

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA**

Nevels v. Kern

Nevels · No. 2:22-cv-0441 KJM AC P · Decided May 20, 2025

OPINION

(PC) Nevels v. Kern

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10

11 ROMAIN NEVELS, No. 2:22-cv-0441 KJM AC P

12 Plaintiff,

13 v. FINDINGS & RECOMMENDATIONS

14 J. KERN,

15 Defendant. 16

17 Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C.
§ 1983. Currently before the court is defendants' motion for summary judgment. ECF
19 No. 23.

20 I. Procedural History 21 The complaint named defendant Kern in his individual and official
capacity and alleged 22 that Kern violated plaintiff's Eighth Amendment rights. ECF No. 1. On
screening, the court 23 found that plaintiff had stated a claim against Kern in his individual
capacity but dismissed the 24 official capacity claim. ECF Nos. 7, 14. 25 Prior to the close of
discovery, defendant filed a motion for summary judgment on the 26 ground that plaintiff failed to
exhaust his administrative remedies. ECF No. 23. Plaintiff opposes 27 the motion. ECF Nos. 31,
32. Merits-based discovery is presently stayed pending resolution of 28 the motion for summary
judgment. ECF No. 25. 1 II. Plaintiff's Allegations 2 Plaintiff alleges that on May 17, 2020,
defendant and another officer were supposed to 3 escort him back to his cell but instead took him
to the sally port. ECF No. 1 at 3. Once there, 4 defendant told the other officer to get leg restraints,
which plaintiff stated he refused to put on.

5 Id. at 4. After plaintiff voiced his refusal, defendant stuck out his leg to throw plaintiff to the
6 ground. Id. Plaintiff hopped over defendant's leg, and defendant responded by swinging plaintiff
7 around and slamming him onto the concrete, causing his right shoulder and side of his head to 8
slam into the ground. Id. 9 III. Motion for Summary Judgment 10 A. Defendants' Arguments 11
Defendant argues that he is entitled to summary judgment because plaintiff failed to 12 exhaust

his administrative remedies prior to filing suit. ECF No. 23. 13 B. Plaintiff's Response 14 At the outset, the court notes that while plaintiff has filed a statement of disputed facts 15 (ECF No. 32), he has failed to file a separate document in response to defendants' statement of 16 undisputed facts that identifies which facts are admitted and which are disputed, as required by 17 Local Rule 260(b). 18 "Pro se litigants must follow the same rules of procedure that govern other litigants." 19 *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (citation omitted), overruled on other grounds, 20 *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc). However, it is well- 21 established that district courts are to "construe liberally motion papers and pleadings filed by pro 22 se inmates and should avoid applying summary judgment rules strictly." *Thomas v. Ponder*, 611 23 F.3d 1144, 1150 (9th Cir. 2010). The unrepresented prisoner's choice to proceed without counsel 24 "is less than voluntary" and they are subject to "the handicaps . . . detention necessarily imposes 25 upon a litigant," such as "limited access to legal materials" as well as "sources of proof." 26 *Jacobsen v. Filler*, 790 F.2d 1362, 1364 n.4 (9th Cir. 1986) (alteration in original) (citations and 27 internal quotation marks omitted). Inmate litigants, therefore, should not be held to a standard of 28 1 "strict literalness" with respect to the requirements of the summary judgment rule. *Id.* (citation 2 omitted). 3 Accordingly, the court considers the record before it in its entirety despite plaintiff's 4 failure to be in strict compliance with the applicable rules. However, only those assertions in the 5 opposition which have evidentiary support in the record will be considered. 6 Plaintiff opposes the motion for summary judgment on the ground that he properly 7 exhausted his administrative remedies.¹ ECF No. 31. 8 IV. Legal Standards for Summary Judgment 9 Summary judgment is appropriate when the moving party "shows that there is no genuine 10 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. 11 Civ. P. 56(a). Under summary judgment practice, "[t]he moving party initially bears the burden 12 of proving the absence of a genuine issue of material fact." *In re Oracle Corp. Sec. Litig.*, 627 13 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The 14 moving party may accomplish this by "citing to particular parts of materials in the record, 15 including depositions, documents, electronically stored information, affidavits or declarations, 16 stipulations (including those made for purposes of the motion only), admissions, interrogatory 17 answers, or other materials" or by showing that such materials "do not establish the absence or 18 presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to 19 support the fact." Fed. R. Civ. P. 56(c)(1). 20 "Where the non-moving party bears the burden of proof at trial, the moving party need 21 only prove that there is an absence of evidence to support the non-moving party's case." *Oracle 22 Corp.*, 627 F.3d at 387 (citing *Celotex*, 477 U.S. at 325); see also Fed. R. Civ. P. 56(c)(1)(B). 23 Indeed, summary judgment should be entered, "after adequate time for discovery and upon 24 motion, against a party who fails to make a showing sufficient to establish the existence of an 25 element essential to that party's case, and on which that party will bear the burden of proof at 26 1 Plaintiff also argues extensively that defendant violated his Eighth Amendment rights. 27 However, defendant's

motion for summary judgment is based solely on his assertion that plaintiff failed to exhaust his administrative remedies. Any arguments regarding the merits of plaintiff's 28 claim will therefore not be addressed. 1 trial." *Celotex*, 477 U.S. at 322. "[A] complete failure of proof concerning an essential element 2 of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323. In such 3 a circumstance, summary judgment should "be granted so long as whatever is before the district 4 court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 5 56(c), is satisfied." *Id.* 6 If the moving party meets its initial responsibility, the burden then shifts to the opposing 7 party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. 8 Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). In attempting to establish the 9 existence of this factual dispute, the opposing party may not rely upon the allegations or denials 10 of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or 11 admissible discovery material, in support of its contention that the dispute exists. See Fed. R. 12 Civ. P. 56(c). The opposing party must demonstrate that the fact in contention is material, i.e., a 13 fact "that might affect the outcome of the suit under the governing law," and that the dispute is 14 genuine, i.e., "the evidence is such that a reasonable jury could return a verdict for the nonmoving 15 party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). 16 In the endeavor to establish the existence of a factual dispute, the opposing party need not 17 establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual 18 dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at 19 trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) 20 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)). Thus, the 21 "purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see 22 whether there is a genuine need for trial." *Matsushita*, 475 U.S. at 587 (citation and internal 23 quotation marks omitted). 24 "In evaluating the evidence to determine whether there is a genuine issue of fact, [the 25 court] draw[s] all inferences supported by the evidence in favor of the non-moving party." *Walls 26 v. Cent. Contra Costa Transit Auth.*, 653 F.3d 963, 966 (9th Cir. 2011) (citation omitted). It is the 27 opposing party's obligation to produce a factual predicate from which the inference may be 28 drawn. See *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to 1 demonstrate a genuine issue, the opposing party "must do more than simply show that there is 2 some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586 (citations 3 omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the 4 non-moving party, there is no 'genuine issue for trial.'" *Id.* at 587 (quoting *First Nat'l Bank*, 391 5 U.S. at 289). 6 Defendants simultaneously served plaintiff with notice of the requirements for opposing a 7 motion pursuant to Rule 56 of the Federal Rules of Civil Procedure along with their motion for 8 summary judgment. ECF No. 23-10; see *Klingele v. Eikenberry*, 849 F.2d 409, 411 (9th Cir. 9 1988) (pro se prisoners must be provided with notice of the requirements for summary judgment); 10 *Rand v. Rowland*, 154 F.3d 952, 960 (9th Cir. 1998) (en banc) (movant may

provide notice). 11 V. Undisputed Material Facts 12 Plaintiff did not separately respond to Defendant's Statement of Undisputed Facts 13 (DSUF), and the facts are therefore deemed undisputed except as otherwise discussed. Additional 14 facts have been taken from plaintiff's grievances as appropriate. 15 At all relevant times, plaintiff was a California prison inmate and was housed at California 16 State Prison (CSP)-Sacramento. DSUF (ECF No. 23-2) ¶ 1. Title 15 of the California Code of 17 Regulations provides an administrative appeals process that permits an inmate to submit a written 18 grievance to dispute a policy, decision, action, condition, or omission by the California 19 Department of Corrections and Rehabilitation (CDCR) or CDCR staff. DSUF ¶ 4; Plaintiff's 20 Statement of Disputed Facts (PSDF) (ECF No. 32) ¶ 4. Amendments which revised the 21 grievance process went into effect on June 1, 2020. DSUF ¶ 4. The date a grievance was 22 initiated determined which version of the regulations governed the procedures. Id. 23 Plaintiff's grievance history reflects that he submitted two grievances related to 24 defendant's alleged May 17, 2020 use of force: Log No. SAC-A-20-01938 and Log. No. 016100. 25 DSUF ¶ 5; ECF No. 31 at 4. Grievance SAC-A-20-01938 was submitted on or around May 19, 26 2020, and identified the subject as "Imminent Danger Staff complaint/excessive force P.C. 27 832.5/P.C.832.7." DSUF ¶¶ 5-6; PSDF ¶ 5; ECF No. 23-5 at 6. The form indicates that the first 28 level of review was bypassed, and the appeal was accepted at the second level of review. ECF

1 No. 23-5 at 6-7. The appeal was partially granted in that an appeal inquiry was conducted, and it 2 was determined that staff did not violate department policy. Id. at 2, 4; DSUF ¶ 6. The response 3 was mailed or delivered to plaintiff on June 22, 2020. ECF No. 23-5 at 7; PSDF ¶ 5. Included in 4 the response was the following advisement: 5 Although you have the right to submit a staff complaint, a request for administrative action regarding staff or the placement of 6 documentation in a staff member's personnel file is beyond the scope of the staff complaint process. Allegations of staff misconduct do 7 not limit or restrict the availability of further relief via the inmate appeal process. If you wish to appeal the decision, you must submit 8 your staff complaint appeal through all levels of appeal review up to, and including, the Secretary's Level of Review. Once a decision has 9 been rendered at the Third Level, your administrative remedies will be considered exhausted. 10 11 ECF No. 23-5 at 4; DSUF ¶ 7. Plaintiff did not appeal the decision. DSUF ¶ 10. 12 Log No. 016100 was submitted on July 15, 2020. DSUF ¶ 12; PSDF ¶ 5. Plaintiff 13 characterizes Log No. 016100 as an amended grievance. PSDF ¶ 5. The subject was identified as 14 "Fabricated & overblown RVR 115/Resisting staff" and alleged that the RVR was designed to 15 cover up defendant's unnecessary use of force. ECF No. 23-8 at 8, 10. On August 25, 2020, an 16 appeal response was issued that divided the grievance into two claims: Claim #001 related to the 17 use of force and Claim #002 related to the disciplinary. ECF No. 23-8 at 3-4. The appeal was 18 rejected with respect to the use of force allegations on the ground that the claims were duplicative 19 to Log No. SAC-A-20-01938, and plaintiff was advised that he could appeal the rejection 20 decision to the Office of Appeals.² DSUF ¶ 12; ECF No. 23-8 at 3. On August 26,

2020, 21 plaintiff filed an appeal in which he identified that he was appealing the decision as to Claim 22 #001 and asserted that it was not duplicative because he was appealing the disciplinary, not the 23 use of force. DSUF ¶ 14; ECF No. 23-8 at 6-7. The appeal of the rejection was denied on

24 October 31, 2020, on the ground that the claim regarding an alleged use of force was duplicative.

25 DSUF ¶ 14; ECF No. 23-8 at 2. It stated that the decision exhausted plaintiff's administrative 26 remedies. ECF No. 23-8 at 2. 27 2 The grievance was disapproved as to the disciplinary claims and advised that the disapproval 28 could also be appealed to the Office of Appeals. ECF No. 23-8 at 3-4. 1 The complaint also alleges that plaintiff received a "time-expired response" from the 2 Office of Appeal for Log No. SAC-A-20-01938 dated November 11, 2020. ECF No. 1 at 5. 3 Plaintiff's file reflects that no "time-expired response" was issued regarding Log No. SAC-A-20-4 01938. DSUF ¶ 19. A time expired notice was issued on November 11, 2020, regarding an 5 appeal of an unrelated disciplinary charge. Id.; ECF No. 23-9 (paperwork for Log No. 29682). 6 Plaintiff's grievance history at CSP-Sacramento through June 2, 2023, reflects that these 7 were the only two grievances plaintiff submitted regarding defendant's use of force and the 8 Office of Appeals does not show any further appeals filed by plaintiff on this issue. DSUF ¶¶ 5, 9 20. The complaint was filed on March 9, 2022. DSUF ¶ 2; PSDF ¶ 2. 10 VI. Legal Standards for Exhaustion 11 A. Exhaustion under the Prison Litigation Reform Act 12 Because plaintiff is a prisoner suing over the conditions of his confinement, his claims are 13 subject to the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). Under the PLRA, 14 "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or 15 any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until 16 such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); *Porter v. 17 Nussle*, 534 U.S. 516, 520 (2002) ("§ 1997e(a)'s exhaustion requirement applies to all prisoners 18 seeking redress for prison circumstances or occurrences"). "[T]hat language is 'mandatory': An 19 inmate 'shall' bring 'no action' (or said more conversationally, may not bring any action) absent 20 exhaustion of available administrative remedies." *Ross v. Blake*, 578 U.S. 632, 638 (2016) 21 (quoting *Woodford v. Ngo*, 548 U.S. 81, 85 (2006)). 22 Failure to exhaust is "an affirmative defense the defendant must plead and prove." *Jones 23 v. Bock*, 549 U.S. 199, 204, 216 (2007). "[T]he defendant's burden is to prove that there was an 24 available administrative remedy, and that the prisoner did not exhaust that available remedy." 25 *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014) (en banc) (citing *Hilao v. Estate of Marcos*, 26 103 F.3d 767, 778 n.5 (9th Cir. 1996)). "[T]here can be no 'absence of exhaustion' unless some 27 relief remains 'available.'" *Brown v. Valoff*, 422 F.3d 926, 936 (9th Cir. 2005) (emphasis in 28 original). Therefore, the defendant must produce evidence showing that a remedy is available "as 1 a practical matter," that is, "it must be capable of use; at hand." *Albino*, 747 F.3d at 1171 2 (citation and internal quotations marks omitted). "[A]side from [the unavailability] exception, the 3 PLRA's

text suggests no limits on an inmate's obligation to exhaust—irrespective of any ‘special 4 circumstances.’” Ross, 578 U.S. at 639. “[M]andatory exhaustion statutes like the PLRA 5 establish mandatory exhaustion regimes, foreclosing judicial discretion.” Id. (citation omitted). 6 For exhaustion to be “proper,” a prisoner must comply with the prison’s procedural rules, 7 including deadlines, as a precondition to bringing suit in federal court. Woodford, 548 U.S. at 90 8 (“Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural 9 rules.”). “[I]t is the prison’s requirements, and not the PLRA, that define the boundaries of 10 proper exhaustion.” Jones, 549 U.S. at 218; see also *Marella v. Terhune*, 568 F.3d 1024, 1027 11 (9th Cir. 2009) (“The California prison system’s requirements ‘define the boundaries of proper 12 exhaustion’” (quoting Jones, 549 U.S. at 218)). 13 As long as some potential remedy remained available through the administrative appeals 14 process, even if it was not the remedy he sought, plaintiff was required to exhaust his remedies. 15 *Booth v. Churner*, 532 U.S. 731, 741 & n.6 (2001) (“Congress has provided in § 1997e(a) that an 16 inmate must exhaust irrespective of the forms of relief sought and offered through administrative 17 avenues.”). The Supreme Court has identified “three kinds of circumstances in which an 18 administrative remedy, although officially on the books, is not capable of use to obtain relief.” 19 Ross, 578 U.S. at 643. “First, . . . an administrative procedure is unavailable when (despite what 20 regulations or guidance materials may promise) it operates as a simple dead end—with officers 21 unable or consistently unwilling to provide any relief to aggrieved inmates.” Id. (citing *Booth*, 22 532 U.S. at 736). “Next, an administrative scheme might be so opaque that it becomes, 23 practically speaking, incapable of use.” Id. Finally, administrative remedies are unavailable 24 “when prison administrators thwart inmates from taking advantage of a grievance process through 25 machination, misrepresentation, or intimidation.” Id. at 644. 26 When the district court concludes that the prisoner has not exhausted administrative 27 remedies on a claim, “the proper remedy is dismissal of the claim without prejudice.” *Wyatt v. 28 Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003) (citation omitted), overruled on other grounds by 1 *Albino*, 747 F.3d at 1168. 2 B. California Regulations Governing Exhaustion of Administrative Remedies 3 Exhaustion requires that the prisoner complete the administrative review process in 4 accordance with all applicable procedural rules. Woodford, 548 U.S. at 90. This review process 5 is set forth in the California Code of Regulations. 6 For grievances initiated prior to June 1, 2020, the regulations allowed prisoners to “appeal 7 any policy, decision, action, condition, or omission by the department or its staff that the inmate 8 or parolee can demonstrate as having a material adverse effect upon his or her health, safety, or 9 welfare.” Cal. Code Regs. tit. 15, § 3084.1(a) (2019). The process was comprised of three levels 10 of review for most types of appeals. Id. § 3084.7. In certain circumstances, the appeals 11 coordinator was permitted to bypass the first level of appeal. Id. § 3084.7(a). If an appeal was 12 denied at the first or second level, or the inmate was otherwise not satisfied by the response, he 13 could appeal to the next level. Id. 3084.7(b), (c). The third level of review was for “review of 14 appeals not resolved at the second level, id. at 3084.7(c), and except as provided by the 15

regulations, an appeal was exhausted by obtaining a decision at the third level, *id.* § 3084.1(b). 16 For grievances initiated on or after June 1, 2020,³ the regulations allowed prisoners “to 17 dispute a policy, decision, action, condition, or omission by the Department or departmental staff 18 that causes some measurable harm to their health, safety, or welfare.” Cal. Code Regs. tit. 15, 19 § 3481(a) (2020). The process was comprised of two levels of review for most types of appeals. 20 *Id.* An appeal could also be exhausted at the first level if the decision issued was “Under Inquiry 21 or Investigation,” “Pending Legal Matter,” or “Time Expired,” otherwise, review by the Office of 22 Appeals exhausted all administrative remedies. *Id.* §§ 3483(m), 3486(m). A claim was not 23 considered exhausted if it was rejected. *Id.* A claim could be rejected for several reasons, 24 including that it was “substantially duplicative of a prior claim by the same claimant.” *Id.* 25 § 3487(a)(3). A rejection could be appealed to the Office of Appeals, and if the appeal was 26 27 3 Beginning January 5, 2022, another version of the regulations went into effect. DSUF ¶ 4. However, since plaintiff did not submit any grievances related to the claims in this case to which 28 that version of the regulations would apply, those procedures will not be addressed. 1 granted the claim would be reassigned to the Office of Grievances to be addressed at the first 2 level. *Id.* § 3487(c). 3 VII. Discussion 4 The facts regarding the availability of and plaintiff’s use of the grievance process are 5 largely undisputed. Though plaintiff asserts that his second-filed grievance was an amendment to 6 the first, the parties are essentially in agreement that he filed two appeals which included 7 allegations of excessive force against defendant. They dispute whether those appeals were 8 sufficient to exhaust plaintiff’s administrative remedies. 9 Plaintiff argues that because grievance 016100 was an amendment to grievance SAC-A- 10 20-01938, and 016100 was appealed to the Office of Appeals, he exhausted his administrative 11 remedies. ECF No. 31 at 4, 7; ECF No. 32 at 3. He also appears to argue that 016100 exhausted 12 his administrative remedies because when he appealed the rejection to the third level it put the 13 CDCR on notice of his claims against defendant and the response said his administrative 14 remedies were exhausted. ECF No. 31 at 5-9, 11. He reasons that the statement that he had 15 exhausted his remedies waived any defects in the grievance. *Id.* at 6, 11. Considering the 16 regulations governing inmate grievances and the evidence before the court, plaintiff’s theory of 17 exhaustion must fail. 18 First, whether a grievance was sufficient to put the prison on notice of plaintiff’s claim is 19 only one factor in determining whether a grievance satisfies the PLRA’s exhaustion requirement. 20 In addition to providing the prison with sufficient notice of the problem, plaintiff must have also 21 complied with the procedural requirements of the grievance process. See *Sapp v. Kimbrell*, 623 22 F.3d 813, 824 (9th Cir. 2010) (“A grievance suffices to exhaust a claim if it puts the prison on 23 adequate notice of the problem for which the prisoner seeks redress.”); *Woodford*, 548 U.S. at 90 24 (“Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural 25 rules.”). In this case, both grievances were sufficient to put the prison on notice regarding 26 plaintiff’s claims since they both identified defendant by name and alleged that defendant had 27 used unnecessary force against plaintiff on May 17, 2020, and were

recognized by the prison as 28 making such claims. See ECF No. 23-5 at 2, 6, 8 (SAC-A-20-01938); ECF No. 23-8 at 3, 8, 10 1 (016100). However, plaintiff failed to appeal grievance SAC-A-20-01938 through the third level 2 of appeal, and grievance 016100 was rejected as duplicative of SAC-A-20-01938. 3 It is undisputed that plaintiff did not appeal SAC-A-20-01938 and therefore did not 4 exhaust that appeal. Instead, plaintiff argues that he submitted 016100 as an “amended 5 grievance.” This argument is unconvincing. Though the grievance submitted in 016100 6 mentions defendant’s use of force, plaintiff’s primary complaint was clearly the allegedly false 7 disciplinary charge he received as a result of the incident. ECF No. 23-8 at 8, 10. At no point 8 within the grievance did plaintiff state he was amending his prior grievance, *id.*, and in his appeal 9 of the rejection, plaintiff explicitly stated that he was grieving the disciplinary and that his “claim 10 simply explain and lay out the event that took place on 5-17-20,” *id.* at 6. It is therefore clear that 11 plaintiff’s intent was to grieve a separate, though related, issue.⁴ Based on the undisputed 12 evidence, the rejection of grievance 016100 as duplicative to the extent it complained of 13 defendant’s use of force appears to be clearly within the applicable regulations. Cal. Code Regs. 14 tit. 15, § 3487(a)(3) (2020) (permitting rejection where “claim is substantially duplicative of a 15 prior claim by the same claimant”). 16 Plaintiff’s argument that his appeal of the rejection exhausted his administrative remedies 17 as to his claim against defendant also fails. As defendant points out, plaintiff was appealing the 18 rejection, in other words, the determination that the grievance was duplicative, not the substance 19 of the grievance. The regulations are clear that if plaintiff had successfully challenged the 20 rejection, his grievance would have been sent back for a decision on the merits. See *id.* § 3487(c) 21 (procedure for appealing rejection). Since the rejection of the claim as duplicative and the denial 22 of plaintiff’s appeal were both appropriate under the regulations, the merits of grievance 016100 23 were not appealed to the highest level. While plaintiff may have exhausted his administrative 24 remedies as to the issue of whether his appeal was duplicative, he did not exhaust the claim itself. 25 See *id.* §§ 3483(m)(1) (rejected claims and review of process resulting in rejection does not 26 constitute exhaustion), 3486(m) (rejected claim is not exhausted). 27 4 Even if plaintiff had intended to amend SAC-A-20-01938, it is not clear that amendment, rather 28 than appealing the decision, would have complied with the applicable procedural rules. 1 To the extent plaintiff argues that the rejection of this grievance rendered his 2 administrative remedies unavailable, to demonstrate unavailability he 3 must establish (1) that he actually filed a grievance or grievances that, if pursued through all levels of administrative appeals, would 4 have sufficed to exhaust the claim that he seeks to pursue in federal court, and (2) that prison officials screened his grievance or 5 grievances for reasons inconsistent with or unsupported by applicable regulations. 6 7 Sapp, 623 F.3d at 823-24. As set forth above, plaintiff cannot show that the rejection of his 8 grievance was inconsistent with the applicable regulations. 9 Finally, the complaint alleges that plaintiff received a “time-expired response” for 10 grievance SAC-A-20-01938 on November 11, 2020 from Howard Moseley. ECF No. 1 at 5. 11 However, defendant has presented evidence, which plaintiff does not dispute,

showing that no 12 such response was issued regarding Log No. SAC-A-20-01938, and that the time expired notice 13 issued on November 11, 2020, was for an appeal of an unrelated disciplinary charge. DSUF ¶ 19; 14 ECF No. 23-9 (paperwork for Log No. 29682). 15 VIII. Conclusion 16 For the reasons set forth above, the undersigned finds that plaintiff did not exhaust his 17 administrative remedies prior to filing the complaint and defendant's motion for summary 18 judgment should be granted. 19 IX. Plain Language Summary of this Order for a Pro Se Litigant 20 It is being recommended that defendant's motion for summary judgment be granted and 21 your claim against defendant be dismissed because you did not exhaust the prison grievance 22 process for your claim. 23 Accordingly, IT IS HEREBY RECOMMENDED that defendant's motion for summary 24 judgment (ECF No. 23) be GRANTED and this action be dismissed without prejudice for failure 25 to exhaust administrative remedies. 26 These findings and recommendations are submitted to the United States District Judge 27 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days 28 after being served with these findings and recommendations, any party may file written 1 | objections with the court and serve a copy on all parties. Such a document should be captioned 2 || "Objections to Magistrate Judge's Findings and Recommendations." Any response to the 3 || objections shall be served and filed within fourteen days after service of the objections. The 4 || parties are advised that failure to file objections within the specified time may waive the right to 5 || appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). 6 || DATED: May 19, 2025 ~ 7 Httven— Lhar—e_

ALLISON CLAIRE

8 UNITED STATES MAGISTRATE JUDGE

9 10 1] 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 13