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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DEMETRI ALEXANDER,

Plaintiff,

v.

GARY DUTTON,

Defendant.

Case No. 3:15-cv-00074-MMD-WGC

ORDER ACCEPTING AND ADOPTING
REPORT AND RECOMMENDATION OF
MAGISTRATE JUDGE
WILLIAM G. COBB

I. SUMMARY

Before the Court is the Report and Recommendation of United States Magistrate Judge William G. Cobb (ECF No. 31) (“R&R”) relating to Defendant’s Motion for Summary Judgment (“Motion”) (ECF No. 19). The Court has reviewed Plaintiff’s objection (ECF No. 32) and Defendant’s response (ECF No. 34).¹ For the reasons discussed below, the Court accepts and adopts the R&R in full.

II. RELEVANT BACKGROUND

Plaintiff, who is proceeding *pro se*, is an inmate in the custody of the Nevada Department of Corrections (“NDOC”). After screening pursuant to under 28 U.S.C. § 1915A, the Court permitted Plaintiff to proceed on one claim under the Fourth Amendment for the intentional deprivation of property, namely Plaintiff’s blue jeans. (ECF No. 14.) Defendant moves for summary judgment, arguing that Plaintiff failed to exhaust his administrative remedies. (ECF No. 19.) The Magistrate Judge agreed with

¹Defendant’s motion for extension of time to file his response (ECF No. 33) is granted *nunc pro tunc*.

1 Defendant and recommends granting summary judgment. (ECF No. 31.) Plaintiff objects
2 to the Magistrate Judge’s recommendation. (ECF No. 32.)

3 **III. LEGAL STANDARDS**

4 This Court “may accept, reject, or modify, in whole or in part, the findings or
5 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Where a party
6 timely objects to a magistrate judge’s report and recommendation, then the court is
7 required to “make a *de novo* determination of those portions of the [report and
8 recommendation] to which objection is made.” 28 U.S.C. § 636(b)(1). In light of Plaintiffs’
9 objection, the Court has engaged in a *de novo* review to determine whether to adopt
10 Magistrate Judge Cobb’s recommendation.

11 “The purpose of summary judgment is to avoid unnecessary trials when there is
12 no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*,
13 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when “the movant
14 shows that there is no genuine dispute as to any material fact and the movant is entitled
15 to a judgment as a matter of law.” Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*,
16 477 U.S. 317, 322 (1986). In evaluating a summary judgment motion, a court views all
17 facts and draws all inferences in the light most favorable to the nonmoving party. *Kaiser*
18 *Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). The
19 moving party bears the burden of showing that there are no genuine issues of material
20 fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982).

21 **IV. DISCUSSION**

22 Defendant seeks summary judgment under the Prison Litigation Reform Act
23 (“PLRA”), which provides that “[n]o action shall be brought with respect to prison
24 conditions under section 1983 . . . by a prisoner confined in any jail, prison, or other
25 correctional facility until such administrative remedies as are available are
26 exhausted.” 42 U.S.C. § 1997e(a). Defendant argues that NDOC records show Plaintiff
27 did not file any grievance relating to his claimed intentional deprivation of his jeans. (ECF
28 No. 19-1 at 2-3.) Plaintiff responds that he was afraid of reprisal or physical harm if he

1 filed a grievance because of Defendant's open display of racism. (ECF No. 28 at 3.) The
2 Magistrate Judge found that Plaintiff has not shown that his failure to exhaust NDOC's
3 grievance process was excusable under the test that the Ninth Circuit Court of Appeals
4 has adopted in *McBride v. Lopez*, 807 F.3d 982 (9th Cir. 2015). (ECF No. 31 at 7-9.)
5 That test requires the following conditions to be satisfied:

6 In *McBride*, the Ninth Circuit addressed whether a threat of retaliation may be
7 sufficient to render an administrative remedy "effectively unavailable" to excuse a failure
8 to exhaust. *McBride*, 807 F.3d at 986-87. The court adopted the Eleventh Circuit's test,
9 which requires the following conditions be satisfied: "(1) the threat [of retaliation] actually
10 did deter the plaintiff inmate from lodging a grievance or pursuing a particular part of the
11 process; and (2) the threat is one that would deter a reasonable inmate of ordinary
12 firmness and fortitude from lodging a grievance or pursuing the part of the grievance
13 process that the inmate failed to exhaust." *Id.* at 987 (quoting *Turner v. Burnside*, 541
14 F.3d 1077, 1085 (11th Cir.2008)).

15 Plaintiff argues that Defendant's use of racial slur — calling Plaintiff the
16 derogatory "N" word — deterred him from pursuing NDOC's grievance process.² (ECF
17 No. 32 at 1-5.) There is no question that the racial epithet is extremely offensive,
18 particularly given Plaintiff's race and the historical use of the slur. Even assuming that
19 Defendant's alleged conduct satisfies the first prong of the *McBride* test, use of the racial
20 slur alone, without more, would not deter a reasonable inmate from filing a grievance to
21 satisfy the objective prong of the test. The Court thus agrees with the Magistrate Judge
22 that Plaintiff's failure to exhaust his administrative remedies is not excusable.

23 In his objection, Plaintiff also argues that his failure to exhaust is excusable
24 because NDOC's procedural rules, which appear in Administrative Regulation ("AR")

25
26 ²In *Ross v. Blake*, the Supreme Court found three kinds of circumstances in which
27 an "administrative remedy, although officially on the books, is not capable of use" by an
28 inmate to obtain relief. *Ross*, 136 S.Ct. 1850, 1859-60 (2016). Plaintiff's allegation that
Defendant used racial slur does not fall within the three kinds of circumstances
addressed in *Ross*.

1 740, do not require him to file a grievance on deprivation of his personal property. (ECF
2 No. 32 at 8-10.) As Defendant correctly pointed out, Plaintiff's reading of AR 740.03 is
3 selective. AR 740.03(1) provides that inmates may use the grievance procedure to
4 resolve claims involving "personal property," which is the claim raised in this case.

5 In sum, the Court agrees with the Magistrate Judge that Plaintiff failed to exhaust
6 his administrative remedies and summary judgment is the appropriate remedy.

7 **V. CONCLUSION**

8 The Court notes that the parties made several arguments and cited to several
9 cases not discussed above. The Court has reviewed these arguments and cases and
10 determines that they do not warrant discussion or reconsideration as they do not affect
11 the outcome of the Motion and Objection.


12 It is therefore ordered, adjudged and decreed that the Report and
13 Recommendation of Magistrate Judge William G. Cobb (ECF No. 31) is accepted and
14 adopted in its entirety. Defendant's Motion for Summary Judgment (ECF No. 19) is
15 granted.

16 It is further ordered that Defendant's motion for extension of time (ECF No. 33) is
17 granted *nunc pro tunc*.

18 It is further ordered that Plaintiff's Motion for Contempt of Court (ECF No. 30) is
19 denied. Plaintiff seeks contempt for Defendant's filing of a response to his objection
20 when the Magistrate Judge had withdrawn the report and recommendation to which
21 Plaintiff objects. However, Defendant's filing, while incorrectly docketed as Defendant's
22 response to Plaintiff's objections, is a reply in support of his motion for summary
23 judgment. (ECF No. 29.)

24 The Clerk is directed to enter judgment in favor of Defendant and close this case.

25 DATED THIS 17th day of March 2017.

26 
27 _____
28 MIRANDA M. DU
UNITED STATES DISTRICT JUDGE