

JAN 25 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>ROBERT ALAN BAILEY,</p> <p style="text-align: center;">Plaintiff - Appellant,</p> <p>v.</p> <p>NEVADA DEPARTMENT OF CORRECTIONS; et al.,</p> <p style="text-align: center;">Defendants - Appellees.</p>
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No. 08-15291

D.C. No. CV-07-01017-PMP/LRL

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Submitted January 11, 2010**

Before: BEEZER, TROTT, and BYBEE, Circuit Judges.

Nevada state prisoner Robert Alan Bailey appeals pro se from the district court's judgment in his 42 U.S.C. § 1983 action alleging that prison officials failed

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

to ensure that he was provided with an adequate gluten-free diet. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to exhaust administrative remedies, *O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1059 (9th Cir. 2007), and we affirm.

The district court properly dismissed Bailey's action because he failed to exhaust prison grievance procedures prior to commencing his action against defendants. *See id.* at 1059-60 (concluding that the Prison Litigation Reform Act requires administrative exhaustion of claims under 42 U.S.C. § 1983, the Americans with Disabilities Act, and the Rehabilitation Act).

We construe the dismissal as without prejudice. *See id.* at 1059 ("If the district court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice." (citation omitted)).

AFFIRMED.