IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

PHILLIP NATHAN KERCH,	:	
	:	
Plaintiff,	:	
	:	
VS.	:	
	:	**CIVIL No: 5:17-cv-108 MTT-CHW**
Warden GLENN JOHNSON, ***et al.*****,**	:	
	:	**PROCEEDINGS UNDER 42 U.S.C. § 1983**
Defendants.	:	

REPORT & RECOMMENDATION

Plaintiff Phillip Kerch filed a *pro se* complaint pursuant to 42 U.S.C. § 1983 on March 23, 2017. Doc. 1. Defendants Glenn Johnson and Kenneth McClain ("Defendants") have filed a Motion to Dismiss, contending that Plaintiff did not properly exhaust his available administrative remedies. Doc. 23. Because Plaintiff has failed to exhaust his available administrative remedies in accordance with the Prison Litigation Reform Act ("PLRA"), it is **RECOMMENDED** that Defendants' Motion to Dismiss (Doc. 23) be **GRANTED**, and Plaintiff's claims be **DISMISSED.** Additionally, it is **RECOMMENDED** that Plaintiff's Motion for Preliminary Injunction (Doc. 33) be **DENIED.**

EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. The Prison Litigation Reform Act

Before this Court may address Plaintiff's claims on the merits, it must determine whether Plaintiff exhausted his available administrative remedies in accordance with the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). *Bryant v. Rich*, 530 F.3d 1368, 1372–78 (11th Cir. 2008) (noting that exhaustion is "a precondition to an adjudication on the merits"). The PLRA

requires that an inmate must exhaust all available remedies before filing a claim with the courts. *Porter v. Nussle*, 534 U.S. 516, 532 (2002); *Pearson v. Taylor*, 665 F. App'x 858, 866 (11th Cir. 2016); *see* 42 U.S.C. § 1997e(a).“To exhaust administrative remedies in accordance with the PLRA, prisoners must properly take each step within the administrative process.” *Id.* (internal quotation marks omitted). This rule applies even where the administrative process is “futile and inadequate.” *Alexander v. Hawk*, 159 F.3d 1321, 1325–28 (11th Cir. 1998). That said, administrative remedies must be “available” for the exhaustion requirement to apply. *See, e.g.*, *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1322–26 (11th Cir. 2007).

An inmate is not required to “name any particular defendant in a grievance to properly exhaust his claim[,]” but must alert prison officials of the problem and present them with an opportunity to correct the alleged problem. *Pearson*, 665 F. App'x at 866 (quoting *Parzyck v. Prison Health Servs. Inc.*, 627 F.3d 1215, 1218–19 (11th Cir. 2010)(“[the] exhaustion requirement is designed to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued”)). The PLRA simply requires the inmate to properly complete the grievance process to allow prison officials “time and opportunity to address complaints internally before allowing the initiation of a federal case.” *Parzyck*, 627 F.3d at 1219(quoting *Woodford v. Ngo*, 548 U.S. 81, 93 (2006)).

Because exhaustion is “a matter in abatement,” it is properly the subject of dismissal. *Bryant*, 530 F.3d at 1374-75. As with other matters in abatement, courts may consider facts outside of the pleadings when determining whether a prisoner properly exhausted his available administrative remedies. *Id.* at 1376. Additionally, courts may resolve factual disputes so long as those disputes do not decide the merits, and so long as the parties have a sufficient opportunity to develop a record. *Id.*

In ruling upon motions to dismiss based upon the affirmative defense of failure to exhaust, courts in this Circuit follow a two-step process established by *Turner v. Burnside*, 541 F.3d 1077 (11th Cir. 2008). First, courts look to the factual allegations in the defendant's motion to dismiss and those in the plaintiff's response, and if they conflict, the court takes the plaintiff's version of the facts as true. *Turner*, 541 F.3d at 1082. "If, in that light, the defendant is entitled to have the complaint dismissed for failure to exhaust administrative remedies, it must be dismissed." *Id*. If the complaint is not subject to dismissal based on the plaintiff's version of the facts, the court must proceed to the second step, where it makes specific findings of fact in order to resolve the disputed factual issues related to exhaustion. *Id.* At the second step, it is the defendant's burden to prove that the plaintiff failed to exhaust his available administrative remedies. *Id.*

Also important to this specific case, "when a state provides a grievance procedure for its prisoners, as Georgia does here, an inmate alleging harm suffered from prison conditions must file a grievance and exhaust the remedies available under that procedure *before* pursuing a § 1983 lawsuit." *Brown v. Sikes*, 212 F.3d 1205, 1207 (11th Cir. 2000) (emphasis added). Congress intended to afford prison officials time to address grievances internally before allowing a prisoner to initiate a federal lawsuit. *Porter v. Nussle*, 534 U.S. 516, 525 (2002). Thus, even if Plaintiff exhausted his administrative remedies after he filed his complaint, the Court cannot take action on those claims. See 42 U.S.C. § 1997e(a).

B. Available Administrative Remedies

During the period relevant to this case, the Georgia Department of Corrections provided prisoners with a two-step grievance procedure. McClairen Aff. Doc. 23-2, p. 3; S.O.P. Doc. 23-3, p. 8. At step one, a prisoner must file a grievance no later than ten (10) calendar days from the

date he knew or should have known of the facts underlying his grievance. McClairen Aff. Doc. 23-2, p. 4; S.O.P. Doc. 23-3, p. 9. The Warden must respond to the grievance within forty (40) days. McClairen Aff. Doc. 23-2, p. 4; S.O.P. Doc. 23-3, p. 10. If this initial grievance is rejected, the prisoner may appeal to the Central Office within seven (7) calendar days of the rejection. McClairen Aff. Doc. 23-2, p. 4; S.O.P. Doc. 23-3, p. 13. If the time allowed for a response expires without a response from the Warden, the plaintiff may also file an appeal. S.O.P. Doc. 23-3, p. 13.

The procedure also provides for the above-stated timelines to be waived by the grievance coordinator "for good cause." McClairen Aff. Doc. 23-2, p. 4; S.O.P. Doc. 23-3, p. 9. Good cause is defined as: "A legitimate reason involving unusual circumstances that prevented the offender from timely filing a grievance or an appeal. Examples include: serious illness, being housed away from a facility covered by this procedure (such as being out on a court production order or for medical treatment)." S.O.P. Doc. 23-3, p. 2.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff's allegations, accepted as true, state that Plaintiff and all other inmates housed in J-1 administrative segregation at Dooly State Prison ("Dooly") were moved to J-2 segregation because of renovations. Doc. 1, p. 5. Building J-2 was not "properly furnished for recreation," and no alternative means for recreation were provided for the inmates. *Id.* Plaintiff alleged that as of June 19, 2017, he had not received any recreation time. Doc. 9, p. 1.

Plaintiff alleges that he filed a grievance against Defendant McClain on March 7, 2017, "for fear of [his] life." Doc. 1-1, p. 5. Plaintiff alleged that Defendant McClain retaliated against Plaintiff by writing disciplinary reports to "get [Plaintiff] off 'Protective Custody Status.'" *Id.* Defendant McClain also harassed and informed Plaintiff that he "is gonna write as many D.R's

as necessary to accomplish his goal [of removing Plaintiff from protective custody status]" and having Plaintiff sent to a "nightmare prison." *Id.*

Plaintiff moved to supplement his Complaint on August 3, 2017. Doc. 16. Following a screening pursuant to 28 U.S.C. § 1915A, the Court allowed Plaintiff to proceed with his claims against Defendants Johnson and McClain regarding First Amendment retaliation and Eighth Amendment denial of recreation. Doc. 32, p. 5. All of Plaintiff's other claims were dismissed without prejudice. *Id.*[1]

GRIEVANCE HISTORY

Plaintiff filed seven grievances from January 1, 2017, to September of 2017. Doc. 23-2, p. 6; Doc. 23-5. Plaintiff filed Grievance Number 239122 on March 10, 2017, alleging that Defendant McClain retaliated against Plaintiff when Plaintiff alleged a Prison Rape Elimination Act ("PREA") claim against Officer Redding. Doc. 23-5, p. 2. Allegedly, Defendant McClain told Plaintiff he caused "too much trouble by [filing grievances and civil actions,]" and Plaintiff reported he was "scared of this retaliatory punishment." *Id.* On March 31, 2017, a Resolution Memo was sent and received by Plaintiff noting that Plaintiff "decided no further action," and that the problem was being resolved. *Id.* at 4.

Plaintiff filed Grievance Number 242943 on May 6, 2017, alleging that Officer Redding shut a tray flap on Plaintiff's hand and refused to call medical. *Id.* at 9-10. The Warden denied Plaintiff's grievance on June 11, stating that Officer Redding denied closing the flap on Plaintiff's hand and that Plaintiff had informed others that his hand was hurt because Plaintiff

[1] Plaintiff has another case before this Court, with similar claims and defendants, 5:17-cv-186-MTT-CHW ("*Kerch II*"). In *Kerch II*, Plaintiff filed a Complaint against Defendants Johnson, and two new Defendants, Defendants McClairen and Redding, alleging an Eighth Amendment claim against all three, and a First Amendment retaliatory transfer against Defendant McClairen. *Kerch II*, Doc. 13. The Defendants in *Kerch II* have filed a Motion to Dismiss, alleging that Plaintiff did not properly and fully exhaust his administrative remedies before filing his complaint in that case.

"fell out of his bed and landed on his hand." *Id.* at 8. Plaintiff appealed the denial of his grievance on June 18, 2017, and his appeal was denied after witness statements from several officers discredited Plaintiff's allegations. *Id.*at 5-14.

On May 19, 2017, Plaintiff filed Grievance Number 243442, alleging that Officer Redding cuffed Plaintiff then sexually assaulted Plaintiff by "grabb[ing Plaintiff's butt.]" *Id.* at 16. Plaintiff reported that he communicated with several prison officials regarding this incident, and requested that this grievance be sent to Internal Affairs, thereby administratively closing the grievance process. *Id.* at 16-20. On June 15, 2017, Plaintiff filed Grievance Number 245418, alleging that he had not received any outdoor recreation in over five months. *Id.* at 22. The Warden denied Plaintiff's grievance on July 25, informing Plaintiff that construction was being done to the recreation area and that the area "lacks the security and poses safety issues for inmates" during construction. *Id.* at 23. Plaintiff did not appeal the denial of this grievance.

Plaintiff filed Grievance Number 246705 on July 5, 2017, alleging that he had not received his medication since his arrival at Autry State Prison. *Id.* at 27. On August 8, Plaintiff dropped this grievance, and on August 9, it was further noted that Plaintiff's prescriptions had expired and were not renewed. *Id.* at 32-33. On July 31, Plaintiff filed Grievance Number 248248, requesting protective custody. *Id.* at 35. Plaintiff alleged that he was moved to general population and that he was continuously assaulted while in general population. *Id.* This grievance was resolved on August 9, 2017, and no further action was required. *Id.* at 36.

On August 24, 2017, Plaintiff filed Grievance Number 250606, alleging that he had been denied access to the law library and legal supplies. *Id.* at 38. It appears that this grievance is still pending. There are no grievances regarding any retaliatory conduct by Defendant Johnson.

DISCUSSION

Plaintiff's claims should be dismissed due to his failure to exhaust his administrative remedies before filing this federal claim. If Plaintiff's version of the facts is construed as true, Defendants are not entitled to dismissal at step one of *Turner*. Although Plaintiff admits that his grievances are "going through [the grievance] process as of now" (Doc. 1, p. 3), Plaintiff has offered several reasons why he did not properly exhaust the available administrative remedies, including a "mental health crisis," the misleading advice of a guidance counselor, and a lack of writing supplies. Doc. 27-1, pp. 1-3. Accepted as true, Plaintiff's allegations and excuses make it unclear that Defendants are entitled to dismissal at step one of *Turner*. The Court must therefore proceed to step two of *Turner* to make specific findings of fact to resolve the disputed factual issues.

The evidence submitted shows that Plaintiff's Complaint should be dismissed at step two of the *Turner* analysis. Out of the seven grievances Plaintiff filed during the relevant time period, only two grievances, Grievance Numbers 239122 and 245418, are relevant to Plaintiff's federal claim. Grievance Number 239122 alleged that Defendant McClain retaliated against Plaintiff. Doc. 23-5, p. 2. This grievance was filed on March 10, 2017, and on March 31, 2017, a Resolution Memo noted that grievance was concluded. *Id.* at 2-4. As Plaintiff filed his current lawsuit on March 23, 2017, it is clear that Plaintiff had not fully and properly exhausted this grievance before filing his federal lawsuit.

In Grievance Number 245418, Plaintiff grieved that he had not been allowed any recreation in over five months, the basis for his Eighth Amendment claim. *Id.* at 22. Plaintiff filed this grievance on June 15, 2017, almost three months after he filed his federal lawsuit. As full and proper exhaustion requires exhausting available remedies *before* filing a § 1983 lawsuit,

Plaintiff has failed to exhaust his Eighth Amendment claim. *Brown*, 212 F.3d at 1207.

The reasons Plaintiff has offered do not excuse his failure to exhaust available remedies before filing a lawsuit. Plaintiff contends that he voluntarily dropped Grievance Number 245418, the grievance regarding his recreation time, because he was "misled" by a grievance consular. Doc. 27-1, p. 2. The grievance records show, however, that this grievance was denied, not that Plaintiff voluntarily dropped the grievance. Doc. 23-5, p. 23. More importantly, Grievance Number 245418 was not filed until June 15, 2015, almost 3 months *after* Plaintiff filed this federal law suit. *Id.* at 22; Doc. 1.

Additionally, Plaintiff's contention that he was placed on "mental health observation" and did not have access to writing supplies does not excuse his failure to exhaust. Doc. 27-1, p. 1. Plaintiff alleged that he had a mental health crisis and was placed on lockdown in late June of 2017. *Id.* Any delay this alleged crisis would have caused is unimportant, as this mental health crisis occurred several months *after* Plaintiff initiated his federal lawsuit. Although Plaintiff contends that any grievance he would have filed once he was released from the mental health observation would have been "way past the 10 day filing time," Plaintiff could have filed an untimely grievance and attempted to demonstrate good cause for his delay. Doc. 27-1, pp. 1-2. Even if Plaintiff had filed an untimely grievance and succeeded in demonstrating good cause, that grievance would not have excused the fact that Plaintiff had already filed this federal claim.

Plaintiff's contention that he had to drop Grievance Number 239122 in order to file another grievance also does not excuse his failure to exhaust this grievance. Doc. 27-1, p. 2. The Georgia Department of Corrections allows inmates to have only two active grievances at any one time, requiring inmates to prioritize grievances. S.O.P. Doc. 23-3; *Pearson v. Taylor*, 665 F. App'x 858, 868 (11th Cir. 2016). Plaintiff admits that Grievance Number 23912 "was supposed

to be resolved" and that he dropped Grievance Number 23912 "so I could file another grievance." Doc. 27-1, p. 2. Plaintiff's voluntary abandonment of this grievance does not constitute proper exhaustion. Furthermore, although Plaintiff states that he refiled this grievance on April 20, 2017, this alleged refiling would have occurred *after* he filed this federal lawsuit. Accordingly, Plaintiff's claims are subject to dismissal due to Plaintiff's failure to exhaust his administrative remedies before filing his present lawsuit.

Plaintiff has also alleged that he has filed a temporary restraining order and a preliminary injunction under an "emergency situation." Doc. 27-2, p. 2. The Georgia Department of Corrections does allow for emergency grievances to be filed, which are immediately referred to the Grievance Coordinator. Doc. 23-3, p. 14. There is no record that Plaintiff has presently filed an emergency grievance. Plaintiff has filed a Motion for Preliminary Injunction (Doc. 33) "against the Warden here at G.S.P." In his Motion, Plaintiff concedes that the Warden at G.S.P. is "not involved in my civil actions," but moves the Court to order the Warden to "provide access to the law library and to get indigent supplies—paper, envelopes, pens, etc. . . ." *Id.*

Plaintiff is not entitled to an injunction because his allegations in the preliminary injunction are outside the scope of his underlying suit. "A district court should not issue an injunction when the injunction in question is not of the same character, and deals with a matter lying wholly outside the issues in the suit." *Bruce v. Reese*, 431 F. App'x 805, 806 n. 1 (11th Cir. 2011) (quoting *Kaimowitz v. Orlando*, 122 F.3d 41, 43 (11th Cir.1997)). It appears that Plaintiff is currently attempting to seek injunctive relief against a non-party, possibly regarding a new "access to courts" claim. As this possible new claim is unrelated to Plaintiff's underlying claims, Plaintiff's motion for a preliminary injunction regards claims that are clearly "outside the scope

of the underlying suit." *Bruce*, 431 F. App'x at 806 n.1.[2] Accordingly, it is **RECOMMENDED** that Plaintiff's Motion for Preliminary Injunctive Relief be **DENIED.**

CONCLUSION

Plaintiff failed to exhaust his administrative remedies, properly and fully, before filing this federal lawsuit. The reasons Plaintiff has offered do not excuse his failure to exhaust, and Plaintiff's Complaint is subject to dismissal. Accordingly, it is **RECOMMENDED** that Defendants' Motions to Dismiss (Doc. 23) be **GRANTED** and Plaintiff's claims be **DISMISSED without prejudice.** Additionally, it is **RECOMMENDED** that Plaintiff's Motion for Preliminary Injunction (Doc. 33) be **DENIED.**

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, **WITHIN FOURTEEN (14) DAYS** after being served with a copy thereof. The District Judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are further notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on

[2] Insofar as Plaintiff is requesting an "obey-the-law" injunction upon the Warden at G.S.P. to make the Warden "provide access to the law library [. . .]," that injunctive relief is denied. "Obey-the-law" injunctions have consistently been found to be over-broad and vague. *SEC v. Smyth*, 420 F.3d 1225, 1233 (11th Cir. 2005); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999); *Hines v. Nichols*, No. 5:14-CV-00147 (MTT) CHW, 2016 WL 3460220, at *2 (M.D. Ga. May 18, 2016), *report and recommendation adopted*, No. 5:14-CV-147 (MTT), 2016 WL 3460384 (M.D. Ga. June 21, 2016). Furthermore, Federal courts are incapable of enforcing such "obey-the-law" injunctions. *SEC*, 420 F.3d at 1233 ("This circuit has repeatedly held that 'obey the law' injunctions are unenforceable.").

appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO RECOMMENDED, this 10th day of May, 2018.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge