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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

SCOTT JOHNSTON,
Plaintiff,

No. CIV S-09-1353-FCD-CMK

vs.

FINDINGS AND RECOMMENDATIONS

CITY OF RED BLUFF, et al.,
Defendants.

_____ /

Plaintiff brings this civil action under the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §§ 621-634, against the City of Red Bluff and various of its employees. Pending before the court are plaintiff’s motions for summary judgment (Docs. 43 and 55). Oppositions and replies thereto having been filed, the matter was submitted on the briefs and record.

In their oppositions, defendants argue, among other things, that they have not had adequate time to conduct discovery in order to adequately and completely oppose the motions. The court agrees. Since the inception of this case in May 2009, the parties have litigated the sufficiency of plaintiff’s claims. A final order on defendants’ motion to dismiss was only issued in March 2011 (see order at Doc. 52). Thereafter, in April 2008 plaintiff filed a second amended

1 complaint as permitted by the March 2011 order. This case became at issue with the filing of
2 defendants' answer to the second amended complaint on April 29, 2011.¹ No scheduling order
3 has been issued.

4 Federal Rule of Civil Procedure 56(d)(1) provides that the court may deny a
5 motion for summary judgment where the opposing party shows by affidavit that, for specified
6 reasons, facts necessary to justify oppositions to plaintiff's motions cannot be presented. Here,
7 defendants' counsel has submitted a declaration making this showing. In particular, counsel
8 accurately recites the relevant procedural history and states that, because the litigation thus far
9 has centered on the sufficiency of plaintiff's claims, defendants have not conducted any
10 discovery. In essence, plaintiff's motions for summary judgment are premature and should be
11 denied without prejudice to renewing the arguments after the conclusion of discovery.

12 Based on the foregoing, the undersigned recommends that plaintiff's motions for
13 summary judgment (Docs. 43 and 55) be denied as premature.

14 These findings and recommendations are submitted to the United States District
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
16 after being served with these findings and recommendations, any party may file written
17 objections with the court. Responses to objections shall be filed within 14 days after service of
18 objections. Failure to file objections within the specified time may waive the right to appeal.

19 See *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

20
21 DATED: June 22,, 2011

22 
23 **CRAIG M. KELLISON**
24 UNITED STATES MAGISTRATE JUDGE

25 _____
26 ¹ Defendants' motion to amend the answer is set for hearing before the undersigned
on July 7, 2011.