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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. FOSTER,
Plaintiff,
v.
LT. T. AKIN, et al.,
Defendants.

CASE NO. 1:14-cv-01222-LJO-MJS (PC)

**FINDINGS AND RECOMMENDATION TO
DISMISS ACTION WITH PREJUDICE
FOR FAILURE TO OBEY A COURT
ORDER AND FAILURE TO PROSECUTE**

(ECF No. 13)

**FOURTEEN (14) DAY OBJECTION
DEADLINE**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 42 U.S.C. § 1983. On September 29, 2014, Plaintiff's complaint was dismissed for failure to state a claim, but he was given leave to file a first amended complaint within thirty days. (ECF No. 8.) Plaintiff sought and received a thirty day extension of time in which to file his amended pleading. (ECF Nos. 11 & 12.) The extended deadline passed without Plaintiff either filing an amended pleading or seeking an extension of time to do so.

On December 30, 2014, the Court ordered Plaintiff to show cause, within fourteen days, why the action should not be dismissed for failure to obey a court order and failure to prosecute. (ECF No. 13.) Plaintiff did not respond to the Court's order to show cause.

1 Local Rule 110 provides that “failure of counsel or of a party to comply with these
2 Rules or with any order of the Court may be grounds for imposition by the Court of any
3 and all sanctions . . . within the inherent power of the Court.” District courts have the
4 inherent power to control their dockets and “in the exercise of that power, they may
5 impose sanctions including, where appropriate . . . dismissal of a case.” Thompson v.
6 Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986). A court may dismiss an action, with
7 prejudice, based on a party’s failure to prosecute, failure to obey a court order, or failure
8 to comply with local rules. See, e.g., Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995)
9 (dismissal for noncompliance with local rule); Ferdik v. Bonzelet, 963 F.2d 1258, 1260-
10 61 (9th Cir. 1992) (dismissal for failure to comply with an order requiring amendment of a
11 complaint); Carey v. King, 856 F.2d 1439, 1440-41 (9th Cir. 1988) (dismissal for failure
12 to comply with local rule requiring pro se plaintiffs to keep court apprised of address);
13 Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to
14 comply with a court order); Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir. 1986)
15 (dismissal for lack of prosecution and failure to comply with local rules).

16 In determining whether to dismiss an action for lack of prosecution, failure to obey
17 a court order, or failure to comply with local rules, the Court must consider several
18 factors: (1) the public’s interest in expeditious resolution of litigation, (2) the Court’s need
19 to manage its docket, (3) the risk of prejudice to the defendants, (4) the public policy
20 favoring disposition of cases on their merits, and (5) the availability of less drastic
21 alternatives. Thompson, 782 F.2d at 831; Henderson, 779 F.2d at 1423-24; Malone, 833
22 F.2d at 130; Ferdik, 963 F.2d at 1260-61; Ghazali, 46 F.3d at 53.

23 In the instant case, the public’s interest in expeditiously resolving this litigation
24 and the Court’s interest in managing its docket weigh in favor of dismissal. The third
25 factor, risk of prejudice to Defendants, also weighs in favor of dismissal, since a
26 presumption of injury arises from the occurrence of unreasonable delay in prosecuting
27 this action. Anderson v. Air West, 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor –
28 public policy favoring disposition of cases on their merits – is greatly outweighed by the

1 factors in favor of dismissal discussed herein. Finally, as for the availability of lesser
2 sanctions, at this stage in the proceedings there is little available which would constitute
3 a satisfactory lesser sanction while preserving scarce Court resources. Plaintiff has not
4 paid the filing fees in this action and likely is unable to pay, making monetary sanctions
5 of little use.

6 Based on the foregoing, it is HEREBY RECOMMENDED that the action be
7 dismissed, with prejudice, for failure to obey a court order and failure to prosecute, and
8 that dismissal count as a strike pursuant to 28 U.S.C. § 1915(g). Silva v. Di Vittorio, 658
9 F.3d 1090, 1098 (9th Cir. 2011).

10 These Findings and Recommendations are submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
12 fourteen (14) days after being served with these Findings and Recommendations, any
13 party may file written objections with the Court and serve a copy on all parties. Such a
14 document should be captioned "Objections to Magistrate Judge's Findings and
15 Recommendations." Any reply to the objections shall be served and filed within fourteen
16 (14) days after service of the objections. The parties are advised that failure to file
17 objections within the specified time may result in the waiver of rights on appeal.
18 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
19 F.2d 1391, 1394 (9th Cir. 1991)).

20
21 IT IS SO ORDERED.

22 Dated: January 21, 2015

/s/ Michael J. Seng
23 UNITED STATES MAGISTRATE JUDGE
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