

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

Martinez Aytch,

Plaintiff

V.

Renee Baker, et al.,

## Defendants

2:15-cv-00958-JAD-PAL

## Order Granting Motion for Summary Judgment and Resolving All Other Pending Motions

[ECF Nos. 30, 31, 32, 36]

10 Pro se Nevada state-prison inmate Martinez Aytch sues the Warden of Nevada's Ely State  
11 Prison (ESP), two correctional officers, and a classification caseworker for civil-rights violations that  
12 allegedly occurred while he was incarcerated at ESP. Defendants move to dismiss or for summary  
13 judgment on Aytch's claims, arguing that Aytch failed to properly exhaust all available prison  
14 remedies as the Prison Litigation Reform Act (PLRA) requires. Alternatively, they argue that  
15 Aytch's claims either fail as a matter of law or are unsupported by the record evidence. I grant  
16 defendants' motion for summary judgment, grant their motion for leave to file unredacted versions of  
17 Aytch's medical records under seal,<sup>1</sup> deny as moot defendants' dismissal motion<sup>2</sup> and Aytch's  
18 motion to extend the prison copywork limit,<sup>3</sup> and close this case.<sup>4</sup>

## Background

20 Aytch sues four defendants for events that allegedly occurred while he was incarcerated at  
21 ESP. He sues: Warden Renee Baker, Correctional Officers (COs) Debra Boone-Sharp and Edward

<sup>1</sup> ECF No. 31.

<sup>2</sup> ECF No. 32.

<sup>3</sup> ECF No. 30.

<sup>4</sup> I find this matter suitable for disposition without oral argument. L.R. 78-1.

1 Isenbergh, and caseworker Leslie Healer.<sup>5</sup> He asserts four counts and seeks declaratory judgment,  
2 injunctive relief, and monetary damages.<sup>6</sup>

3 Aytch alleges that on March 26, 2015, he was admitted to the ESP infirmary for high blood  
4 pressure.<sup>7</sup> He claims that he asked CO Boone-Sharp to retrieve his Quaran and Kufi (prayer cap)  
5 from his personal property; she told Aytch that he would need to submit a request to the unit  
6 caseworker.<sup>8</sup> Aytch submitted the request that evening, but caseworker Healer denied it.<sup>9</sup>

7 The next day, Aytch asked C.O. Boone-Sharp for an informal grievance, and Boone-Sharp  
8 told him that there were none.<sup>10</sup> Grievances are normally passed out at 8:00 p.m., and Aytch  
9 requested the grievance at 8:15.<sup>11</sup> Aytch claims that he asked C.O. Isenbergh for an informal  
10 grievance on three separate, unspecified occasions but Isenbergh refused.<sup>12</sup> This prevented him from  
11 filing grievances for the denial of his religious materials.<sup>13</sup> Aytch submitted a second request for his  
12 religious items and legal materials on April 3, 2015, but that request, too, was denied.<sup>14</sup> Aytch  
13 alleges that Christian and Jewish inmates housed in the infirmary were allowed to have their  
14 religious materials, but he was not.<sup>15</sup>

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17 <sup>5</sup> ECF No. 18 at 2.

18 <sup>6</sup> *Id.* at 15.

19 <sup>7</sup> *Id.* at 8.

20 <sup>8</sup> *Id.*

21 <sup>9</sup> *Id.*

22 <sup>10</sup> *Id.* at 7.

23 <sup>11</sup> *Id.*

24 <sup>12</sup> *Id.*

25 <sup>13</sup> *Id.*

26 <sup>14</sup> *Id.* 8–9.

27 <sup>15</sup> *Id.* at 10.

1 Aytch alleges that for the eleven days he was housed in the infirmary, he was locked in an  
2 isolation cell and not allowed indoor or outdoor exercise.<sup>16</sup> The lack of exercise worsened Aytch's  
3 chronic back and knee problems.<sup>17</sup> Additionally, Aych alleges that he was denied a change of  
4 underclothes during this period despite making repeated requests to Caseworker Healer for a change  
5 of underclothes.<sup>18</sup> Aytch claims that Warden Baker has implemented an unconstitutional policy of  
6 depriving inmates housed in the infirmary of indoor and outdoor exercise.<sup>19</sup> Aytch asserts claims for  
7 denial of access to the courts, free-exercise violations, equal-protection violations, and a claim for  
8 unconstitutional conditions of confinement.

9 Defendants move for summary judgment, arguing that Aytch failed to properly exhaust all  
10 prison administrative remedies as required by the PLRA and he has not shown that exhaustion is  
11 excused. Alternatively, defendants argue that Aytch lacks evidence of actual injury to support his  
12 denial-of-access claim, that his free-exercise and equal-protection claims—which are premised on  
13 the prison’s alleged loss or destruction of Aytch’s religious materials while he was housed in the  
14 infirmary—fail as a matter of law because Aytch had an adequate post-deprivation remedy under  
15 state law, and that the conditions Aytch was subjected to while in the infirmary—where he was in  
16 fact allowed outdoor yard time—were constitutional.

## Discussion

## 18 | A. Summary-judgment standards

19 Summary judgment is appropriate when the pleadings and admissible evidence “show there  
20 is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of  
21 law.”<sup>20</sup> When considering summary judgment, the court views all facts and draws all inferences in

<sup>16</sup> *Id.* at 11.

<sup>17</sup> *Id.* at 18.

18 *Id.*

<sup>19</sup> *Id.* at 12.

<sup>28</sup> <sup>20</sup> See *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (citing FED. R. CIV. P. 56(c)).

1 the light most favorable to the nonmoving party.<sup>21</sup> If reasonable minds could differ on the material  
2 facts, summary judgment is inappropriate because its purpose is to avoid unnecessary trials when the  
3 facts are undisputed and the case must proceed to the trier of fact.<sup>22</sup>

4 If the moving party satisfies FRCP 56 by demonstrating the absence of any genuine issue of  
5 material fact, the burden shifts to the party resisting summary judgment to “set forth specific facts  
6 showing that there is a genuine issue as to the material facts”; it “must produce specific evidence,  
7 through affidavits or admissible discovery material, to show that” there is a sufficient evidentiary  
8 basis on which a reasonable fact finder could find in its favor.<sup>23</sup> The court may only consider facts  
9 that could be presented in an admissible form at trial in deciding a motion for summary judgment.<sup>24</sup>  
10 Summary judgment may not be granted by default.<sup>25</sup>

11 **B. Exhaustion under the PLRA**

12 **1. *Prisoner plaintiffs must fully exhaust the grievance process before filing suit.***

13 The PLRA requires inmates to exhaust all available administrative remedies before filing  
14 “any suit challenging prison conditions.”<sup>26</sup> Failure to properly exhaust all available administrative  
15 remedies as required by the PLRA is “an affirmative defense the defendant must plead and prove.”<sup>27</sup>  
16 Once a defendant proves that there was an available administrative remedy that the inmate did not  
17 exhaust, “the burden shifts to the prisoner to come forward with evidence showing that there is  
18 something in his particular case that made the existing and generally available administrative

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20 <sup>21</sup> *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

21 <sup>22</sup> *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995); *see also Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).

23 <sup>23</sup> *Bank of Am. v. Orr*, 285 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted); *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991); *Anderson*, 477 U.S. at 248–49.

24 <sup>24</sup> FED. R. CIV. P. 56(c).

25 <sup>25</sup> *See Henry v. Gill Industries, Inc.*, 983 F.2d 943, 949–50 (9th Cir. 1993).

26 <sup>26</sup> 42 U.S.C. § 1997e(a).

27 <sup>27</sup> *Jones v. Bock*, 549 U.S. 199, 204 (2007).

1 remedies effectively unavailable to him.”<sup>28</sup> Nonetheless, the ultimate burden of proof remains with  
2 the defendant.<sup>29</sup> The question of exhaustion is typically disposed of on summary judgment, with the  
3 judge deciding disputed factual issues relevant to exhaustion.<sup>30</sup> If feasible, exhaustion should be  
4 decided before reaching the merits of a prisoner’s claims.<sup>31</sup>

5 In *Woodford v. Ngo*, the United States Supreme Court held that the PLRA’s exhaustion  
6 requirement requires *proper* exhaustion.<sup>32</sup> Proper exhaustion means that the inmate must comply  
7 with the prison’s “deadlines and other critical procedural rules”<sup>33</sup> and properly use “all steps that the  
8 [prison] holds out,” so that the prison is given an opportunity to address the issues on the merits.<sup>34</sup>  
9 Recently, in *Ross v. Blake*, the United States Supreme Court reiterated that the PLRA’s proper  
10 exhaustion requirement is mandatory: exhaustion is only excused if administrative procedures are  
11 effectively unavailable to the inmate.<sup>35</sup>

12 **2. Defendants have shown that Aytch failed to exhaust all available administrative  
13 remedies before filing suit, and Aytch fails to shift the burden back to defendants.**

14 The NDOC has a three-level grievance process.<sup>36</sup> An inmate begins this process by filing an  
15 informal grievance. An inmate can appeal the prison’s response to his informal grievance by filing a  
16 first-level grievance. To exhaust, the inmate must also appeal the prison’s first-level response by

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18 <sup>28</sup> *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014).

19 <sup>29</sup> *Id.*

20 <sup>30</sup> *Id.* at 1170–71.

21 <sup>31</sup> *Id.*, 747 F.3d at 1170.

22 <sup>32</sup> *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (emphasis added).

23 <sup>33</sup> *Id.* at 91.

24 <sup>34</sup> *Id.* at 90–91 (internal citation and quotation omitted).

25 <sup>35</sup> *Ross v. Blake*, 136 S.Ct. 1850 (2016) (holding that a court may not excuse an inmate’s failure to  
26 exhaust administrative remedies before bringing suit under the PLRA, even to take “special”  
27 circumstances into account).

28 <sup>36</sup> AR 740.

1 filing a second-level grievance.<sup>37</sup>

2 Defendants' records show that Aytch submitted only one grievance action relating to the  
3 allegations in this case, grievance number 2006-29-9964.<sup>38</sup> Aytch submitted the informal grievance  
4 on April 16, 2015. In the grievance, Aytch states that on March 26, 2015, he was admitted into the  
5 prison infirmary and ordered to change into a jumpsuit and out of the clothes that he was wearing,  
6 which included blue jean pants, a blue shirt, a jacket, a personal velcro belt, and his prayer cap.<sup>39</sup>  
7 When he was released from the infirmary and retrieved his personal property, his prayer cap and belt  
8 were missing.<sup>40</sup> Aytch requested to be reimbursed for these lost items.<sup>41</sup>

9 The prison rejected the grievance, indicating that when Aytch's personal property was  
10 returned he "did not mention any lost items" and "signed the inventory sheet showing" that he had  
11 received everything.<sup>42</sup> Aytch then filed a first-level grievance complaining that the grievance  
12 responder failed to properly investigate the grievance and that the infirmary and C.O. Boone-Sharp  
13 lost his belt and cap.<sup>43</sup> The prison also rejected the first-level grievance, responding that the  
14 purportedly lost items "were signed for."<sup>44</sup>

15 First, Aytch did not exhaust this grievance because he did not file a second-level grievance.  
16 Even if Aytch had fully exhausted his lost-property claim, he never grieved the allegations in this  
17 case: that he was denied access to the courts, that his free-exercise and equal-protection rights were  
18 violated, and that he was subjected to unconstitutional conditions of confinement while in the

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20 <sup>37</sup> AR 740.04, 740.05, 740.06, 740.07.

21 <sup>38</sup> ECF No. 38-10.

22 <sup>39</sup> *Id.* at 6–7.

23 <sup>40</sup> *Id.* at 7.

24 <sup>41</sup> *Id.*

25 <sup>42</sup> *Id.* at 5.

26 <sup>43</sup> *Id.* at 4.

27 <sup>44</sup> *Id.* at 3.

1 infirmary because he was denied a clean change of underclothes and exercise. Because defendants  
2 have shown that there were available prison administrative remedies that Aytch did not take  
3 advantage of, the burden shifts to Aytch “to come forward with evidence showing that there is  
4 something in his particular case that made the existing and generally available administrative  
5 remedies effectively unavailable to him.”<sup>45</sup>

6 Aytch responds that the allegations in his complaint that COs Boon-Sharp and Isenbergh  
7 denied his grievance requests establish that the prison’s administrative grievance process was  
8 effectively unavailable to him, excusing his failure to exhaust his claims.<sup>46</sup> I find that Aytch’s  
9 conclusory statements—that C.O. Boon-Sharp denied his request for a grievance on March 27, 2015,  
10 and that Isenbergh denied three requests for grievances on three separate and unspecified  
11 occasions—are not sufficient to create a triable issue about exhaustion, particularly in light of  
12 Aytch’s ability to file a grievance complaining about the purported loss of his prayer cap just two-  
13 and-a-half weeks later. Aytch makes no effort to explain why he could not have simply included the  
14 rest of the allegations relating to his infirmary stay in that grievance. I thus find that defendants are  
15 entitled to summary judgment for lack of exhaustion, and I therefore decline to reach defendants’  
16 other arguments.

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27 <sup>45</sup> *Baca*, 747 F.3d at 1172.

28 <sup>46</sup> ECF No. 40 at 2–3.

## Conclusion

2        Accordingly, IT IS HEREBY ORDERED that defendants' motion for summary judgement  
3 [ECF No. 36] is GRANTED.

4 IT IS FURTHER ORDERED that defendants' motion to dismiss [ECF No. 32] and Aytch's  
5 motion to extend prison copywork limit [ECF No. 31] are **DENIED as moot**.

6 IT IS FURTHER ORDERED that defendants' motion for leave to file unredacted versions of  
7 Aytch's medical records under seal [ECF No. 31] is GRANTED. The exhibits at ECF No. 33 will  
8 remain under seal.

9 IT IS FURTHER ORDERED that the Clerk is directed to **ENTER JUDGMENT** for  
10 defendants and against Aytch and **CLOSE THIS CASE**.

11 || Dated this 31st day of March, 2017.

Jennifer A. Dorsey  
United States District Judge