UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS WILLIAM SINCLAIR RICHEY,

Plaintiff,

v.

DENNIS THAUT,

Defendant.

No. C11-5680 RBL/KLS

ORDER ADOPTING REPORT AND RECOMMENDATION

The Court, having reviewed the Report and Recommendation of Magistrate Judge Karen L. Strombom, objections to the Report and Recommendation, if any, and the remaining record, does hereby find and **ORDER**:

1) The Court adopts the Report and Recommendation.

2) Defendants' Motion to Dismiss (ECF No. 14) is **GRANTED;** Plaintiff's claims are **Dismissed without Prejudice for failure to exhaust and that the dismissal count as a strike pursuant to 28 U.S.C. § 1915(g).**

3) The Clerk is directed to send copies of this Order to Plaintiff, counsel for Defendant and to the Hon. Karen L. Strombom.

DATED this 26th day of March, 2011.

RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS WILLIAM SINCLAIR RICHEY, Plaintiff, v. DOUGLAS THAUT, Defendant.	No. C11-5680 RBL/KLS **REPORT AND RECOMMENDATION** **Noted for: March 9, 2012**

Before the Court is Defendant Douglas Thaut's Motion for Dismissal. ECF No. 14. Defendant moves for the dismissal of all of Plaintiff Thomas William Sinclair Richey's claims based on Plaintiff's failure to exhaust administrative remedies and for failure to state a claim. Defendant also asks that dismissal of this action count as a strike under the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g). Plaintiff filed a response to the motion to dismiss (ECF No. 15) and a motion to amend (ECF No. 16). Plaintiff's motion to amend was denied under separate Order. Defendant filed a reply (ECF No. 17).

Having carefully considered the parties' papers and balance of the record, the Court recommends that Plaintiff's claims be dismissed without prejudice for failure to exhaust and that the dismissal count as a strike. The Court does not reach Defendant's stated alternative grounds for dismissal because once it has been determined that a suit filed by a prisoner must be dismissed for failure to exhaust, a district court lacks discretion to resolve those claims on the merits.

FACTS

A. Plaintiff's Claims

Plaintiff filed this 42 U.S.C. § 1983 complaint against Defendant Douglas Thaut for "violating my 1st Amendment right to redress grievances and for violating my 14th Amendment right to equal protection." ECF No. 5. Plaintiff bases his allegations on Defendant Thaut's handing of Plaintiff's grievance No. 1114798, in which he stated that he was denied his "right to a shower" by an "extremely obese female Hispanic guard." ECF No. 14, Exhibit 1 (Declaraton of Kerri McTarsney), p. 7. In his grievance, Plaintiff stated further:

> . . . On return from the yard, I asked if there's a fat farm that raises all the obese women that Stafford Creek hires. I then asked if maybe there is a womens [sic] football team here because she was as big as a linebacker. After this statement, she denied me a shower.
>
> If a guard has a problem, they have an avenue to punish me. Take my Level or infract me. They have no authority to deprive me of a right without due process. Even prison isn't a dictatorship when it comes to the deprivation of a right. I was not a threat to security. I merely insulted her. But she has to see that I was actually trying to positively encourage her to diet. She is unhealthy. Frankly if she has such thin skin, she shouldn't work in prison around men who are largely anti-social.

Id.

On August 1, 2011, Defendant Thaut advised Plaintiff to re-write the grievance leaving out objectionable language and re-submit the grievance by August 10, 2011. *Id*.

On August 3, 2011, Plaintiff filed a grievance (No. 1115787) against Defendant Thaut for failing to process his previous grievance (No. 1114798). *Id*., Exhibit 1 (McTarsney Decl.), p. 10.

On August 10, 2011, Plaintiff did not submit an amended grievance. Instead, he filed an offender kite stating:

> Re: Grievance # 1114798. You will not censor my right to free speech. I will not rewrite my grievance. You will not punish me for the language I choose to use. You are not the language police. You will do your assigned job and investigate my grievance. If not, give it to a grievance coordinator who will. I used no objectional [sic] language in my grievance. So process it pronto (also process my grievance I filed against you).

Id., Exhibit 1 (McTarsney Decl.), Attach. C, p. 12. at ¶12, Attachment C.

Plaintiff's grievance against Defendant Thaut was found to be non-grieveable on August 12, 2011. His original grievance (No. 1114798) was administratively withdrawn on August 15, 2011 because Plaintiff chose not to file an amended grievance by the August 10, 2011 deadline. *Id.* at ¶ 11 and ¶ 12.

B. The Washington Offender Grievance Program

There is a grievance procedure available to inmates who are incarcerated in Department of Correction (DOC) institutions. ECF No. 14-1, Exhibit 1 (Declaration of Kerri McTarsney), ¶3.2 Under DOC's grievance system, an offender may file an offender complaint over a wide range of aspects of his incarceration. *Id*., ¶ 4. Inmates may file grievances challenging: 1) DOC institution policies, rules and procedures; 2) the application of such policies, rules and procedures; 3) the lack of policies, rules or procedures that directly affect the living conditions of the offender; 4) the actions of staff and volunteers; 5) the actions of other offenders; 6) retaliation by staff for filing grievances; and 7) physical plant conditions. *Id*. An offender may not file a grievance challenging: 1) state or federal law; 2) court actions and decisions; 3) Indeterminate Sentence Review Board actions and decisions; 4) administrative segregation placement or retention; 5) classification/unit team decisions; 6) transfers; 7) disciplinary actions. *Id*.

The grievance procedure consists of four levels of review. *Id*., ¶ 6. At Level 0, the grievance coordinator at the prison receives a written complaint from an inmate on an issue

about which the offender wishes to pursue a formal grievance. At this complaint level, the grievance coordinator pursues informal resolution, returns the complaint to the inmate for rewriting, returns the complaint to the inmate requesting additional information, or accepts the complaint and processes it as a formal grievance. Inmates must submit a complaint to the grievance coordinator within twenty days of the incident. *Id.*, Exhibit 1 (McTarsney Decl.), Attachment A.

A complaint that has been returned for rewriting must be re-submitted within five days or on or before by a date set by the Grievance Coordinator. *Id.* A complaint that is not re-submitted within five days or a date set by the Grievance Coordinator will be administratively withdrawn. *Id.* A complaint that the Grievance Coordinator determines is non-grievable will be returned to the inmate. *Id.* An inmate can appeal a Grievance Coordinator's decision that a complaint is non-grievable to the Grievance Program Manager. *Id.*

Level I grievances are handled by the local grievance coordinator. *Id.*, Exhibit 1 (McTarsney Decl.), ¶ 6. If the inmate would like a review of the Level I response, the inmate may appeal to Level II. *Id.* All appeals and initial grievances received at Level II are reviewed and responded to by the facility's superintendent. *Id.* Offenders may appeal all Level II responses except emergency grievances to Level III at Department Headquarters in Olympia, where they are reinvestigated. *Id.* Grievance Program Administrators are the respondents at Level III. *Id.*

STANDARD OF REVIEW

A motion to dismiss for failure to exhaust administrative remedies is properly brought as an unenumerated 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). Generally, this Court's review is limited to the face of the complaint, materials incorporated into

the complaint by reference, and matters of judicial notice. *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008). However, when considering whether to dismiss a complaint for lack of exhaustion of administrative remedies under the PLRA, a court may look outside the pleadings to decide disputed issues of fact. *Wyatt*, 315 F.3d at 1119. To survive a motion to dismiss for failure to exhaust, an inmate's claims must be both exhausted and timely. *McCollum v. California Dept. of Corrections and Rehabilitation*, 647 F.3d 870 (9th Cir. 2011). This Court determines whether an inmate's claim has been fully exhausted by referencing the prison's own grievance requirements. *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009).

DISCUSSION

A. Exhaustion

The Prison Litigation Reform Act of 1995 (PLRA) mandates that:

> *No action shall be brought with respect to prison conditions* under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), 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*.

42 U.S.C. § 1997e [emphasis added]. *See Woodford v. Ngo*, 548 U.S. 81, 85, 93–95, 126 S. Ct. 2378 (2006) (concluding that "proper exhaustion" is mandatory and requires adherence to administrative procedural rules); *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam) (requiring exhaustion of administrative remedies prior to filing suit).

"There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought to court." *Jones v. Bock*, 549 U.S. 199, 127 S. Ct. 910, 918-19 (2007). Inmates must exhaust their prison grievance remedies before filing suit if the prison grievance system is capable of providing any relief or taking any action in

response to the grievance. "Congress has mandated exhaustion clearly enough, regardless of the relief offered through administrative procedures." *Booth v. Churner*, 532 U.S. 731, 741 (2001). The "PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). The underlying premise is that requiring exhaustion "reduce[s] the quantity and improve[s] the quality of prisoner suits, [and] affords corrections officials an opportunity to address complaints internally. . . . In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation." *Id.* at 525.

Requiring proper exhaustion serves all of the goals of the rulings in *Nussle* and *Booth*, providing inmates an effective incentive to use the prison grievance system and thereby provides prisons with a fair opportunity to correct their own mistakes. *Woodford*, 548 U.S. at 93-94. This is particularly critical to state corrections systems because it is "difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Id.* at 94 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 491-492 [1973]). Courts have a limited role in reviewing the difficult and complex task of modern prison administration. *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 84-85 [1987]) (urging a policy of judicial restraint as prison administration requires expertise, planning and the commitment of resources, all of which are the responsibility of the legislative and executive branches).

It is undisputed that there is a well-established grievance procedure available to inmates who are incarcerated in DOC institutions. ECF No. 14-1, Exh. 1 (McTarsney Dec.) Under that system, an offender can file a grievance for a wide range of aspects of his incarceration, including the actions of staff. *Id.* The grievance procedure consists of four levels of review. *Id.* The records reflect that after Plaintiff's initial grievance (No. 1114798) was returned to him for rewriting because it included objectionable language, Plaintiff chose not to re-write his grievance. Instead, he submitted an entirely new grievance (No. 1115787) complaining that the grievance officer failed to process his initial grievance that included the objectionable language. *Id.*, pp. 10, 12. The first grievance was administratively withdrawn because Plaintiff chose not to submit a re-write within the deadline and his second grievance was found non-grievable. *Id.*, ¶ 11 and ¶ 12. It is undisputed that Plaintiff took no further action within the prison's grievance system on either of his grievances. Instead, he filed this lawsuit.

Plaintiff does not dispute these facts. Plaintiff admits that Defendant asked him to submit an amended offender complaint, that Defendant had the authority to ask him to do so, and that Plaintiff chose to not file an amended complaint. ECF No. 15, pp. 6-7. Plaintiff argues instead that "re-writes" are not appealable, Grievance Manager McTarsney has perjured herself in her declaration by stating otherwise, and that he had no avenue to appeal the dismissal of his grievance (No. 1114798). ECF No. 15, p. 5. However, it is undisputed that Plaintiff had access to and was very familiar with the grievance procedure at SCCC. He was able to file grievances and clearly did so in this matter. Here, Plaintiff simply failed to follow the prescribed procedure and failed to amend his grievance when he was asked to do so. Instead, he chose to re-direct his grievance toward the grievance officer who failed to process the grievance to Plaintiff's liking, thus abandoning his initial grievance.

Washington state prisoners are required to use the process set forth by the OGP to exhaust their claims prior to filing suit. *See Ngo*, 548 U.S. at 90-91 (proper exhaustion requires complying "with an agency's deadlines and other critical procedural issues because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings"). This means that a prisoner must file any grievances, complaints, and appeals he has concerning his prison conditions in the time, place, and manner required by the prison's administrative rules. *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002); *see also Marella v. Terhune*, 568 F.3d 1024, 1028 (9th Cir. 2009) (A prisoner must comply with a prison's procedural requirements). Plaintiff's first grievance was rejected because Defendant found that his grievance contained objectionable language. Plaintiff must follow the prison's administrative rules in order to exhaust his administrative remedies. He was clearly aware that his remedy was to re-submit his grievance. He was given an opportunity to do so, but he chose not to avail himself of that remedy.

Because the Court finds that Plaintiff has failed to exhaust his administrative remedies, the Court lacks discretion to resolve any claims relating to those grievances on the merits. *See, e.g., Perez v. Wisconsin Dep't of Corr.*, 182 F.3d 532, 535 (7th Cir.1999) (suit filed by prisoner before administrative remedies have been exhausted must be dismissed; district court lacks discretion to resolve claim on merits, even if prisoner exhausts intra-prison remedies before judgment). Therefore, the Court does not address the merits of Plaintiff's claims against Defendant and it is recommended that those claims be dismissed without prejudice.

B. 28 U.S.C. § 1915(g) Strike

Defendants also argue that argue that dismissal of Plaintiff's claims should count as a strike under § 1915(g).

The "strike" provision of the PLRA, 28 U.S.C. § 1915(g), provides courts with the means "to deter frivolous prisoner litigation." *Taylor v. Delatoore*, 281 F.3d 844, 849 (9th Cir. 2002). Congress outlined three situations in which an inmate may receive a "strike." *Smith v. Duke*, 296 F. Supp. 2d 965, 967 (E.D. Ark. 2003). Courts have read related situations into § 1915(g) when a claim is baseless, without merit, or an abuse of the judicial process. While these situations are not literally within § 1915(g), they are clearly associated with actions that are frivolous, malicious, or fail to state a claim upon which relief may be granted. *Id*. Moreover, a court can impose a strike even where a case is dismissed without prejudice, including where an inmate has failed to exhaust his administrative remedies. *See O'Neal v. Price*, 531 F.3d 1146, 1155-56 (9th Cir. 2008) (citing *Day v. Maynard*, 200 F.3d 665, 667 (10th Cir. 1999) ("[A] dismissal without prejudice counts as a strike, so long as the dismissal is made because the action is frivolous, malicious, or fails to state a claim.").

While incarcerated, Plaintiff has filed at least six other civil rights actions, including two others filed in 2011, one of which also names Mr. Thaut. *See Richey v. Riveland*, No. CV-92-5216-CRD, 1994 WL 249994 (9th Cir. June, 9, 1994) (denial of a transfer to another prison not unconstitutional); *Richey v. Blodgett*, No. CV-92-00158-CI, 1994 WL 697597 (9th Cir., December 12, 1994) (prison officials did not impermissibly violate due process and first amendment by confiscating two manuscripts marked "legal mail"); *Richey v. Aldana*, No. C05-5513FDB, 2007 WL 666619 (W.D. Wash., February 28, 2007) (dismissed finding that withholding publications from an inmate for behavioral modifications reasons is legitimate in light of the First Amendment); *Richey v. Lane*, No. C09-5195FDB, 2009 WL 1867607 (W.D. Wash., June 29, 2009) (action remanded to superior court after plaintiff strikes all federal claims); *Richey v. Dixon*, W.D. Wash. No. C11-5944 RBL/JRC (closed following stipulated

settlement); *Richey v. Thaut,* W.D. Wash. No., C11-6580 RJB/KLS (currently pending regarding denial of a constitutional right to shower). Plaintiff has also filed 27 pages of grievances while he has been in custody. ECF No. 14-1, Exhibit 1 (McTarsney Decl.), Attachment B (Grievance Summary). The foregoing indicates that Plaintiff is very familiar with the prison grievance system and the requirements for pleading a civil rights action. Despite this familiarity, he filed this lawsuit prior to appealing either of the two grievances at issue in this lawsuit.

When Plaintiff's actions are considered in their entirety, as Defendant urges this Court to do, they are frivolous. The undersigned recommends that imposing a § 1915(g) "strike" under these circumstances is merited and appropriate.

CONCLUSION

Accordingly, the undersigned finds that Plaintiff filed this lawsuit prematurely and recommends that this action should be **dismissed without prejudice** for failure to exhaust. The undersigned also recommends that dismissal of this action count as a strike under the PLRA pursuant to 28 U.S.C. § 1915(g).

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **March 9, 2012**, as noted in the caption.

DATED this 16th day of February, 2012.

Karen L. Strombom
United States Magistrate Judge

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

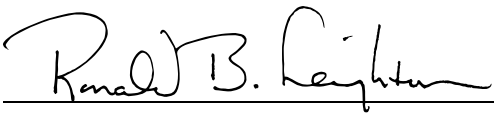
THOMAS WILLIAMS SINCLAIR RICHEY, Plaintiff, v. DOUGLAS THAUT, Defendant.	No. 11-cv-5680 RBL ORDER DENYING IFP STATUS ON APPEAL [Dkt. #27]

On February 26, 2012, this Court adopted the magistrate's report and recommendation dismissing the case. Plaintiff has filed an appeal and the question of continued *in forma pauperis* status is before the Court.

A district court may permit indigent litigants to proceed *in forma pauperis* upon completion of a proper affidavit of indigency. *See* 28 U.S.C. § 1915(a). The court has broad discretion in resolving the application, but "the privilege of proceeding *in forma pauperis* in civil actions for damages should be sparingly granted." *Weller v. Dickson*, 314 F.2d 598, 600 (9th Cir. 1963), *cert. denied* 375 U.S. 845 (1963). Moreover, a court should "deny leave to proceed *in forma pauperis* at the outset if it appears from the face of the proposed complaint that the action is frivolous or without merit." *Tripati v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1369 (9th Cir. 1987) (citations omitted); *see also* 28 U.S.C. § 1915(e)(2)(B)(i). An *in forma pauperis* complaint is frivolous if "it ha[s] no arguable substance in law or fact." *Id.* (citing *Rizzo v. Dawson*, 778 F.2d 527, 529 (9th Cir. 1985); *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984).

Plaintiff's appeal must be found frivolous. Magistrate Strombom properly recommended dismissal because Plaintiff failed to exhaust available remedies, as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e. Plaintiff's initial grievance (regarding denial of a shower after he made derogatory comments to a guard concerning her weight) was returned to him so that he could delete "objectionable language." Instead of removing the objectionable language, Plaintiff filed a grievance on a grievance. He then filed this lawsuit. The Complaint is without merit, the appeal is frivolous, and *in forma pauperis* status is **REVOKED**. (Dkt. #27.)

Dated this 16th day of April 2012.



RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE