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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SCOTT F. FIAHLO, Plaintiff, v. G. HERRERA, et. al., Defendants.	Case NO. 14cv1378-GPC(MDD) ORDER ADOPTING MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION GRANTING DEFENDANTS’ MOTION TO DISMISS [ECF Nos. 26, 32]
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Scott F. Fiahlo (“Fiahlo”), a state prisoner proceeding *pro se*, filed a Complaint pursuant to 42 U.S.C. section 1983, alleging constitutional violations for an incident occurring on January 25, 2014 at the Calipatria State Prison (“CSP”). (Dkt. No. 1.) On March 4, 2015, Defendants Kissol and Anderson (“Kissol” and “Anderson”) moved to dismiss the complaint for failure to state a claim. (Dkt. No. 26.) Defendant Herrera joined Defendants’ Motion to Dismiss on March 6, 2015. (Dkt. No. 28.) On March 23, 2015, Plaintiff filed a response in opposition to Defendants’ motion to dismiss (“Response”). (Dkt. No. 29.) Defendants Kissol and Anderson filed a reply on April 4, 2015. (Dkt. No. 30.) On April 24, 2015, the Magistrate Judge filed a report and recommendation granting Defendants’ motion to dismiss the complaint for failure to state a claim. (Dkt. No. 32.) After a careful review of the briefing, supporting documentation and the applicable law,

1 the Court **ADOPTS** the report and recommendation and thereby **GRANTS** Defendants'
2 motion to dismiss the complaint for failure to state a claim.

3 **PROCEDURAL BACKGROUND**

4 On June 5, 2014, Plaintiff filed a complaint against Defendants Correctional
5 Officers Kissol and Anderson, and Registered Nurse (“R.N.”) G. Herrera. (Dkt. No. 1.)
6 Fiahlo alleges that Defendants violated his Eighth Amendment constitutional right in
7 refusing to provide him adequate medical treatment, which caused him harm and
8 suffering due to delay in treatment. (Id. at 3.)

9 On March 4, 2015, Defendants Kissol and Anderson filed a motion to dismiss the
10 complaint under Federal Rule of Civil Procedure 12(b)(6), because Plaintiff failed to
11 exhaust all administrative remedies as required by 42 U.S.C. § 1997e(a). (Dkt. No. 26 at
12 6.) Two days later, Defendant Herrera filed a notice of joinder to Defendants Kissol and
13 Anderson’s motion to dismiss. (Dkt. No. 28.)

14 On March 23, 2015, Plaintiff filed a Response in opposition to Defendants’ motion
15 to dismiss the complaint. (Dkt. No. 29.) Defendants Kissol and Anderson filed a reply to
16 Plaintiff’s response in opposition to the motion to dismiss on April 4, 2015. (Dkt. No.
17 30.)

18 On April 24, 2015, the Magistrate Judge filed a report and recommendation
19 granting Defendants’ motion to dismiss the complaint. (Dkt. No. 32.)

20 **FACTUAL BACKGROUND**

21 According to the Complaint, on January 25, 2014 while incarcerated at CSP,
22 Fiahlo got a call from his family and received news that his eldest brother had been
23 killed. (Dkt. No. 1 at 3.) The news caused Fiahlo to lose track of the copious amounts of
24 water he was drinking, and he became “very sick” as a result. (Id.) Fiahlo then began to
25 vomit, urinate and defecate on himself in his cell, which caused him to slip and fall on his
26 head. (Id.) As a result of the fall, Fiahlo became temporarily paralyzed in his movements
27 and voice, but was “still conscious” and able to hear. (Id.)

28 Fiahlo overheard Anderson tell him to “get up,” and asked Fiahlo why he was on

1 the floor. (Id.) Anderson then left the room and returned shortly after with Herrera, a
2 registered nurse. (Id.) Anderson and Herrera “started ‘laughing at [him]’” and “making
3 jokes,” stating that Fiahlo was drunk and needed to “sleep it off.” (Id.) Plaintiff
4 additionally overheard Kissol, a building control tower officer, tell Anderson and Herrera
5 to leave Fiahlo in his cell because he was “just drunk.” (Id.) Kissol also made jokes at
6 Fiahlo’s expense. (Id.) As a result, Fiahlo received medical treatment five to seven hours
7 later, which lead to a coma lasting two to four days. (Id.)

8 On March 7, 2014, Fiahlo submitted an inmate administrative appeal by filing a
9 California Department of Corrections and Rehabilitation (“CDCR”) 602 Form, as well as
10 an inmate healthcare appeal by filing a CDCR 602 HC Form. (Dkt. No. 1-2 at 52-53, 55.)
11 In his administrative appeal, Fiahlo prayed for a “full investigation” and a “detailed
12 response of the investigation.” (Id. at 52.) In his healthcare appeal, Plaintiff asked that
13 Herrera be fired, her “medical license” revoked, and requested a justification for the
14 misconduct. (Id. at 55.)

15 A memorandum from the second level appeals staff at CDCR, dated April 8, 2014,
16 notified Fiahlo that his appeal was “granted,” in that “[a]n investigation is being
17 conducted by the Office of Internal Affairs.” (Id. at 51.) Fiahlo would be notified of the
18 results upon conclusion of the investigation. (Id.) In response to Fiahlo’s healthcare
19 appeal, the second level appeals staff at CDCR informed Fiahlo in a May 15, 2014
20 memorandum that his healthcare appeal was “partially granted,” in that the matter would
21 also be referred to the Office of Internal Affairs for “follow-up and a possible
22 investigation.” (Id. at 54.) Fiahlo was also informed that he would be notified as to the
23 results of the investigation into the allegations stated in his healthcare appeal. (Id.)

24 On June 5, 2014, Fiahlo filed the operative Complaint, prior to receiving results of
25 the pending investigations. Fiahlo asks that the Court grant him \$50,000 or more in
26 general and punitive damages, in addition to the firing of the named Defendants from
27 employment at CDCR. (Dkt. No. 1 at 7.)
28

1 **DISCUSSION**

2 **A. Standard of Review**

3 The district court “shall make a *de novo* determination of those portions of the
4 report . . . to which objection is made,” and “may accept, reject, or modify, in whole or in
5 part, the findings or recommendations made by the magistrate judge.” 28 U.S.C.
6 § 636(b)(1). When the parties do not object, a district court may assume the correctness
7 of the magistrate judge’s findings of fact and decide the motion on the applicable law.
8 Campbell v. U.S. Dist. Court, 501 F.2d 196, 206 (9th Cir. 1974); Johnson v. Nelson, 142
9 F. Supp. 2d 1215, 1217 (S.D. Cal. 2001).

10 **B. Legal Standard under Federal Rule of Civil Procedure 12(b)(6)**

11 Federal Rule of Civil Procedure (“Rule”) 12(b)(6) permits dismissal for “failure to
12 state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal is
13 warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory.
14 Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).
15 Alternatively, a complaint may be dismissed where it presents a cognizable legal theory,
16 yet fails to plead essential facts under that theory. Id. While a plaintiff need not give
17 “detailed factual allegations,” a plaintiff must plead sufficient facts that, if true, “raise a
18 right to relief above the speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S.
19 544, 545 (2007).

20 “To survive a motion to dismiss, a complaint must contain sufficient factual
21 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft
22 v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 547). A claim is
23 facially plausible when the factual allegations permit “the court to draw the reasonable
24 inference that the defendant is liable for the misconduct alleged.” Id.

25 Allegations in pro se complaints are generally held to less stringent standards than
26 complaints drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972). Thus,
27 courts have an obligation to construe these complaints liberally and to afford the prisoner
28 the benefit of any doubt. Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en

1 banc). However, “a liberal interpretation of a civil rights complaint may not supply
2 essential elements of the claim that were not initially pled. Vague and conclusory
3 allegations of official participation in civil rights violations are not sufficient to withstand
4 a motion to dismiss.” Bruns v. NCUA, 122 F.3d 1251, 1257 (9th Cir. 1997) (citing Ivey
5 v. Board of Regents, 673 F.2d 266 (9th Cir. 1982)).

6 **C. Legal Standard under the Prison Litigation Reform Act**

7 The Prison Litigation Reform Act (“PLRA”) requires that “[n]o action shall be
8 brought with respect to prison conditions under. . . [42 U.S.C. § 1983], or any other
9 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
10 such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a); see
11 also Booth v. Churner, 532 U.S. 731, 736 (2001) (requiring exhaustion even where relief
12 sought cannot be granted by administrative process); Morton v. Hall, 599 F.3d 942, 945
13 (9th Cir. 2010). “[A] prisoner must complete the administrative review process in
14 accordance with the applicable procedural rules . . . as a precondition to bringing suit in
15 federal court.” Woodford v. Ngo, 548 U.S. 81, 88 (2006). Prisoners must exhaust their
16 administrative remedies prior to filing suit, not during the pendency of the suit. See
17 McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam) (requiring
18 dismissal without prejudice where a prisoner “d[oes] not exhaust his administrative
19 remedies prior to filing suit but is in the process of doing so when a motion to dismiss is
20 filed”).

21 Prisoners are required to exhaust prison administrative procedures regardless of
22 whether the type of relief they seek matches the type of relief available through
23 administrative procedures. See Booth, 532 U.S. at 741; see also Morton, 599 F.3d at 945.
24 However, the PLRA requires exhaustion only of those administrative remedies “as are
25 available,” and the PLRA does not require exhaustion when circumstances render
26 administrative remedies “effectively unavailable.” Nunez v. Duncan, 591 F.3d 1217,
27 1223-26 (9th Cir. 2010) (holding that plaintiff’s failure to timely exhaust his
28 administrative remedies was excused because he took reasonable steps to exhaust his

1 claim and was precluded from exhausting by the warden’s mistake). A prisoner’s
2 participation in an internal investigation of official conduct does not constitute
3 constructive exhaustion of administrative remedies. See Panaro v. City of N. Las Vegas,
4 432 F.3d 949, 953-54 (9th Cir. 2005).

5 **D. Analysis**

6 **1. Defendants’ Motion to Dismiss**

7 Defendants urge dismissal of the Complaint because Plaintiff admits in his
8 Complaint that he has failed to exhaust all administrative remedies. (Dkt. No. 26 at 6.)
9 Defendants refer to Plaintiff’s administrative and healthcare appeals in his Complaint,
10 where he concedes that “there has been no conclusion [sic] yet on both 602s, they [CDCR
11 officials] are still investigating . . . The CDCR authorities have not given me no [sic]
12 indications of how long or estimations [sic] these investigations will take.” (Dkt. No. 1 at
13 6.) (internal quotation marks omitted). Defendants argue that within the CDCR staff
14 misconduct appeals process, there remains a third level of review that Plaintiff must
15 pursue under PLRA § 1997e(a), before he can bring a Complaint on these issues before
16 this Court. (Dkt. No. 26 at 5-6.)

17 In his response, Plaintiff claims he is “not obligated to pursue the appeal through
18 the third level in order to exhaust administrative remedies,” since his appeals have been
19 granted or partially granted at the lower level. (Dkt. No. 29 at 1.) Plaintiff therefore
20 asserts that his claims are fully exhausted and the Defendants’ motion to dismiss should
21 be denied. (Id.) To support this contention, Plaintiff relies on the decision in Brown v.
22 Valoff, 422 F.3d 926 (9th Cir. 2004).

23 Failure to exhaust is an affirmative defense that defendants must raise and prove.
24 See Jones v. Bock, 549 U.S. 199, 212-17 (2007) (explaining that inmates are not required
25 to plead specifically or demonstrate exhaustion in their complaints). In the rare case a
26 prisoner’s failure to exhaust is clear from the face of the complaint, a “defendant may
27 successfully move to dismiss under Rule 12(b)(6) for failure to state a claim.” Albino v.
28 Baca, 747 F.3d 1162, 1169 (9th Cir. 2014). Although a motion to dismiss is not the

1 appropriate method for deciding disputed factual questions relevant to exhaustion,
2 “[e]xhaustion should be decided, if feasible, before reaching the merits of a prisoner's
3 claim.” Id. at 1170.

4 Since exhaustion is an affirmative defense, Defendants bear the burden of
5 demonstrating “that pertinent relief remained available, whether at unexhausted levels of
6 the grievance process or through awaiting the results of the relief already granted as a
7 result of the process.” Brown, 422 F.3d at 936-37 (citing Wyatt v. Terhune, 315 F.3d
8 1108, 1119 (9th Cir. 2003)).

9 The Magistrate Judge recommends granting Defendants’ motion to dismiss on the
10 ground that Defendants met their burden to show that from the face of the pleadings,
11 Plaintiff failed to exhaust his claim of cruel and unusual punishment under the PLRA
12 prior to filing this action. (Dkt. No. 32 at 13.) The Magistrate noted that from the face of
13 the Complaint, Plaintiff has failed to exhaust administrative remedies, as Plaintiff himself
14 admits that second level appeal investigations are still pending. (Id. at 10.) Further, the
15 Magistrate Judge found Plaintiff’s reliance on Brown misplaced. (Id. at 9-10.)

16 The Court agrees with the Magistrate Judge’s finding of Plaintiff’s reliance on this
17 case as misplaced, and further notes that it is directly contrary to his contentions. In
18 Brown, the Ninth Circuit considered two cases in which both prisoners filed appeals but
19 failed to pursue them up to the third and final level of review after receiving responses at
20 the intermediate levels of review. Brown, 422 F.3d at 929. In distinguishing the two cases
21 before it, the court established that a prisoner has not exhausted his claim if an
22 investigation remains pending, some relief is still available, and CDCR has not informed
23 plaintiff that no remedies are available. Id. at 935, 942.

24 The Magistrate Judge found that much of the very relief Plaintiff requested is still
25 available, albeit not necessarily in the level of detail he requested. (Dkt. No. 32 at 10.)
26 We agree. Plaintiff requested a “full investigation” and a “detailed response of the
27 investigation” in his administrative appeal, and the firing of Defendant Herrera, a
28 revocation of her “medical license,” and a justification for the alleged misconduct in his

1 healthcare appeal. (Dkt. No. 1-2 at 52, 55.) However, Plaintiff is still required to exhaust
2 prison administrative procedures regardless of whether the relief sought matches the type
3 of relief available through administrative procedures. See Booth, 532 U.S. at 739, 741 n.6
4 (noting that “an inmate must exhaust irrespective of the forms of relief sought and offered
5 through administrative avenues,” *id.* at 739, “regardless of the fit between a prisoner’s
6 prayer for relief and the administrative remedies possible,” *id.* at 741 n.6). As set forth
7 above, Plaintiff was informed that upon completion of an investigation, he would receive
8 further relief in the form of notification as to whether the allegations were sustained, not
9 sustained, unfounded, exonerated, or there was no finding. (Dkt. No. 1-2 at 54.)

10 Moreover, Defendants argue that if the investigation yields the result “not
11 sustained,” “unfounded,” “exonerated” or “no finding,” Plaintiff would not achieve
12 vindication for his allegations of staff misconduct, or receive an exoneration from the
13 allegation of intoxication. (Dkt. No. 29 at 4-5.) Defendants point out that Plaintiff will
14 have the chance to appeal these unfavorable results at the third level of appeal. (Id.) This
15 demonstrates that some relief, through the exoneration of claims of intoxication and the
16 acknowledgement of the legitimacy of his claims of staff misconduct, remains available.

17 Plaintiff acknowledges that he has yet to receive the results from the investigation.
18 This shows that the very relief sought, an investigation and the results, are still in fact
19 available through the CDCR grievance process that Plaintiff prematurely abandoned. In
20 addition, Plaintiff has not been informed that no further remedies are available to him. To
21 the contrary, the response he received at the second level of appeal specifically advised
22 Plaintiff that it is only “[o]nce a decision has been rendered at the Third Level, your
23 administrative remedies will be considered exhausted.” (Dkt. No. 1-2 at 51.) Further, in
24 his healthcare appeal, Plaintiff was advised that “[a]llegations of staff misconduct do not
25 limit or restrict the availability of further relief via the inmate appeals process.” (Id. at
26 54.)

27 The Court agrees with the Magistrate Judge’s finding that Defendants have met
28 their burden and shown that, from the face of the pleadings, it is apparent Plaintiff failed

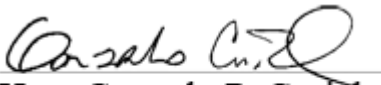
1 to exhaust his claim of cruel and unusual punishment under PLRA § 1997e(a) before
2 filing the operative Complaint. Accordingly, the Court **ADOPTS** the report and
3 recommendation granting Defendants' motion to dismiss for failure to state a claim.

4 **CONCLUSION**

5 For the foregoing reasons, the Court **ADOPTS** the Magistrate Judge's report and
6 recommendation and **GRANTS** Defendants' motion to dismiss for failure to state a
7 claim.

8 **IT IS SO ORDERED.**

9 Dated: December 2, 2015

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11 Hon. Gonzalo P. Curiel
12 United States District Judge
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