APPENDIX

Documents	A #
Appellants Informal Brief	1-19
Decision of the United States Court of Appeals	20-24
Order of the United States Court of Appeals Denial of Rehearing En Banc	25
Order of the United States District Court	26-31
Petition For Rehearing En Banc	32-42
Findings And Recommendation of the United States District Court	43-51

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIR GIORGIO SANFORD CLARDY, Plaintiff-Appellant, v. JUDY GILMORE; et al., Defendants-Appellees.	No. 17-35435 D.C. No. 2:15-cv-01241-CL MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernandez, District Judge, Presiding

Submitted July 9, 2019**
Portland, Oregon

Before: FERNANDEZ, TASHIMA, and OWENS, Circuit Judges.

Sir Giorgio Clardy appeals from the district court's grant of summary judgment for ten Oregon Department of Corrections ("ODOC") officials ("Defendants"). As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

in part, and remand.

1. Clardy argues that the district court erred in granting Defendants' motion to stay discovery pending the resolution of their summary judgment motion. We disagree. Granting the stay was within the district court's discretion. *See Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 383 (9th Cir. 1993). Defendants reasonably sought to stay discovery under Federal Rule of Civil Procedure 26(c) because it would be an unnecessary burden and expense before threshold, dispositive issues, including exhaustion, were resolved. *See* Fed. R. Civ. P. 26(c)(1) (permitting a district court to, "for good cause, issue an order to protect a party or person from . . . undue burden or expense"). Nor has Clardy "show[n] what material facts would be discovered that would preclude summary judgment." *Klingele v. Eikenberry*, 849 F.2d 409, 412 (9th Cir. 1988).

2. Next, Clardy alleges that Defendants filed an untimely answer, thus waiving their affirmative defenses. We also reject this argument. The district court allowed Defendants to waive service by filing a form that stated: "If you comply with this request and return the waiver to the court, no summons will be served. The action will then proceed as if you had been served on the date the waiver is filed." Accordingly, the Defendants' filing of the waiver form triggered the 21-day deadline to file their answer, which they then complied with. *See* Fed. R. Civ. P. 12(a)(1)(A)(i).

3. Lastly, Clardy argues that the district court erred in granting summary judgment for Defendants. Although the Prison Litigation Reform Act, 42 U.S.C. § 1997e, requires "compliance with [a prison's] deadlines and other critical procedural rules," *Woodford v. Ngo*, 548 U.S. 81, 90 (2006), that requirement is excepted if an administrative remedy is unavailable, *see Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016). We review de novo the district court's grant of summary judgment for failure to exhaust administrative remedies. *See Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015).

First, we affirm the district court's grant of summary judgment for Defendants Bell, Bugher, Gilmore, Miller, Mooney, Peters, and Waggoner. Clardy never filed a grievance related to the incident at issue naming these seven Defendants, as is required by the ODOC's procedural rules. *See* Or. Admin. R. 291-109-1040(5) (requiring a prisoner to file a separate grievance for each individual involved in an incident).

Next, we turn to the district court's grant of summary judgment for Defendants Jones and Steiner. As to these two defendants, Clardy initiated ODOC's administrative review procedure. However, his grievances were rejected because he had exceeded the maximum number of initial grievances that a prisoner can file per week and month. Although we have concerns about whether this policy, Or. Admin. R. 291-109-0180(1)(a), renders an administrative remedy

unavailable to ODOC prisoners, it did not bar Clardy from exhausting. Clardy had the opportunity to file these grievances before exceeding the limit. As such, based on the facts presented, we affirm the district court's dismissal of Clardy's federal claims against Defendants Jones and Steiner.

Finally, we consider the district court's grant of summary judgment for Defendant Jost. Here, too, Clardy initiated ODOC's administrative review process, filing a grievance specifically naming Defendant Jost. But ODOC rejected this grievance because Clardy had already filed a notice of tort claim related to the same incident. ODOC prohibits filing a notice of tort claim before filing an initial grievance, Or. Admin. R. 291-109-0140(3)(g), or at any point during the administrative review process, Or. Admin. R. 291-109-0160(4). Yet, because Oregon law requires a prisoner to file a notice of tort claim within 180 days of the alleged injury, Or. Rev. Stat. Ann. § 30.275(2)(b), a prisoner in Clardy's position might have to choose between fully exhausting or timely filing a notice of tort claim. As such, we reverse the grant of summary judgment for Defendant Jost and remand for the district court to consider in the first instance whether ODOC's policy prohibiting the simultaneous filing of a grievance and notice of tort claim deprived Clardy of an administrative remedy.[1]

AFFIRMED in part; REVERSED in part; and REMANDED.

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[1] We deny Clardy's motion to transport. Dkt. No. 51.

Each party shall bear its own costs.

A-25

FILED

AUG 28 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIR GIORGIO SANFORD CLARDY, Plaintiff-Appellant, v. JUDY GILMORE; et al., Defendants-Appellees.	No. 17-35435 D.C. No. 2:15-cv-01241-CL District of Oregon, Pendleton ORDER

Before: FERNANDEZ, TASHIMA, and OWENS, Circuit Judges.

Judge Owens has voted to deny the petition for rehearing en banc, and Judges Fernandez and Tashima have so recommended.

The panel has voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

Appellant's petition for rehearing en banc is therefore **DENIED**.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SIR GIORGIO SANFORD CLARDY,

Plaintiff,

v.

JONES, STEINER, JOST, JUDY GILMORE, JASON BELL, MILLER, COLLETTE PETERS, WAGGONER, BUGHER, MOONEY, JOHN AND JANE DOES, all members of IPC Committee;

Defendants.

No. 2:15-cv-01241-CL

ORDER

HERNÁNDEZ, District Judge:

Magistrate Judge Clarke issued a Findings and Recommendation [78] on December 19, 2016, in which he recommends that this Court grant Defendants' Motion for Summary Judgment [23], and deny Plaintiff's Motion for Temporary Restraining Order [29], Motion for Leave to File Second Supplemental Declaration in Support of Temporary Restraining Order and

Preliminary Injunction [75], and Motion for Stay [77]. The matter is now before the Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b).

Plaintiff filed timely objections to the Magistrate Judge's Findings & Recommendation. Pl.'s Obj., ECF 32. Defendants did not respond. When any party objects to any portion of the Magistrate Judge's Findings & Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

Upon review, the Court agrees with Judge Clarke's recommendation to dismiss Plaintiff's 42 U.S.C. § 1983 claims for failure to exhaust administrative remedies, as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997(e). Thus, the Court grants summary judgment to Defendants on these claims.

As to Plaintiff's state law claims, the Court declines to exercise supplemental jurisdiction and, thus, does not adopt Judge Clarke's analysis of Plaintiff's state law claims. *See* 28 U.S.C. § 1367(c)(3) (providing that if the federal claim giving rise to the court's jurisdiction is dismissed before trial, supplemental state law claims may be dismissed as well). *See also Schneider v. TRW, Inc.*, 938 F.2d 986, 993–994 (9th Cir. 1991) (explaining that the district court has discretion to dismiss supplemental claims).

Plaintiff filed 22 pages of single-spaced, handwritten objections. Plaintiff's primary objection is to any consideration by Judge Clarke of Defendants' affirmative defenses. According to Plaintiff, Defendants' affirmative defenses are procedurally waived and admitted because Defendants failed to raise them in a timely manner. Plaintiff is incorrect.

On December 11, 2015, the Court issued to Defendants a Notice of Lawsuit and Request for Waiver of Service of Summons ("Notice"). *See* ECF 7. In the Notice, the Court explained that if Defendants complied with the Court's request and returned the waiver to the Court, no summons would be served. *Id.* Instead, the action would proceed as if Defendants had been served on the date the waiver was filed. *Id.* Defendants were also informed that execution of the waiver form would not increase the time in which to file their answer; in other words, their answer still needed to comply with the time limits set forth in Federal Rule of Civil Procedure 12(a)(1)(A) or (a)(3). *Id.* Defendants subsequently sought and received an extension of time in which to file their waiver of service form. *See* ECF 9, 12.

Defendants filed their waiver of service form on February 16, 2016. ECF 12, 17. Thus, Defendants' answer was due by March 8, 2016, 21 days after February 16, 2016. *See* Fed. R. Civ. P. 12(a)(1)(A). On March 8, 2016, Defendants filed their answer, which included affirmative defenses. ECF 21. Therefore, Defendants' answer and assertion of affirmative defenses was timely.

Plaintiff also objected to Judge Clarke's determination that the Oregon Tort Claims Act ("OTCA") requires the Court to substitute the State of Oregon for individually named defendants and, thus, dismiss Plaintiff's state law tort claims as barred by the Eleventh Amendment. Plaintiff argues that, because he alleges damages in excess of the OTCA's statutory cap, his action may be maintained as one against individually named defendants.[1] Pl.'s Obj. 12, ECF 83.

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[1] O.R.S. 30.265(4) provides, in part, that:

> If an action under ORS 30.260 to 30.300 alleges damages in an amount greater than the damages allowed under ORS 30.271, 30.272 or 30.273, the action may be brought and maintained against an officer, employee or agent of a public body, whether or not the public body is also named as a defendant.

The statutory cap for a single claimant bringing a cause of action between July 1, 2015 and July 1, 2016 is $2,048,300. *See* O.R.S. 30.271(4) and

In addition, Plaintiff argues that, because he alleges that Defendants were not acting within the scope of their employment, the OTCA does not require the Court to substitute the State of Oregon for individual defendants. *Id.* at 13. Because the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims, it is unnecessary for the Court to opine on the merit of Plaintiff's arguments.

The Court reviewed the remainder of Plaintiff's objections and found them unavailing.[2]

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http://www.courts.oregon.gov/OJD/docs/courts/circuit/Table_of_Liability_Limits.pdf (last accessed, April 19, 2017). Plaintiff's complaint alleges damages in excess of this amount. *See* Compl. 24, ECF 2.

[2] For example, Plaintiff objects to Judge Clarke's finding that there is no defendant "John Jones" properly before this Court because there is nothing in the record to establish that such defendant was served. *See* F&R 7, ECF 78. Plaintiff is correct that Defendants' Waiver of Service form lists "Jones" as one of the defendants who waives service. Decl. Opp. Summ. J. Ex. 7 ("Waiver of Service Form"), ECF 32-1 at 34. Therefore, the Court does not adopt that portion of the F&R. However, this does not change the Court's overall conclusion.

CONCLUSION

The Court ADOPTS IN PART Magistrate Judge Clarke's Findings and Recommendation [78]. The Court grants Defendants' Motion for Summary Judgment [23] as to Plaintiff's §1983 claims and declines to exercise supplemental jurisdiction over Plaintiff's state law claims. The Court denies Plaintiff's Motion for Temporary Restraining Order [29], Motion for Leave to File Second Supplemental Declaration in Support of Temporary Restraining Order and Preliminary Injunction [75], and Motion for Stay [77].

Any appeal from this Order would be frivolous and not taken in good faith. Therefore, Plaintiff's *in forma pauperis* status is revoked.

IT IS SO ORDERED.

DATED this 23 day of April, 2017.

Marco Hernandez

MARCO A. HERNÁNDEZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SIR GIORGIO SANFORD CLARDY,

Plaintiff,

v.

JONES, STEINER, JOST, JUDY GILMORE, JASON BELL, MILLER, COLLETTE PETERS, WAGGONER, BUGHER, MOONEY, JOHN AND JANE DOES, all members of IPC Committee;

Defendants.

No. 2:15-cv-01241-CL

JUDGMENT

HERNÁNDEZ, District Judge:

Based on the record, IT IS ORDERED AND ADJUDGED that Plaintiff's § 1983 claims are dismissed with prejudice. Plaintiff's state law claims are dismissed without prejudice. Pending motions, if any, are denied as moot.

DATED this 23 day of April, 2017.

Marco Hernandez

MARCO A. HERNÁNDEZ
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

SIR GIORGIO SANFORD CLARDY,

Plaintiff,

2:15-cv-01241-CL

v.

FINDINGS AND RECOMMENDATION

JOHN JONES, et al.,

Defendants.

Clarke, Magistrate Judge.

Plaintiff, an inmate in the custody of the Oregon Department of Corrections, filed a pro se complaint under 42 U.S.C. § 1983 alleging excessive force and denial of equal protection claims against corrections officers and officials. Plaintiff alleges that defendant Jones assaulted him during a cell search on April 23, 2015, and that defendant Jost tampered with the evidence surrounding that incident. Complaint (#2).

Defendants move for summary judgment (#23).

Plaintiff apparently seeks to hold defendant Collette Peters liable on a theory of respondeat superior. It is well settled that respondeat superior is not a proper basis for liability under §1983. Monell v. New York City Dept. Of Social Services, 436 U.S. 658 (1978). Plaintiff has not alleged that defendant Peters was personal involved in the alleged violations complained of in his complaint. Therefore, she is entitled to judgment as a matter of law. Ashcroft v. Iqubal, 556 U.S. 662, 676 (2009).

Plaintiff alleges state law claims for intentional infliction of emotional distress and negligence. Under the Oregon Tort claims Act, individually named defendants must be dismissed from plaintiff's complaint and the state of Oregon substituted in their place. ORS 30.265,(1); Demaray v. Dept. of Environmental Quality, 127 Or. App. 494, 502 (1994).

Therefore, plaintiff's "Oregon common law" claims are essentially claims against the state and are barred by the Eleventh Amendment. Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996); see also, Quern v. Jordan, 440 U.S. 332 (1979); Edleman v. Jordan, 415 U.S. 651, 673 (1984); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984); Brooks v. Sulpher Springs Valley Elec. Co-

Op, 951 F.2d 1050, 1053 (9th Cir. 1991).

In addition, plaintiff alleges claims for "official misconduct," evidence tampering and obstruction of justice under Oregon criminal statutes. Plaintiff has no private right of action under Oregon's criminal statutes and no authority to enforce them. Therefore defendants are entitled to judgment as a matter of all as to plaintiff's ancillary state law claims.

The Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal Law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

Prisoners exhaust available administrative remedies before bringing a federal action concerning prison conditions. Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing 42 U.S.C. § 1997e(a)). Inmates are required to exhaust *all* grievance remedies before filing a Section 1983 action, including appealing the grievance decision to the highest level within the grievance system. Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003); Bennett v. King, 293 F.3d 1096, 1098 (9th Cir. 2002); McKinney v. Carey, 311 F.3d 1198 (9th Cir. 2002). Moreover, "the PLRA exhaustion requirement requires proper

exhaustion." Woodford v. Ngo, 548 U.S. 81, 93 (2006). This means that a prisoner must "complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court." Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009)(quoting *Woodford*, 548 U.S. at 88).

Exhaustion of administrative remedies is an affirmatve defense properly raised by a motion for summary judgment pursuant to Fed. R. Civ. P. 56. Albino v. Bacca ***. If the evidence, viewed in the light most favorable to the prisoner, "shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56." Id. at 4-5. If there are disputed issues of fact that preclude summary judgment on the issue of exhaustion, those factual disputes should be resolved by a court - not a jury - in the same manner that a court would decide disputed factual questions relevant to jurisdiction or venue. Id. at 14. The defense of exhaustion should be decided "before reaching a prisoner's claim". Id.

The ODOC has a grievance process in place to address inmates complaints. *See*, OAR 291-109-0100 to 291-109-0190.

The Declaration Tammy Greiner (#24) establishes that plaintiff did not grieve any matters concerning defendants Peters, Miller, Gilmore, Bell, Waggoner, Bugher,, or Mooney during the time period set forth in his complaint (April 7,

2015 - May 13, 2015). Therefore plaintiff has failed to exhaust (or even initiate) administrative remedies for his claims against these defendants, and they are entitled to judgment as a matter of law.

Plaintiff's first claim alleges excessive use of force by all defendants on April 23, 2015. The Greiner Declaration establishes that plaintiff filed 24 grievances in the month of May, 2016, including four that mentioned the use of force on April 23, 2015.

Inmates are prohibited from filing more than two initial inmate grievances in any one week or six in any calendar month. OAR 291-109-1080(1). All four of plaintiff's excessive force grievances were denied for exceeding the allowable number of grievances under the rule. Greiner Declaration (#24) p. 5.

Therefore plaintiff failed to properly exhaust his remedies regarding his excessive use of force claim.

Plaintiff alleges in his second claim that defendants Jost, Steiner, Peters and Miller denied him equal protection on April 23, 2015. Complaint(#2) p. 12.

As noted above, plaintiff did not grievance the conduct of Defendants Peters or Miller at any time material to his claims.

The record reflects that plaintiff filed a grievance

against defendant Steiner concerning the April 23, 2015 incident. However, the grievance was plaintiff's twentieth in the same month and was returned to plaintiff for exceeding the maximum allowable grievance quota. *See*, Greiner Declaration (#24) p. 6. Therefore, plaintiff did not properly exhaust his remedies as to his claim against defendant Steiner.

Plaintiff filed one grievance against defendant Jost concerning the April 23, 2015 incident. However, plaintiff attached a tort claim notice regarding the incident to the grievance. An inmate may not grieve "claims or issues for which the inmate has filed a Notice of Tort" with the ODOC. OAR 291-109-0140(3)(g). Therefore, the grievance was returned to plaintiff. This was the *tenth* time plaintiff had a grievance returned to him with an explanation about initiating premature litigation.

By failing to complete the administrative process *before* filing a tort claim notice, plaintiff did not properly exhaust his administrative remedies as to his claim against defendant Jost.

Based on the foregoing, I find that plaintiff did not properly exhaust his available administrative remedies with respect to any of the matters alleged as claims in this case and that defendant are entitled to judgment as a matter of

law.[1]

Plaintiff's Motion for temporary restraining order and preliminary injunction alleges that he is being denied appropriate mental health services for his severe mental illness because of his classification as a dangerous offender. Plaintiff more or less accurately sets forth the appropriate standards for preliminary equitable relief, and generally argues his entitlement to such relief. However, plaintiff does not specifically allege the precise (or even general) nature of the relief he seeks. Moreover, plaintiff's motion does not seem to relate to his claims in the underlying case. Under these circumstances plaintiff has failed to demonstrate probable success on the merits and his Motion for Temporary Restraining Order (#29) should be denied.

Defendant's Motion for Summary Judgment (#23) should be allowed. plaintiff's Motion for Temporary Restraining Order (#29), Motion for leave to file (#75), and Motion for Stay (#77) should be denied. The Clerk of the Court should be directed to enter a judgment dismissing this action with prejudice.

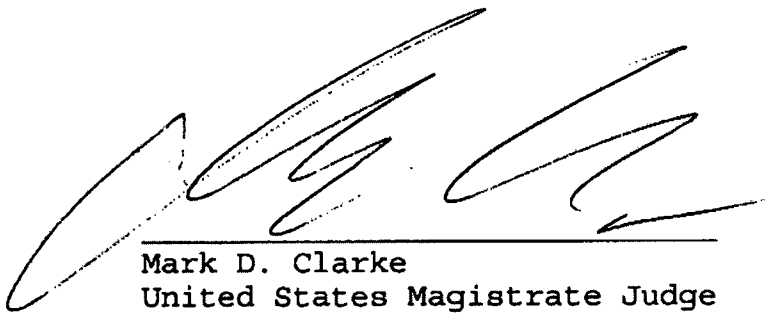
1

The Notice of Lawsuit and Request for Waiver of Service sent to counsel for defendants listed "Jones" as a defendant. However, "Jones" was not listed among the defendants waiving service. There is nothing in the record to establish that he was ever served and I find that there is no defendant "John" Jones properly before the court in this action.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

Any appeal from an order adopting this Findings and Recommendation or judgment dismissing this case would be frivolous and not taken in good faith. Therefore, plaintiff's in forma pauperis status should be revoked.

DATED this 19 day of December, 2016.



Mark D. Clarke
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.