UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JACIE LEE GOUDLOCK, JR., Plaintiff, v. ROBERT HERNANDEZ, Warden; SILVIA H. GARCIA, Associate Warden; THOMPSON; Correctional Officer; CRUZ, Correctional Sergeant; L. PETERSEN, Registered Nurse, Defendants.	Civil No. 08cv204 BEN(RBB) **REPORT AND RECOMMENDATION GRANTING DEFENDANT PETERSEN'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT [DOC. NO. 23]**

Plaintiff, a state prisoner proceeding pro se and in forma pauperis, filed a civil rights complaint on February 1, 2008, pursuant to 42 U.S.C. § 1983 [doc. no. 1]. His Amended Complaint was filed on August 8, 2008 [doc. no. 7].[1] Defendants Hernandez and Garcia were not named in the Amended Complaint, so they were dismissed from this action on December 2, 2008 [doc. no. 12].

[1] Because the pages in the Amended Complaint are not consecutively numbered, the Court will cite this document using the page numbers assigned by the Court's electronic case filing system.

Goudlock asserts that Defendants Thompson, Cruz, an unknown correctional officer, and Nurse Petersen[2] violated his Eighth Amendment rights. (Am. Compl. 2-4, 8, 14.) On February 10, 2009, Defendant Petersen filed this Motion to Dismiss [doc. no. 23] and Memorandum of Points and Authorities in Support of the Motion [doc. no. 23-1]. The Motion was accompanied by Declarations from N. Grannis [doc. no. 23-2], and E. Franklin [doc. no. 23-3].

The Court found Defendant's Motion suitable for decision without oral argument pursuant to Civil Local Rule 7.1(d)(1) [doc. no. 24]. On March 20, 2009, the Court issued a Klingele/Rand Notice Warning Pro Se Prisoner of Unenumerated 12(B) Motion to Dismiss for Failure to Exhaust Administrative Remedies [doc. no. 25]. Plaintiff's Response to Defendant L. Petersen's Motion to Dismiss was filed on April 24, 2009 [doc. no. 28]. Petersen's Reply was filed five days later [doc. no. 29].

Nurse Petersen argues that Goudlock's claims against her should be dismissed pursuant to the unenumerated portions of Federal Rule of Civil Procedure 12(b) because Plaintiff failed to exhaust his administrative remedies before filing suit. (Def. Petersen's Mot. Dismiss Attach. #1 Mem. P. & A. 2.) Defendant also argues that Plaintiff has failed to state an Eighth Amendment claim against her, and she is entitled to Eleventh Amendment and qualified immunities. (Id.)

[2] Petersen explains that her name was misspelled as Peterson in the Amended Complaint. (Def. Petersen's Mot. Dismiss Attach. #1 Mem. P. & A. 1 n.1.) To avoid any confusion, the Court will identify Defendant as Petersen, not Peterson, throughout this Report and Recommendation.

I. FACTUAL BACKGROUND

Plaintiff was a prisoner at R. J. Donovan Correctional Facility. (Am. Compl. 1.) On June 15, 2007, at approximately 4:00 a.m., Goudlock was injured when he fell off the top bunk while sleeping. (Am. Compl. 3.) He claims that he "cut [his] left foot to the point that the injury needed stitches, and was bleeding profusely, as well as twist[ed] [his] ankle, [and] shav[ed] skin off [his] right thigh, and caus[ed] further damage to an already damaged [s]ciatic nerve." (Id.)

Plaintiff's first cause of action is against unknown correctional officers who failed to respond quickly to his calls for help. (Id.)

Goudlock's second cause of action is against Defendant Petersen. (Id. at 4-7.) Plaintiff arrived at Facility One Medical Clinic at approximately 8:15 a.m., and Petersen, a registered nurse, made him wait for treatment. (Id. at 4.) Goudlock claims that he "was left sitting in the medical clinic from 8:15 a.m. to 1:15 p.m. (over five hours) without care, causing [him] to suffer needlessly." (Id.) He contends that an argument broke out between a correctional officer and Petersen; shortly thereafter, Dr. Lindsey Dugan came out and talked to Goudlock. (Id.) According to Plaintiff, Dr. Dugan ordered that Goudlock be taken to the triage area for stitches, but he was unable to receive stitches because too much time had elapsed since his injury. (Id.) Plaintiff claims that he "could not receive the best option of treatment due to L. Petersen, R.N. ignoring [his] need for medical care, therefore violating [his] rights, and causing [him] unreasonable suffering." (Id.) Plaintiff attached a copy of his "Health Care

Services Request Form" as evidence of his encounter with Petersen. (Id. at 5-7.)

Goudlock's third and fourth causes of action are against Correctional Officer Thompson and Correctional Sergeant Cruz for forcing him to sleep on the top bunk. (Id. at 8-17.)

II. LEGAL STANDARDS APPLICABLE TO THE FAILURE TO EXHAUST

A. Dismissing Unexhausted Claims Pursuant to the Unenumerated Portions of Rule 12(b)

Title 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act ("PLRA") states: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C.A. § 1997e(a) (West 2008). The exhaustion requirement applies regardless of the relief sought. Booth v. Churner, 532 U.S. 731, 741 (2001).

"'[A]n action is "brought" for purposes of § 1997e(a) when the complaint is tendered to the district clerk[]' . . . ." Vaden v. Summerhill, 449 F.3d 1047, 1050 (9th Cir. 2006) (quoting Ford v. Johnson, 362 F.3d 395, 400 (7th Cir. 2004)). Therefore, prisoners must "exhaust administrative remedies before submitting any papers to the federal courts." Vaden, 449 F.3d at 1048.

Section 1997e(a)'s exhaustion requirement creates an affirmative defense. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). "[D]efendants have the burden of raising and proving the absence of exhaustion." Id. (footnote omitted). In § 1983 actions, the affirmative defense of failure to exhaust

administrative remedies may be raised through an unenumerated motion to dismiss under Federal Rule of Civil Procedure 12(b). Id.

Unlike Rule 12(b)(6) motions to dismiss for failure to state a claim, "[i]n deciding a motion to dismiss for failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact." Id. at 1119-20 (citing Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 369 (9th Cir. 1988)). "A court ruling on a motion to dismiss also may take judicial notice of 'matters of public record.'" Hazleton v. Alameida, 358 F. Supp. 2d 926, 928 (C.D. Cal. 2005) (citing Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)). But "if the district court looks beyond the pleadings to a factual record in deciding the motion to dismiss for failure to exhaust[,] . . . the court must assure that [the plaintiff] has fair notice of his opportunity to develop a record." Wyatt, 315 F.3d at 1120 n.14.

"[When] the district court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice." Id. at 1120 (citing Ritza, 837 F.2d at 368 n.3). A factual finding that a plaintiff failed to exhaust is reviewed under the clearly erroneous standard. Id.

B. The Administrative Grievance Process

"The California Department of Corrections [CDC] provides a four-step grievance process for prisoners who seek review of an administrative decision or perceived mistreatment: an informal level, a first formal level, a second formal level, and the Director's level." Vaden, 449 F.3d at 1048-49 (citing Brown v. Valoff, 422 F.3d 926, 929-30 (9th Cir. 2005)). The administrative appeal system can be found in title 15, sections 3084.1 through

3085 of the California Code of Regulations. See Cal. Code Regs. tit. 15, §§ 3084.1(a), 3084.5(a)-(e), 3084.6(c) (2009) see also Brown, 422 F.3d at 929-30 (citation omitted). To comply with the CDC's administrative grievance procedure, an inmate is required to make an informal attempt to resolve the grievance with the staff involved before proceeding to the formal levels, unless the grievance is one excepted by sections 3084.5(a)(3) and 3084.7. Cal. Code Regs. tit. 15, § 3084.2(b) (2009). An inmate must file his grievance "within 15 working days of the event or decision being appealed . . . ." Cal. Code Regs. tit. 15, § 3084.6(c) (2009); see also Brown, 422 F.3d at 929. But the informal level of the grievance process is bypassed when the appeal relates to eight specified actions. Cal. Code Regs. tit. 15, § 3084.5(a)(3)(A)-(H) (2008). There are other specific exceptions to the regular appeal process which are not applicable here. Cal. Code Regs. tit. 15, § 3084.7 (2009). Generally, inmates must appeal the grievance through the first, second, and third ("Director's") level of formal review. Cal. Code Regs. tit. 15, § 3084.5(b)-(e).

C. Standards Applicable to Pro Se Litigants

When a plaintiff appears in propria persona in a civil rights case, the Court must construe the pleadings liberally and give the plaintiff the benefit of any doubts. Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988); see also Jackson v. Carey, 353 F.3d 750, 757 (9th Cir. 2003). The rule of liberal construction is "particularly important in civil rights cases." Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992). "However, a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled."

Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982). In evaluating a motion to dismiss, the court may consider documents attached to the complaint. Roth v. Garcia Marquez, 942 F.2d 617, 625 n.1 (9th Cir. 1991). "[The court] need not accept as true conclusory allegations that are contradicted by documents referred to in the complaint." Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008) (citing Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

III. PLAINTIFF'S EFFORTS TO EXHAUST

In deciding whether Defendant Petersen's Motion to Dismiss should be granted, this Court considered Plaintiff's Amended Complaint and the attached exhibits [doc. no. 7]. Goudlock attached a copy of his inmate appeal form ("602"), in which he complains that upon his transfer to R. J. Donovan Correctional Facility on June 11, 2007, he was placed in an top floor cell, in the upper bunk bed despite his doctor's orders directing otherwise. (Am. Compl. 26-28.) Plaintiff informed Correctional Officers Thompson, Hamil, and Tyrell; Correctional Sergeant Cruz; two unidentified correctional officers, and the CCI of the unit about his improper placement to no avail. (Id. at 27-28.) Goudlock explains:

> [N]o one tried [to reassign Plaintiff to a lower tier cell and lower bunk] until 6-15-07 [when] I fell off the top bunk severely injuring my left foot, slicing open the little toe. I was taken by ambulance to the hospital. I reinjured my lower back, sprained my foot very badly, upon being examined at the clinic the Doctor stated I could have been killed. I am in constant pain[;] also I injured my right thigh with several bruises. I'm suffering due to staff gross neglect and deliberate indifference towards my safety. All ignored my pleas for help until to[o] late.

(Id. at 28.) Plaintiff also holds Lieutenant Walker responsible because "it happened on his watch . . . ." (Id.)

Goudlock does not mention Defendant Petersen by name or refer to an unidentified registered nurse in this grievance. (See id. at 26-28.) Plaintiff also does not allege he had to wait an unreasonable amount of time to receive medical treatment or that staff was deliberately indifferent to his medical needs and the injuries he sustained on June 15, 2007. (Id.)

Plaintiff bypassed the informal level and his grievance was denied at the first level of formal review on August 2, 2007. (Id. at 23, 26.) Goudlock's appeal was denied at the second level of formal review. (Id. at 25.) On December 22, 2007, his appeal was denied at the third level of formal review. (Id. at 20-21.)

A. The Failure to Exhaust Administrative Remedies

Defendant Petersen moves to dismiss Goudlock's Complaint pursuant to the unenumerated portions of Federal Rule of Civil Procedure 12(b) on the ground that Plaintiff has not properly exhausted his administrative remedies as to her. (Def. Petersen's Mot. Dismiss Attach. #1 Mem. P. & A. 3.) Petersen explains, "Although Plaintiff submitted a claim related to falling from the top bunk and appealed that claim to the third level of review, he did not ever submit an Eighth Amendment claim against Defendant Petersen for deliberate indifference to his medical needs." (Id.)

Defendant has provided two declarations explaining that Goudlock did not submit any grievances naming or referring to her or alleging that Plaintiff had to wait too long for medical treatment. (Def. Petersen's Mot. Dismiss Attach. #2 Grannis Decl. 3 (discussing third level appeals); Attach. #3 Franklin Decl. 3-4

(identifying appeals filed while Goudlock was at Donovan).) Franklin is the Appeals Coordinator at R. J. Donovan Correctional Facility and handles inmate appeals at the prison level. (Id. Attach. #3 Franklin Decl. 1-2.) Grannis is the Chief of Inmate Appeals Branch in Sacramento, California, which receives all inmate appeals at the third level. (Id. Attach. #2 Grannis Decl. 1-2.)

A motion to dismiss for failure to exhaust differs from a summary judgment motion. Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d at 369. The Ninth Circuit, id., explained:

> [One] reason why a jurisdictional or related type of motion, raising matter in abatement . . . , should be distinguished from a motion for summary judgment relates to the method of trial. In ruling on a motion for summary judgment the court should not resolve any material factual issue . . . . If there is such an issue it should be resolved at trial . . . . On the other hand, where a factual issue arises in connection with a jurisdictional or related type of motion, . . . the court has a broad discretion as to the method to be used in resolving the factual dispute.
>
> Moore's Federal Practice, supra, ¶ 56.03 at 56-61 (footnotes omitted); cf. Thornhill Publishing Co. v. General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979) ("Faced with a factual attack on subject matter jurisdiction, 'the trial court may proceed as it never could under Rule 12(b)(6) or Fed. R. Civ. P. 56 . . . . [T]he existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims'" (quoting Mortensen v. First Fed. Sav. & Loan Ass'n., 549 F.2d 884, 891 (3d Cir. 1977) (footnote omitted))).

Accord Goethe v. California, No. 2:07CV01945 MCE-GGH, 2008 U.S. Dist. LEXIS 72807, at **3-4 (E.D. Cal. Aug. 19, 2008).

"Exhaustion of administrative remedies serves two main purposes." Woodford v. Ngo, 548 U.S. 81, 89 (2006) (citing McCarthy v. Madigan, 503 U.S. 140, 145 (1992)). It first "protects 'administrative agency authority'" by giving an agency "'an opportunity to correct its own mistakes . . . before it is haled into federal court,' and it discourages 'disregard of [the agency's] procedures.'" Id. (quoting McCarthy, 503 U.S. at 145). "Second, exhaustion promotes efficiency. . . . [It] 'may produce a useful record for subsequent judicial consideration.'" Id. (quoting McCarthy, 503 U.S. at 145). These two objectives are met when civil rights plaintiffs are forced to properly exhaust administrative remedies and comply with deadlines and other "critical" procedural rules set by the administrative agency. Id. at 90-91.

Because the failure to exhaust is an affirmative defense, it is the defendant's burden to raise and prove the absence of exhaustion. Brown, 422 F.3d at 936. In ruling on Defendant Petersen's Motion, the Court may "look beyond the pleadings and decide disputed issues of fact." Wyatt, 315 F.3d at 1119-20. "[T]he court has a broad discretion as to the method to be used in resolving the factual dispute." Ritza, 837 F.2d at 369 (citation omitted). If the defendant has pleaded and proved a failure to exhaust, the burden shifts to the plaintiff to present evidence that he did exhaust administrative remedies. Ming Ching Jin v. Hense, No. 03cv5282, 2005 WL 3080969, at *2 (E.D. Cal. Nov. 15, 2005).

Here, Goudlock completed an Inmate Appeal Form 602 complaining that he was improperly placed in an upper-tier cell,

and in the top bunk, despite medical orders directing his placement in a lower-tier cell, on the lower bunk. (Am. Compl. 26-28.) Plaintiff properly appealed the denial of his grievance through the first, second, and Director's levels of formal review. (Id. at 20-21, 23, 25.) Thus, Goudlock has properly exhausted his grievance relating to his improper assignment to an upper-tier cell, upper bunk.

Goudlock did not, however, mention Defendant Petersen by name or reference in his grievance even though he specifically named or identified eight other individuals involved in his improper housing assignment. (Id. at 27-28.) Plaintiff also made no allegations relating to an unreasonable delay or lack of medical treatment for the injuries he sustained when he fell out of his bed. (Id.)

In his Response to Defendant L. Petersen's Motion to Dismiss, Goudlock explains that he did not include Petersen's name in his grievance because he did not know her legal name when he competed the form and "was too focused on the pain" to "seek her name at the time of [his] late treatment . . . ." (Pl.'s Resp. 2.) Plaintiff points to the "Action Requested" section of the form in which he seeks compensation from "all staff named and yet to be named" as evidence of his intent to include charges against Petersen. (Id.)

Additionally, "when [he] stated the word 'Staf[f]' [in his 602 form] it was to include all those involved in this situation, which does include Defendant L. Petersen." (Id.) Goudlock contends that "the staff that responded to [his] inmate appeal referred to the employees in question as 'Staff' and therefore,

using a blanket statement as well, . . . did include the specific defendant, L. Petersen in the inmate appeal." (Id. at 3.)

"[E]xhaustion is not per se inadequate simply because an individual later sued was not named in the grievances." Jones v. Bock, 549 U.S. 199, 219 (2007). "Prisoners need comply only with the prison's own grievance procedures to properly exhaust . . . ." Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing Jones, 549 U.S. at 218). A prisoner in California is not required to name all defendants in his grievance but must "describe the problem and action requested." Cal. Code Regs. tit. 15, § 3084.2(a); see also Thorns v. Ryan, No. 07-CV-00218-H (AJB), 2009 WL 230035, at *6 (S.D. Cal. Jan. 23, 2009) (citing Lewis v. Mitchell, 416 F. Supp. 2d 935, 941-45 (S.D. Cal. 2005)); Jensen v. Knowles, No. 2:02-cv-02373 JKS P, 2008 WL 5156694, at *4 (E.D. Cal. Dec. 9, 2008) (explaining that a prisoner in California is not required to "expressly name the defendant[]"). "[W]hen a prison's grievance procedures are silent or incomplete as to factual specificity, 'a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought.'" Griffin, 557 F.3d at 1120 (quoting Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)).

Goudlock's argument that he did not include Petersen's name in his grievance because he did not know it is not persuasive. Plaintiff did not need to identify the nurse by name as long as he gave the prison sufficient notice of nature of the wrong. Jones, 549 U.S. at 219; Jensen v. Knowles, 2008 WL 5156694, at *4.

Plaintiff's grievance does not contain any allegations relating to the medical care he received for injuries sustained on

June 15, 2007, or any staff members at the clinic. He has not described the "problem and action requested" or stated any claim against Petersen as required. Cal. Code Regs. tit. 15, § 3084.2(a); Jones, 549 U.S. at 218; Griffin, 557 F.3d at 1119. Goudlock's subjective intent to initiate a grievance against Petersen and seek compensation from "all staff named and yet to be named" does not adequately alert the prison to a possible claim against staff working in the medical clinic. See Griffin, 557 F.3d at 1120. Thus, Plaintiff has not properly exhausted his administrative remedies for claim two in his Amended Complaint. Defendant Petersen's Motion to Dismiss should be **GRANTED**.

Existing Ninth Circuit case law directs the district court to dismiss the Complaint without prejudice. Vaden, 449 F.3d at 1051 (citing Wyatt, 315 F.3d at 1120). But Vaden v. Summerhill, 449 F.3d 1047, and Wyatt v. Terhune, 315 F.3d 1108, were decided prior to Woodford v. Ngo. Since the Supreme Court's decision in Woodford v. Ngo, 548 U.S. 81, it may no longer be appropriate to dismiss this Complaint with leave to amend if it is too late for Goudlock to properly exhaust administrative remedies. A prisoner would "have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction." Woodford v. Ngo, 548 U.S. at 95. Goudlock is in that situation. Because a grievance against Peterson was not filed within fifteen working days of the action being challenged, any attempt to file it now is untimely. See Cal. Code Regs. tit. 15, § 3084.6(c).

Exceptions to the exhaustion requirement are limited. See Booth, 532 U.S. at 741. In Booth, the Supreme Court explained, "Thus, we think that Congress has mandated exhaustion clearly

enough, regardless of the relief offered through administrative procedures." Id. (citing McCarthy, 503 U.S. at 144) (footnote omitted). "'Where Congress specifically mandates, exhaustion is required[.]'" Id. (quoting McCarthy, id.) Booth and Woodford effectively eliminated most exceptions to exhaustion.

An inmate must file his grievance "within 15 working days" of the event being appealed. Cal. Code Regs. tit. 15, § 3084.6(c). Goudlock's injury and interactions with Nurse Petersen occurred on June 15, 2007, over two years ago; Plaintiff no longer has time to exhaust his administrative remedies against Defendant Petersen. See id.; (Am. Compl. 4-6.) There are no applicable exceptions to the exhaustion requirement. For all these reasons, Plaintiff's Complaint against Petersen should be **DISMISSED WITHOUT LEAVE TO AMEND**.

IV. ABSOLUTE IMMUNITY

The Eleventh Amendment grants the states immunity from private civil suits. U.S. Const. amend. XI; Seven Up Pete Venture v. Schweitzer, 523 F.3d 948, 952 (9th Cir. 2008); Henry v. County of Shasta, 132 F.3d 512, 517 (9th Cir. 1997), as amended, 137 F.3d 1372 (9th Cir. 1998). This immunity applies to civil rights claims brought under § 1983; thus, an inmate cannot recover damages from the state under § 1983 unless the state waives its immunity. Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989); Barber v. Hawaii, 42 F.3d 1185, 1198 (9th Cir. 1994). A federal court only has jurisdiction over a suit against a state when the relief sought is "prospective injunctive relief in order to end a continuing violation of federal law." Armstrong v. Wilson, 124 F.3d 1019, 1025 (9th Cir. 1997) (quoting Seminole

Tribe of Fla. v. Florida, 517 U.S. 44, 73 (1996)) (internal quotations omitted); see also Seven Up Pete Venture, 523 F.3d at 953.

Eleventh Amendment immunity also extends to state officials sued in federal court in their official capacities. Will, 491 U.S. at 71 (citing Brandon v. Holt, 469 U.S. 464, 471 (1985) (explaining that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office[]"); Seven Up Pete Venture, 523 F.3d at 952-53. "As such, it is no different from a suit against the State itself." Will, 491 U.S. at 71 (citing Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); Monell, 436 U.S. at 690 n.55).

Petersen argues, "To the extent [Goudlock] request[s] . . . monetary damages against Defendant Petersen in her official capacity, the Court should dismiss Plaintiff's First Amended Complaint under the Eleventh Amendment." (Def. Petersen's Mot. Dismiss Attach. #1 Mem. P. & A. 4.)

Plaintiff sued Petersen, a registered nurse, in her official and individual capacities. (Am. Compl. 2.) Plaintiff's claim against Petersen in her official capacity constitutes a claim against the State of California, which is absolutely immune from liability for damages. See Brandon, 469 U.S. at 471. Accordingly, Goudlock could only proceed against Defendant Petersen as an individual when seeking compensatory damages, but this claim would also be time barred.

V. DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS

"Under 42 U.S.C. § 1983, to maintain an Eighth Amendment claim based on prison medical treatment, an inmate must show 'deliberate indifference to serious medical needs.'" Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). To establish this, there is a two-part test in the Ninth Circuit. Jett, 439 F.3d at 1096. "First, the plaintiff must show a 'serious medical need' by demonstrating that 'failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain.' Second, the plaintiff must show the defendant's response to the need was deliberately indifferent." Id. (citations omitted).

"Examples of serious medical needs include '[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.'" Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc) (quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992)).

The second element, deliberate indifference, is pled if the prisoner alleges facts that show "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." Jett, 439 F.3d at 1096. To be found liable for an Eighth Amendment violation, a prison "official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must

also draw the inference." Farmer v. Brennen, 511 U.S. 825, 837 (1994). "This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." Estelle, 429 U.S. at 104-05 (footnotes omitted); see also Erickson v. Pardus, 551 U.S. 89, 90 (2007) (citing Id.). The indifference to medical needs must be substantial; inadequate treatment due to malpractice, or even gross negligence, does not amount to a constitutional violation. Wilson v. Seiter, 501 U.S. 294, 297 (1991) (quoting Estelle, 429 U.S. at 105-06); Castaneda v. United States, 546 F.3d 682, 694 n.12 (9th Cir. 2008); Jett, 439 F.3d at 1096 (citing McGuckin, 974 F.2d at 1059); Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990).

A defendant's acts or omissions will not rise to the level of a constitutional violation unless there is a reckless disregard of the risk of serious harm to the prisoner. Farmer, 511 U.S. at 836. The official must have "know[n] that [the] inmate[] face[d] a substantial risk of serious harm and disregard[ed] that risk by failing to take reasonable measures to abate it." Id. at 847.

Plaintiff contends in count two of his Amended Complaint that Defendant Petersen violated the Eighth Amendment by making him wait an unreasonable amount of before he was provided with medical care. (Am. Compl. 4.) He alleges that on he arrived at Facility One Medical Clinic at approximately 8:15 a.m. on June 15, 2007. (Id.) Goudlock claims he experienced profuse bleeding, and his "sock was soaked with blood . . . ." (Id.) According to Plaintiff, Nurse Petersen delayed his treatment for over five

hours until Dr. Dugan learned that Goudlock had been waiting and ordered that Goudlock be taken to the triage area for stitches. (Id.) Once Plaintiff arrived at triage, he was told that because so much time had elapsed since his injury, stitches were no longer an option. (Id.) Goudlock explains, "I could not receive the best option of treatment due to L. Petersen, R.N. ignoring my need for medical care, therefore violating my rights, and causing me unreasonable suffering." (Id.)

Plaintiff attached to his Amended Complaint his Health Care Service Request Form, dated June 15, 2007, and Dr. Dugan's notes from a follow-up appointment on June 18, 2007. (Id. at 6-7.) In a note also attached to the Amended Complaint, Goudlock describes what he perceives to be a discrepancy.

> Notice the two times on this [Health Care Service Request] Form. R.N. Petersen put she initially saw me at 09:08 - which is a lie, I was told to fill out this form on [June 18, 2007]. A Monday - because neither Dr. Dugan nor the R.N. examined me on [June 15, 2007]. Neither saw me until [June 18, 2007] See attached form. That is why I put last night I fell instead of this morning I fell.

(Id. at 5.)

Part one of the "Health Services Request Form" was completed by the patient and states, "Late last night I fell out of the top bunk injured my left side knee and a little toe area." (Id. at 6.) Goudlock signed the form and dated it June 15, 2007. (Id.) The remainder of the form appears to have been completed by Nurse Petersen. (Id.)

Petersen signed her name as the nurse who reviewed the form at approximately 9:00 a.m. on June 15, 2007. (Id.) As part of her physical assessment of Goudlock, Petersen wrote that he had a

laceration with avulsion (tearing of the skin) on his small left-toe. (Id.) She found that Plaintiff had an "[a]lteration in skin integrity [related to a] left toe lac[eration] [and] foot trauma." (Id.) Petersen referred Plaintiff "to [triage treatment area] for [left] foot injury eval[uation]/x-ray/tetanus." (Id.) She signed and dated the form June 15, 2007, at 1:40 p.m. (Id.) She made no observations about excessive bleeding or necessity of stitches. Additionally, the form does not indicate when Goudlock received treatment. Instead, it reports the times when the nurse reviewed the form and when she completed it. (Id.)

Dr. Dugan's notes are dated June 18, 2007, and describe the appointment as a follow-up to Plaintiff's triage treatment on June 15, 2007, after Goudlock "f[ell] from top bunk [and] injured [his left] knee [and] toe." (Id. at 7.) Dr. Dugan's physical assessment of Plaintiff was that he had a laceration on the tip of his left small-toe. (Id.) Goudlock was diagnosed with morbid obesity, glucose intolerance, and hypertension. (Id.) He was not prescribed any treatment for his toe injury, but he was placed on a metformin, a diabetes medication, and his dosage of Vasotec, a blood pressure medication, was increased. (Id.) Dr. Dugan made no observations about bleeding or stitches.

In Goudlock's form 602, he states that on June 15, 2007, "[he] fell off the top bunk severely injuring [his] left foot, slicing open the little toe. [He] was taken by ambulance to [the] hospital." (Id. at 28.) Goudlock further explains that he "reinjured [his] lower back, sprained [his] foot very badly, upon being examined at the clinic, the doctor stated [he] could have

been killed. [He is] in constant pain also [he] injured [his] right thigh, with several bruises." (Id.)

These allegations are not sufficient to establish that Goudlock had a serious medical need, and the medical records attached to the Amended Complaint undermine Plaintiff's claim. Goudlock's alleged bleeding and need for stitches were not found to be "important and worthy of comment or treatment." See Lopez, 203 F.3d at 1131 (quoting McGuckin, 974 F.2d at 1059-60). Thus, Plaintiff has not alleged that he had a serious medical need.

To satisfy the second element, Defendant Petersen must have known that Goudlock faced a substantial risk of serious harm when she allegedly forced him to wait over five hours before he was taken to the triage treatment area for treatment. (Am. Compl. 4.) Goudlock's contentions about the timing of medical care are inconsistent throughout his Amended Complaint and refuted by his attachments. (Id. at 4-7.)

In count two, Plaintiff alleges that both Nurse Petersen and Dr. Dugan saw him on June 15, 2007, but Plaintiff contends he was not examined by either Nurse Petersen or Dr. Dugan until June 18, 2007. (Id. at 4-5.) His exhibits indicate that he was seen by Nurse Petersen on June 15, 2007, and examined in a follow-up visit by Dr. Dugan on June 18, 2007. (Id. at 6-7.) Finally, his 602 form states that after he was injured on June 15, 2007, he was taken to a hospital by ambulance rather taken to the clinic at the correctional facility. (Id. at 28.) The Court will not accept allegations that are contradicted by the Amended Complaint and by Goudlock's attachments. See Manzarek, 519 F.3d at 1031. The

Court cannot "supply essential elements" of the Plaintiff's claim. See Ivey, 673 F.2d at 268.

Arguably, Plaintiff has alleged that Petersen purposefully failed to respond to his pain or possible medical need, but he has not sufficiently alleged a serious medical need. See Jett, 439 F.3d at 1096. Allowing Plaintiff to sit in the waiting area for several hours while his toe continued to bleed and Goudlock missing his opportunity for stitches may constitute malpractice or even gross negligence, but more than gross negligence or malpractice is required to allege a serious medical need. See Wilson v. Seiter, 501 U.S. at 297; Castaneda, 546 F.3d at 694 n.12. Thus, Plaintiff has failed to state a claim for deliberate indifference to his serious medical need.

Ordinarily, Defendant Petersen's Motion to Dismiss Plaintiff's count two should be granted with leave to amend so that he can attempt to allege a serious medical need. But because Goudlock has not exhausted this claim, and the time to exhaust has expired, the Respondent's Motion should be **GRANTED WITHOUT LEAVE TO AMEND**.

VI. QUALIFIED IMMUNITY

"[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). A constitutional right is "clearly established" if it is "'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Hope v. Pelzer, 536

U.S. 730, 739 (2002) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). This standard ensures that government officials are on notice of the ilegality of their conduct before they are subjected to suit. Id. (citing Saucier v. Katz, 533 U.S. 194, 206 (2001)). Qualified immunity is immunity from a suit for monetary damages, but it is not immunity from a suit seeking declaratory or injunctive relief. Los Angeles Police Protective League v. Gates, 995 F.2d 1469, 1472 (9th cir. 1993). It protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation." Hope, 536 U.S. at 736; see also Saucier, 533 U.S. at 201. If the allegations make out a constitutional violation, the next step is to determine whether the right alleged to have been violated is "clearly established." Saucier, 533 U.S. at 201. In ruling on qualified immunity, the court must decide the "'purely legal' issue of 'whether facts alleged [by the plaintiff] support a claim of violation of clearly established law.'" Lytle v. Wondrash, 182 F.3d 1083, 1086 (9th Cir. 1999) (quoting Mitchell v. Forsyth, 472 U.S. 511, 528 n.9 (1985) (reversing denial of defendants' motion for summary judgment)). The Supreme Court recently "reconsider[ed] the procedure required in Saucier, [and] conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory." Pearson v. Callahan, __ U.S. __, 129 S. Ct. 808, 818 (2009). The court may exercise its discretion to

determine which of the two prongs of the qualified immunity analysis should be addressed first in a particular case. Id.

As discussed above, the Court has already found that Plaintiff has not stated a claim that Petersen was deliberately indifferent to his serious medical need. Under both Saucier and Pearson, the Court's inquiry may end here. See Pearson, 129 S. Ct. at 818 (explaining that "[i]n some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all[]"); Saucier, 533 U.S. at 201 (holding that "[i]f no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity[]").

Accordingly, Defendant Petersen is entitled to qualified immunity from liability based on the claim alleged against her in count two of Plaintiff's Amended Complaint. Defendant's motion to dismiss Goudlock's claim for damages against her should be **GRANTED WITHOUT LEAVE TO AMEND**.

VII. CONCLUSION AND RECOMMENDATION

Goudlock has not exhausted his administrative remedies regarding his claim against Defendant Petersen. For this reason, count two of the Amended Complaint should be **DISMISSED WITHOUT LEAVE TO AMEND**. In addition, Plaintiff failed to state a claim for deliberate indifference to serious medical need. Even if Goudlock were permitted to amend this claim against Petersen, Defendant's Motion to Dismiss count two should be **GRANTED WITHOUT LEAVE TO AMEND** because the failure to timely exhaust is fatal to the cause of action. Finally, this Defendant is entitled to

Eleventh Amendment immunity from a claim against her in her official capacity, and she is entitled to qualified immunity on any claim for damages.

This Report and Recommendation will be submitted to the United States District Court judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file written objections with the Court and serve a copy on all parties on or before September 7, 2009. The document should be captioned "Objections to Report and Recommendation." Any reply to the objections shall be served and filed on or before September 21, 2009. The parties are advised that failure to file objections within the specified time may waive the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).

Dated: August 4, 2009

Ruben B. Brooks
United States Magistrate Judge

cc: Judge Benitez
All Parties of Record