that she did not
11 appeal any of those responses to the Regional Director or to the General Counsel. *Id.*

12 In her verified complaint, Ms. Simmons says “[p]ursuing such remedies would [have] been
13 futile or unable to afford plaintiff the relief she seeks.” Dkt. No. 1 at ECF p.2. And in her
14 opposition to defendants’ summary judgment motion, she suggests that prison officials failed to
15 respond to her grievances. Dkt. No. 35 at 8. However, the only evidence Ms. Simmons cites is
16 Mr. Castillo’s failure to respond to her informal written and electronic message requests
17 concerning her administrative detention in the SHU. *Id.* She does not explain why she failed to
18 submit a formal complaint (BP-9 form) to the Warden regarding this matter, or why she failed to
19 proceed with appeals with respect to this or any other complaints. In addition, none of the three
20 administrative remedy requests encompasses the allegations that underlie Ms. Simmons’s Eighth
21 Amendment excessive force claim relating to the cell door incident on August 15, 2017. See Dkt.
22 No. 29-1 ¶ 11, Attachs. 5, 8, 9. To the extent Ms. Simmons contends that following the BOP
23 grievance process would be futile, the Court notes that a prisoner may not avoid the exhaustion
24 requirement simply because she feels her request for a remedy will be denied by prison officials or
25 is futile for some other reason. See *Booth v. Churner*, 532 U.S. 731, 741 (2001).

26 On July 1, 2019, well after briefing in this matter was completed, Ms. Simmons filed a
27 “Motion to Show Cause Why Exhaustion of Administrative Remedy Is Futile or Unable to Afford
28 Petitioner’s Relief She Seeks.” Dkt. No. 41. Defendants object that Ms. Simmons’s motion is

1 improper under the Civil Local Rules of this Court and request that the Court disregard it. Dkt.
2 No. 42. Defendants are correct that the Local Rules prohibit the submission of additional briefing
3 after the filing of a reply absent leave of Court, which Ms. Simmons did not obtain. Civ. L.R. 7-
4 3(d). However, as Ms. Simmons is proceeding pro se, and because the Court may not find that
5 Ms. Simmons failed to exhaust available administrative remedies as to some or all of her claims if
6 there are disputed issues of fact on that point, the Court will consider Ms. Simmons’s late
7 submission for the limited purpose of assessing whether the matters raised in that submission bear
8 on the exhaustion issues presented for decision, and if so, whether the interest of justice would be
9 served by permitting the parties to submit further evidence or briefing.

10 In her July 1, 2019 submission, Ms. Simmons argues that, as a general matter, prison
11 officials repeatedly reject her grievances and those of other prisoners and often find technical
12 reasons to reject them, rather than responding to the grievances on the merits. Dkt. No. 41. She
13 does not include any evidence, argument, or explanation about any grievances related to her
14 claims in this action, but instead cites as examples grievances filed in March and April of 2019,
15 well after the events at issue here. *Id.* The Court concludes that this submission does not contain
16 any additional evidence that Ms. Simmons exhausted her administrative remedies, or that the
17 administrative remedies provided by BOP regulations were unavailable to Ms. Simmons with
18 respect to the claims at issue in this case.

19 Having considered the evidence in the record in the light most favorable to Ms. Simmons,
20 the Court concludes that there is no genuine dispute of material fact and that defendants are
21 entitled to summary judgment on their affirmative defense of failure to exhaust administrative
22 remedies. Because Ms. Simmons’s failure to exhaust bars this matter from proceeding on any of
23 the constitutional claims raised in this action, the Court need not address the merits of defendants’
24 Rule 12(b)(6) motion or their other grounds for summary judgment. See *Jones*, 549 U.S. at 212
25 (“There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims
26 cannot be brought in court.”).

27 **B. Federal Tort Claims Act**

28 One other matter deserves attention. In her complaint, under the heading “Exhaustion of

1 Legal Remedies,” Ms. Simmons asserts:

2 Plaintiff used the prisoner tort claim procedure available at FCI-
3 Dublin to try and solve the problem. On 11/30/17 plaintiff
4 presented the facts relating to this complain[t]. On 2/15/18 plaintiff
5 Joyce Simmons was sent a response saying that the grievance had
6 been denied. On 04/07/18 plaintiff filed her Section 1983
7 complaint.

8 Dkt. No. 1 at ECF p.13. The Federal Tort Claims Act (“FTCA”) provides a remedy for acts or
9 omissions by federal employees that constitute torts under state law. See 28 U.S.C. § 1346. While
10 Ms. Simmons may not pursue her constitutional claims under the FTCA, some of the same
11 conduct she alleges in support of those claims may constitute a tort actionable under the FTCA.
12 The record reflects that Ms. Simmons submitted an administrative tort claim concerning the cell
13 door incident to the Regional Director, which was denied on February 15, 2018. Dkt. No. 29-1 ¶
14 14, Attach. 12.

15 Defendants correctly observe that Ms. Simmons’s administrative FTCA claim does not
16 satisfy the PLRA’s exhaustion requirements, and Ms. Simmons complaint asserts only
17 constitutional violations. See Dkt. No. 29 at 15 (citing cases). However, in screening her
18 complaint under 28 U.S.C. §1915A(a), the Court did not consider whether Ms. Simmons’s
19 complaint should be construed as including a tort claim under the FTCA. See Dkt. No. 14. As the
20 Court has an obligation to liberally construe pro se pleadings, the Court is reluctant to dismiss the
21 entire action on exhaustion grounds when Ms. Simmons may be able to sustain a claim under the
22 FTCA that is not subject to the PLRA exhaustion requirements that have been briefed to the Court.
23 See Hughes v. Rowe, 449 U.S. 5, 9 (1980); Haines v. Kerner, 404 U.S. 519, 520 (1972). In these
24 circumstances, the Court concludes that the interests of justice are served by affording Ms.
25 Simmons an opportunity to file an amended complaint to attempt to plead a claim under the
26 FTCA. Fed. R. Civ. P. 15(a)(2).

27 **IV. CONCLUSION**

28 For the foregoing reasons, defendants’ motion for summary judgment is granted with
respect to defendants’ affirmative defense of failure to exhaust administrative remedies.
Accordingly, Ms. Simmons’s Bivens claims are dismissed on that basis.

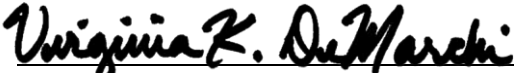
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In the interest of justice, Ms. Simmons may amend her complaint to attempt to state a claim under the FTCA. However, she may not amend her complaint to add any other claims, absent prior leave of Court. If Ms. Simmons chooses to amend her complaint to assert an FTCA claim, she must file her amended complaint no later than 30 days from the date of this order. The amended complaint must include the caption and civil case number used in this order, Case No. C 18-02193 VKD (PR), and the words “AMENDED COMPLAINT” on the first page.

Failure to file an amended complaint in the time provided will result in the dismissal of this action without further notice to Ms. Simmons.

IT IS SO ORDERED.

Dated: September 27, 2019


VIRGINIA K. DEMARCHI
United States Magistrate Judge