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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANTHONY A. JIMENEZ,)	Case No. CV 03-05374 DDP (CTx)
)	
Plaintiff,)	ORDER GRANTING DEFENDANTS' MOTION
)	FOR JUDGMENT ON THE PLEADINGS
v.)	
)	[Motion filed on January 22,
FRANK CARHUNAGAN AND EL LA)	2007]
FON,)	
)	
Defendants.)	
)	
_____)	

This matter comes before the Court on Defendants' motion for judgment on the pleadings. After reviewing the papers submitted by the parties and considering the arguments therein, the Court grants the motion.

I. BACKGROUND

Pro se Plaintiff Anthony Jimenez brings this Eighth Amendment action pursuant to 42 U.S.C. § 1983 against Defendants Frank Carhunagan and El LaFon. Plaintiff first alleges that, on May 20, 1997, while incarcerated at the California Rehabilitation Center ("CRC"), correctional officers escorted him to the medical clinic

1 because they noticed a fresh tattoo on his abdomen. (Compl. ¶ 8.)
2 Defendant/Medical Technician Carhunagan ordered Plaintiff to remove
3 all his clothes so that he could inspect for infection, but
4 Plaintiff would remove only his shirt because female, non-medical
5 staff were present. Plaintiff alleges that Defendant Carhunagan
6 became aggressive toward Plaintiff, attempting to forcibly remove
7 Plaintiff's pants and pushing his head into the wall, thereby
8 causing head injuries. (Compl. ¶¶ 10-12.)

9 Plaintiff further alleges that on July 12, 1997, he returned
10 to his assigned dormitory after work detail and because the showers
11 in his assigned dormitory were broken, correctional staff escorted
12 him to an alternate dormitory under the guard of
13 Defendant/Correctional Officer LaFon. Plaintiff maintains that
14 LaFon turned off the water in the showers less than two minutes
15 after he began showering and that this caused Plaintiff to make his
16 way to the sinks in order to rinse soap from his eyes. At that
17 time, LaFon allegedly struck Plaintiff with a baton and continued
18 attacking Plaintiff while he crawled to the dormitory's main room.
19 (Compl. ¶¶ 22-25.)

20 In April 1999, several state prison inmates, including
21 Plaintiff, brought a civil rights action in federal court against
22 various defendants. In January 2003, it was stipulated that the
23 1999 action be dismissed to allow the plaintiffs to pursue and
24 exhaust administrative remedies with the California Department of
25 Corrections ("CDC"), as required by the Prison Litigation Reform
26 Act of 1995 ("PLRA"), 42 U.S.C. § 1997(e). (Stipulation of
27 Dismissal of Claims in First Amended Complaint Against Defendants
28 LaFon and Carhungan.)

1 In February 2003, after the action was dismissed without
2 prejudice, Plaintiff pursued administrative remedies with the CDC
3 for complaints against both Defendants Carhunagan and LaFon.¹
4 Plaintiff's appeals, however, were rejected by the CDC as untimely.
5 According to the Inmate/Parolee Appeal Screening Form for
6 Plaintiff's grievances, Plaintiff's appeals were rejected because
7 there had been "too great a time laspe between when the action or
8 decision occurred and when you filed your appeal, with no
9 explanation of why you did not, or could not file in a timely
10 manner."² The screening form states that the "screening decision
11 may not be appealed unless you allege the above reason is
12 inaccurate: In such case please return this form to the Appeals
13 Coordinator with the necessary information." (Pl.'s Inmate /
14 Parolee Appeals Screening Form, Defs.' Mot. Tab A and Pl.'s
15 Addendum to Opp'n Tab A.) In seeking a second-level review and
16 third-level review of the denial of his appeals, Plaintiff alleged
17 that he was unable to file in a timely manner "due to injuries
18 resulting from the incident." (Id.) The CDC denied Plaintiff's
19 appeals at both the second-level and third-level reviews on the
20 same ground of untimeliness.

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23 ¹The CDC has an administrative grievance system for prisoner
24 complaints. Cal. Code Regs., tit. 15 § 3084, et seq. Four levels
25 of appeal are involved, including the informal level, first formal
level, second formal level, and third formal level. (Cal. Code
26 Regs., tit. 15 § 3084.5 (2005); see also Decl. Of N. Grannis ¶ 3.)

27 ²The California Code of Regulations provides: "An appellant
28 must submit the appeal within 15 working days of the event or
decision being appealed, or of receiving an unacceptable lower
level appeal decision. (Cal. Code Regs., tit. 15 § 3084.6(c).)

1 In July 2003, Plaintiff again brought a 42 U.S.C. § 1983
2 action. This action was assigned to the Honorable Nora M. Manella.
3 The Complaint alleged that Plaintiff had fully exhausted
4 administrative remedies. (Compl. ¶ 7.) Defendants moved to
5 dismiss the lawsuit on the grounds that Plaintiff failed to exhaust
6 administrative remedies with the CDC. Defendants argued that the
7 CDC's rejection of Plaintiff's claims as time-barred rendered the
8 claims unexhausted. Defendants argued that because the PLRA
9 requires state prisoners' claims to be exhausted in the state
10 prison system before those same claims may be brought in federal
11 court, Plaintiff's claims were barred from federal court and the
12 action should be dismissed. (See Defs.' Mot. to Dismiss.)

13 In July 2004, Judge Manella entered an order vacating the
14 hearing on Defendants' motion to dismiss pending the outcome of
15 Natividad v. McGrath, 139 Fed. Appx. 883 (9th Cir. 2005). In
16 February 2005, Natividad was withdrawn and deferred pending the
17 outcome of Woodford v. Ngo, 403 F.3d 620 (9th Cir. 2005). Woodford
18 addressed whether the PLRA's exhaustion requirement was satisfied
19 by the filing an administrative appeal that was ultimately rejected
20 as untimely. A panel for the Ninth Circuit held that the
21 exhaustion requirement was satisfied even if the administrative
22 appeal was rejected as untimely. Although the Ninth Circuit denied
23 rehearing en banc, the United States Supreme Court granted a
24 petition for certiorari on November 14, 2005. Woodford v. Ngo, 546
25 U.S. 1015, 126 S. Ct. 647, 163 L. Ed. 2d 525 (2005).

26 On April 20, 2006, the case was transferred from Judge Manella
27 to this Court. On June 22, 2006, in Woodford v. Ngo, 546 U.S. ___,
28 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006), the Supreme Court

1 reversed the Ninth Circuit, holding that a prisoner does not
2 exhaust their remedies under the PLRA if their administrative
3 appeal is properly rejected as untimely.

4 Accordingly, Defendants now move for judgment on the pleadings
5 on the ground that Plaintiff failed to exhaust his administrative
6 remedies. An inmate in the California prison system must complete
7 four steps: (1) attempted informal resolution, (2) first formal
8 level appeal, (3) second formal level appeal, and (4) third or
9 director's level appeal. Cal. Code Regs., tit. 15 § 3084.5. Under
10 this scheme, the administrative process is exhausted only after the
11 inmate receives a decision from the Director. Cal. Dep't of
12 Corrections Operations Manual, § 54100.11.

13 14 **II. DISCUSSION**

15 **A. Legal Standard**

16 Federal Rule of Civil Procedure 12(c) provides that "[a]fter
17 the pleadings are closed but within such time as not to delay the
18 trial, any party may move for judgment on the pleadings." Fed. R.
19 Civ. P. 12(c). Judgment on the pleadings is appropriate when "the
20 moving party clearly establishes on the face of the pleadings that
21 no material issue of fact remains to be resolved and that it is
22 entitled to judgment as a matter of law." Hal Roach Studios, Inc.
23 v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990).
24 A motion for judgment on the pleadings is therefore similar to a
25 motion to dismiss. Id.

26 Under the PLRA, an inmate's failure to exhaust administrative
27 remedies is an affirmative defense, and defendants have the burden
28 of proving the absence of exhaustion. Wyatt v. Terhune, 315 F.3d

1 1108, 1119 (9th Cir. 2003). The Ninth Circuit has held that "the
2 failure to exhaust nonjudicial remedies that are not jurisdictional
3 should be treated as a matter in abatement, which is subject to an
4 unenumerated 12(b) motion rather than a motion for summary
5 judgment." Id. In deciding a motion to dismiss for failure to
6 exhaust administrative remedies, the court may look beyond the
7 pleadings and decide disputed issues of fact. Id. at 1119-20. The
8 same standard is appropriate when considering a motion for judgment
9 on the pleadings based upon the failure to exhaust administrative
10 remedies. See id.

11 **B. Analysis**

12 **1. "Proper Exhaustion"**

13 The Prison Litigation Reform Act of 1995 states that "[n]o
14 action shall be brought with respect to prison conditions under [42
15 U.S.C. § 1983], or any other Federal law, by a prisoner confined in
16 any jail, prison, or other correctional facility until such
17 administrative remedies as are available are exhausted." 42 U.S.C.
18 § 1997e(a). The PLRA's exhaustion requirement "applies to all
19 inmate suits about prison life, whether they involve general
20 circumstances or particular episodes, and whether they allege
21 excessive force or some other wrong." Porter v. Nussle, 5343 U.S.
22 516 (2002). Prisoners must complete the prison's administrative
23 process, regardless of the relief sought by the prisoner and
24 regardless of the relief offered by the process, as long as the
25 administrative process can provide some sort of relief on the
26 complaint stated. Booth v. Churner, 532 U.S. 731, 741 (2001)
27 (holding that administrative remedies must be exhausted even when
28 plaintiff seeks only monetary relief and the inmate grievance

1 procedure offers no such relief). Exhaustion must occur prior to
2 filing suit, not while suit is pending. McKinney v. Carey, 311
3 F.3d 1198, 1199-1201 (9th Cir. 2002).

4 The Supreme Court in Woodford v. Ngo, 126 S. Ct. 2378 (2006),
5 held that “[p]roper exhaustion demands compliance with an agency's
6 deadlines and other critical procedural rules because no
7 adjudicative system can function effectively without imposing some
8 orderly structure on the course of its proceedings.” Id. at 2386.
9 The Supreme Court found that “proper exhaustion means ... a
10 prisoner must complete the administrative review process in
11 accordance with the applicable procedural rules, including
12 deadlines, as a precondition to bringing suit in federal court.”
13 Id.

14 Defendants rely on the Supreme Court’s decision in Woodford to
15 argue that Plaintiff did not exhaust administrative remedies under
16 the PLRA by filing an untimely administrative grievance.

17 Defendants argue that the Supreme Court’s decision in Woodford
18 forecloses Plaintiff’s claims, characterizing Woodford as “holding
19 that an inmate’s failure to exhaust within the established time
20 constraints forever bars the inmate from bringing suit because of
21 his or her inability to exhaust administrative remedies.” (Def.’s
22 Mot. 4.)

23 Plaintiff does not dispute that Woodford requires proper
24 exhaustion, but argues that Woodford does not stand for the broad
25 proposition that every untimely grievance must be dismissed for a
26 failure to exhaust remedies. Essentially, Plaintiff contends that
27 an inmate may still be deemed to have exhausted administrative
28 remedies, in spite of an untimely attempt at pursuing

1 administrative remedies, when an inmate had good reason for the
2 untimely grievance. Plaintiff argues that he had a good reason--
3 his inability to file within the 15 day time limit was a
4 consequence of Defendants' conduct, that caused him severe
5 injuries. Plaintiff concludes that he should be deemed to have
6 exhausted under the applicable legal standards and procedural
7 rules. (Pl.'s Opp'n 10-11.)

8 The Court in Woodford explained that exhaustion respects the
9 authority of the administrative agency and promotes efficiency.
10 The Court stressed that the "benefits of exhaustion can be realized
11 only if the prison grievance system is given a fair opportunity to
12 consider the grievance." Woodford, 126 S. Ct. at 2388.
13 Alternatively, if prisoners in noncompliance with administrative
14 filing deadlines were then allowed to bring claims in federal
15 court, this would defeat the purposes of exhaustion as "a prisoner
16 wishing to bypass the available administrative remedies could
17 simply file a late grievance without providing any reason for
18 failing to file on time." Id. at 2388. Thus, the Court in
19 Woodford was concerned to promote the purposes of exhaustion by
20 adopting a rule that would both enable the prison grievance system
21 to hear administrative appeals and prevent prisoners from bypassing
22 administrative remedies. See id. at 2385-88.

23 However, the Court did not articulate a per se rule that all
24 untimely grievances fail to exhaust administrative remedies. In
25 Woodford, the prisoner was placed in administrative segregation and
26 upon release was prohibited from participation in prison religious
27 programs. After six months, the prisoner initiated a grievance,
28 but the grievance was denied as untimely. Id. at 2383-84. As

1 noted in Woodford, under the California Code of Regulations, an
2 appeal may be rejected as untimely when “[t]ime limits for
3 submitting the appeal are exceeded and the appellant had the
4 opportunity to file within the prescribed time constraints.” Cal.
5 Code Regs., tit. 15 § 3084.3(c)(6). Because there was no dispute
6 that the prisoner had the opportunity to file his grievance within
7 the time limits, the Court did not address circumstances where a
8 prisoner’s grievance was untimely, but the prisoner had no
9 opportunity to file in a timely fashion.³ See Woodford, 126 S. Ct.
10 at 2383-84.

11 In Jones v. Bock, 127 S. Ct. 910 (2007), the Supreme Court
12 further explained that Woodford “held that to properly exhaust
13 administrative remedies prisoners must ‘complete the administrative
14 review process in accordance with the applicable procedural rules’-
15 -rules defined not by the PLRA, but by the prison grievance system
16 itself.” Id. at 922 (quoting Woodford, 126 S. Ct. at 2384)
17 (citations omitted). The Court noted that a prisoner’s compliance
18 with grievance procedures “will vary from system to system and
19 claim to claim, but it is the prison’s requirements, and not the
20 PLRA, that define the boundaries of proper exhaustion.” Id.

21 Accordingly, Woodford did not hold that all untimely
22 grievances fail to exhaust administrative remedies. Rather, a
23 court must look to the applicable procedural rules of the state’s
24 grievance procedures. See Jones v. Bock, 127 S. Ct. at 922.
25 Here, as in Woodford, Plaintiff is an inmate of the California

26
27 ³ Also, the Court in Woodford, noted that its facts did not
28 allow it to rule on a situation where prisons “create procedural
requirements for the purpose of tripping up all but the most
skillful prisoners.” Woodford, 126 S. Ct. at 2392-93.

1 Department of Corrections. The California Code of Regulations
2 provide that an inmate's administrative appeal may be rejected as
3 untimely when "[t]ime limits for submitting the appeal are exceeded
4 and the appellant had the opportunity to file within the prescribed
5 time constraints." Cal. Code Regs., tit. 15 § 3084.3(c)(6)
6 (emphasis added).

7 As indicated by Defendants, the CDC's Department Operations
8 Manual ("DOM") provides guidelines for administrative review. The
9 DOM provides that "[t]he acceptance of an appeal request beyond the
10 15-day policy is at the discretion of the appeals coordinator." DOM
11 § 54100.4. An appeals coordinator or staff member may screen-out
12 appeals prior to review, and are instructed that such decisions
13 "should not be construed in any manner that would place
14 unreasonable restraints on the inmate/parolee's right to appeal."
15 DOM § 54100.8. The DOM lists several reasons that warrant
16 rejection of an appeal, including that

17 There has been too great a time laspe between when the action
18 or decision occurred and when the appeal was submitted. The
19 appeals coordinator shall . . . ensure that the inmate or
20 parolee had, in fact, the opportunity to file in a timely
21 manner.

22 DOM § 54100.8.1.

23 The California Code of Regulations and the DOM are clear that
24 rejection of a prisoner's grievance requires the CDC to determine
25 whether the prisoner had an opportunity to file within the
26 prescribed time limits; a finding of untimeliness does not by

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1 itself merit denial of an inmate's claim.⁴ Although the DOM does
2 not provide additional guidance on this requirement, it is implicit
3 that a prisoner who for good reason did not have the opportunity to
4 file within the time limits, must be provided some means to pursue
5 administrative remedies or be excused from further exhaustion.
6 Otherwise, a prisoner has no "available" remedy within the
7 administrative system. See 42 U.S.C. § 1997e(a); Booth, 532 U.S.
8 at 738.

9 Accordingly, the Court holds that a prisoner exhausts
10 administrative remedies if the prisoner files a grievance, that
11 grievance is untimely for a good reason, and the prison grievance
12

13 ⁴ Because the California Code of Regulations require that an
14 inmate have the opportunity to file a grievance within the time
15 limits, the Court does not consider whether a state prison system
16 that categorically rejected untimely grievances without exception
17 would be permissible under due process, the PLRA, principles of
18 administrative law, or otherwise. See Woodford, 126 S. Ct. at 2392
19 (Breyer J. concurring) (recognizing that administrative law
20 "contains well established exceptions to exhaustion"); Brown v.
21 Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (holding "a prisoner need
22 not press on to exhaust further levels of review once he has either
23 received all 'available' remedies [as required by the PLRA] at an
24 intermediate level of review or been reliably informed by an
25 administrator that no remedies are available."). The Court further
26 notes that several district court cases since Woodford have held
27 that prisoners may bring a claim in federal court when they did not
28 have the opportunity to file a grievance within the time limit. See
Holcomb v. Terhune, No. C-03-02765, 2006 U.S. Dist. LEXIS 85683,
*17-19 (N.D. Cal. Nov. 14, 2006) (holding that a prisoner prevented
from making a timely appeal because he suffered physical injuries
caused by defendants had exhausted all administrative remedies when
the late grievance was due to "circumstances outside his control");
Brookins v. Vogel, No. 1:05-CV-0413, 2006 WL 3437482, at *3 (E.D.
Cal. Nov. 28, 2006) (finding that a prisoner who filed a grievance,
but was informed it was never received and therefore untimely,
exhausted all administrative remedies because the prison did not
respond to the grievance); Flory v. Claussen, No. C06-1046, 2006 WL
3404779, at *3-4 (W.D. Wash. Nov. 21, 2006) (holding that a
prisoner had exhausted all administrative remedies when he followed
a prison officials' recommendation to file an appeal with the wrong
agency, rather than filing a timely administrative grievance).

1 system fails to reach any determination regarding the prisoner's
2 opportunity to file within the prescribed time limits. A prisoner
3 does not exhaust administrative remedies if the prisoner had an
4 opportunity to file within the time limits, the prisoner did not
5 have a good reason for failing to file within time limits, or the
6 prisoner simply failed to provide a reason.

7 **2. Application**

8 In this case, Defendants maintain that until 2003, Plaintiff
9 never filed administrative appeals for the May 20, 1997 incident
10 with Defendant Carhunagan or for the July 12, 1997 incident with
11 Defendant LaFon. Defendants offer a declaration of the CDC's
12 Chief of the Inmate Appeals Branch, who is responsible for the
13 third-level review of inmate appeals. According to the
14 declaration, the Inmate Appeals Branch maintains a database that
15 "tracks all properly filed appeals received since 1993 that are
16 accepted by the Inmate Appeals Branch for Director's level
17 adjudication."⁵ (Decl. Of N. Grannis ¶ 4-5.)

18 The declaration states that a search of appeals records shows
19 that Plaintiff never exhausted administrative remedies for claims
20 arising from the May 20, 1997 or July 12, 1997 incidents.
21 Plaintiff was found only to have exhausted a separate claim
22 challenging disciplinary action taken against him for a February
23 26, 1997 violation of prison regulations related to manufacturing
24 alcohol. (Decl. Of N. Grannis ¶ 8(a).) Further, Plaintiff's 2003
25 appeal was "screened-out . . . because [Plaintiff] failed to comply
26 with the requirements set forth in California Code of Regulations,

27
28 ⁵ Director's level adjudication is the third-level review.
(Decl. Of N. Grannis ¶ 4-5.)

1 Title 15, section 3084, et seq." (Id. ¶ 8(a).) N. Grannis
2 addressed a June 17, 2003 letter to Plaintiff explaining the reason
3 that his appeal was being returned to him. The letter stated that
4 Plaintiff's appeal was being returned because "[a]n appellant must
5 submit the appeal within 15 working days of the event or decision
6 being appealed, or a lower level decision in accordance with CCR
7 3084.6(c)." (Letter of N. Grannis to Anthony Jimenez, Def.'s Ex.
8 B.)

9 Although Defendants do not offer evidence disproving that
10 Plaintiff initially filed grievances with respect to the two 1997
11 incidents, the N. Grannis declaration is evidence that Plaintiff
12 did not complete the third-level review within the 15-day deadline,
13 and that it was not until 2003 that Plaintiff brought appeals to
14 the third-level review for the 1997 incidents. (Decl. Of N.
15 Grannis ¶ 8.) On this basis, Defendants argue that Plaintiff's
16 administrative grievances were untimely.

17 Defendants further argue that there is no evidence showing
18 that Plaintiff lacked the opportunity to file a timely grievance,
19 and in fact, that allegations in Plaintiff's original complaint
20 raising the claims in this case show that he was able to pursue
21 administrative remedies, but chose not to do so. Specifically, in
22 that complaint, Plaintiff alleged that he did not pursue
23 administrative remedies because it was a "trivial" process and out
24 of fear of reprisal. (See Defs.' Supp'l. Br. 6, citing Pl.'s First
25 Amended Complaint, Jimenez v. Reno, CV99-3455.) Thus, Defendants
26 conclude that Plaintiff failed to exhaust administrative remedies.

27 Plaintiff does not provide any records of his alleged 1997
28 grievances with respect to the incidents. Rather, Plaintiff

1 asserts that his grievances were untimely due to physical injuries
2 and that he lacked the opportunity to file timely grievances. As
3 to the May 20, 1997 incident, Plaintiff contends that Defendant
4 Carhunagan's conduct caused him injury by aggravating a head wound
5 and that Plaintiff filed a June 1997 grievance with the CDC against
6 Defendant Carhunagan. As to the July 12, 1997 incident, Plaintiff
7 asserts that he was unable to complete the necessary grievance
8 forms because the incident with Defendant LaFon injured his right
9 wrist, which is Plaintiff's writing hand. After regaining the
10 ability to write, Plaintiff maintains that he filed a grievance
11 with the CDC in August 1997, which the CDC later rejected.⁶ (Pl.
12 Opp. 10-11.) Plaintiff states that he informed prison officials
13 when making these grievances that physical injuries prevented his
14 timely filing. (Pl.'s Opp'n 18.)

15 Plaintiff further explains that CDC staff informed him that
16 his 1997 grievance, insofar as it sought discipline of a CDC
17 employee, "was beyond the appeals process due to the confidential
18 nature of staff complaints." (Pl.'s Opp'n 18-19.) He then asserts
19 that he spoke with an internal affairs investigator who informed
20 Plaintiff that his appeal had been partially granted. On that
21 basis, Plaintiff states that he did not seek third-level review,
22

23 ⁶ At least with respect to the claim against Defendant LaFon,
24 Plaintiff likens his situation to the facts in the Fifth Circuit
25 case Days v. Johnson, 322 F.3d 863 (5th Cir. 2003). In that case,
26 the inmate filed an untimely grievance because of injuries to his
27 writing hand suffered during the incident that was the subject of
28 his grievance. Id. at 867. The Fifth Circuit held that
"administrative remedies are deemed unavailable when (1) an
inmate's untimely filing of a grievance is because of a physical
injury and (2) the grievance system rejects the inmate's subsequent
attempt to exhaust his remedies based on the untimely filing of the
grievance." Id. at 868.

1 believing that there were no longer any administrative remedies
2 available to him. (Pl. Opp. 18-19.)

3 In response to Defendants' citation of the original complaint
4 in the *Reno* action, Plaintiff explains that his description of
5 administrative remedies as "trivial" was reasonable because Ninth
6 Circuit law from that time had held a prisoner need not exhaust
7 administrative remedies when pursuing monetary damages, since
8 damages are unavailable through the administrative process. (Pl.'s
9 Suppl. Br. 6, citing Rumbles v. Hill, 182 F.3d 1064, 1069 (9th Cir.
10 1999).) Defendant further argues that he did not raise fear of
11 reprisal in his 2003 grievances based upon a belief that physical
12 injuries provided a sufficient explanation for the untimely
13 grievances. (Id. at 4-5.)

14 The Court notes initially that the untimeliness of Plaintiff's
15 grievances is undisputed. The issue is whether Plaintiff had an
16 opportunity to file within the prescribed 15-day time limit. An
17 appeals coordinator is required to ensure that a prisoner had an
18 opportunity to file within the time constraints when deciding
19 whether their grievance is timely. See Cal. Code Regs., tit. 15 §
20 3084.3(c)(6); DOM § 54100.8.1. This obligation arises only if a
21 prisoner in fact files a grievance and appeal.

22 There is no record that Plaintiff filed grievances in 1997
23 related to the claims in this case. The only record before the
24 Court are the grievances filed in 2003. Those grievances were
25 rejected through third-level review. (See Pl.'s Inmate/Parolee
26 Appeal Form, Defs.' Mot. Tab A and Tab B; Pl.'s Addendum to Opp'n
27 Tab A.) Absent from Defendants' evidence, however, is a showing
28 that the appeals coordinator made any determinations with respect

1 to the Plaintiff's opportunity to file within the time limits due
2 to physical injuries, even though Plaintiff asserted physical
3 injuries as the reason for his untimely grievances.⁷ This
4 indicates that the CDC failed to comply with the California Code of
5 Regulations when considering Plaintiff's grievances in this case.

6 Notwithstanding the absence of a determination in this
7 regard, Defendants' evidence is sufficient to shift the burden of
8 producing evidence. Other than Plaintiff's assertions, there is no
9 evidence showing that physical injuries prevented Plaintiff from
10 filing his grievances or that Plaintiff notified an appeals
11 coordinator of physical injuries preventing his timely filing of
12 grievances.⁸ What's more, the evidence on record shows that
13 Plaintiff did not raise physical injuries as a reason for untimely
14 grievances until 2003, and that Plaintiff previously alleged fear
15 of reprisal and the unavailability of monetary damages as reasons.
16 The assertion of different reasons at different times in the
17 litigation undercuts Plaintiff's current position that he failed to
18 file timely grievances due to physical injuries.⁹ Therefore, the

19
20 ⁷ Neither the letter rejecting Plaintiff's appeals nor the
21 Inmate/Parolee Appeal Form contain such a finding. Notably, the
22 only reason provided in the letter rejecting Plaintiff's appeals
23 was that "[a]n appellant must submit the appeal within 15 working
24 days of the event or decision being appealed, or a lower level
25 decision in accordance with CCR 3084.6(c)." (Letter of N. Grannis
26 to Anthony Jimenez, Def.'s Ex. B.)

27 ⁸ Although Plaintiff submits evidence of injuries to his
28 lower back and lower leg, including medical reports, (Pl.'s
Exhibits, Tab F), there is no indication that these injuries
prevented filing of a grievance within the time constraints.

⁹ While plaintiffs need not plead exhaustion in the complaint,
see Wyatt, 315 F.3d at 1120, the reasons presented by the Plaintiff
in his complaint with respect to not pursuing administrative
remedies are relevant to his argument that physical injuries

(continued...)

1 Court does not find Plaintiff to have shown that he lacked an
2 opportunity to file within the time constraints due to physical
3 injuries.

4 There is a similar lack of evidence verifying whether
5 Plaintiff was informed that his grievances were unappealable staff
6 complaints or had been partially granted. The Court, therefore,
7 does not consider Plaintiff to have established that he was not
8 required to exhaust administrative remedies through a third-level
9 review. Contra Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005).
10 Also, while Plaintiff is correct that exhaustion was not required
11 for claims seeking monetary damages when his original complaint was
12 first filed, the Supreme Court has since held that prisoners must
13 exhaust when seeking monetary damages, and Defendants are entitled
14 to raise non-exhaustion here. See Booth, 532 U.S. at 734; see also
15 Panaro v. City of N. Las Vegas, 432 F.3d 949, 952 (9th Cir. 2005).


16 Accordingly, the Court finds that Plaintiff did not exhaust
17 his administrative remedies.

18
19 **III. CONCLUSION**

20 For the foregoing reasons, the Court GRANTS Defendants' Motion
21 for Judgment on the Pleadings, and dismisses this action.

22
23 IT IS SO ORDERED.

24
25 Dated: January 18, 2008


DEAN D. PREGERSON
United States District Judge

26
27 _____
28 ⁹(...continued)
prevented timely grievances.