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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>DAVID SHARPE MARSHALL,</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>WILLIAM KUBITZ; et al.,</p> <p>Defendants - Appellees.</p>

No. 07-17032

D.C. No. CV-06-00754-PJH

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Submitted June 16, 2009**

Before: PAEZ, TALLMAN, and N.R. SMITH, Circuit Judges.

David Sharpe Marshall, a former inmate at the Dublin Federal Detention Center, appeals pro se from the district court’s judgment dismissing his 42 U.S.C. § 1983 action, without prejudice, for failure to exhaust administrative remedies as

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

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

required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Wyatt v. Terhune*, 315 F.3d 1108, 1117 (9th Cir. 2003), and may affirm on any basis supported by the record, *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001). We affirm.

The district court properly dismissed the action because Marshall did not properly exhaust administrative remedies before filing his complaint in federal court. *See Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006) (explaining that “proper exhaustion” requires adherence to administrative procedural rules). Even if Marshall was prevented from exhausting at the first level, he failed to await a second-level response before proceeding to the third level.

Because we affirm the district court’s dismissal based on non-exhaustion, we do not consider whether Marshall should have been allowed to amend his complaint to add two defendants or whether the district court erred in denying his motion for reconsideration.

Marshall’s remaining contentions are unpersuasive.

Marshall’s pending motions are denied.

AFFIRMED.