

OCT 23 2013

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>CHESTER RAY WISEMAN,</p> <p style="text-align: center;">Plaintiff - Appellant,</p> <p style="text-align: center;">v.</p> <p>JOHN SEBOK, Correctional Sergeant; et al.,</p> <p style="text-align: center;">Defendants - Appellees.</p>
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No. 12-56245

D.C. No. 2:10-cv-04710-DSF-  
AJW

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Dale S. Fischer, District Judge, Presiding

Submitted October 15, 2013\*\*

Before: FISHER, GOULD, and BYBEE, Circuit Judges.

California state prisoner Chester Ray Wiseman appeals pro se from the district court’s judgment dismissing his 42 U.S.C. § 1983 action alleging that defendants transferred him in retaliation for his legal filings. We have jurisdiction

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\* 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).

under 28 U.S.C. § 1291. We review de novo a dismissal for failure to exhaust administrative remedies, and for clear error the district court's underlying factual determinations. *Wyatt v. Terhune*, 315 F.3d 1108, 1117 (9th Cir. 2003). We affirm.

The district court properly dismissed Wiseman's action without prejudice because Wiseman did not exhaust prison grievance procedures concerning his claim and failed to show that exhaustion was effectively unavailable. *See Woodford v. Ngo*, 548 U.S. 81, 93-95 (2006) (exhaustion is mandatory and must be done in a timely manner consistent with prison policies); *Wyatt*, 315 F.3d at 1120 (dismissal for failure to exhaust is without prejudice); *cf. Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010) (excusing prisoner's failure to exhaust where prisoner is prevented from doing so).

**AFFIRMED.**