

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. CV 12-00653-VBF-DTB Dated: August 1, 2013

Title: *Steven Ferguson, Plaintiff v. Officer Pagati, Defendant*

PRESENT: HONORABLE VALERIE BAKER FAIRBANK, U.S. DISTRICT JUDGE

Linda Kanter
Courtroom Deputy

N/A
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF

ATTORNEYS PRESENT FOR DEFENDANT

N/A

N/A

PROCEEDINGS (IN CHAMBERS):

ORDER ADOPTING THE REPORT AND RECOMMENDATION, DISMISSING THE COMPLAINT WITHOUT PREJUDICE FOR FAILURE TO STATE A CLAIM, and GRANTING LEAVE TO AMEND BY A DATE CERTAIN

The Court will adopt Magistrate Judge Bristow's well-reasoned Report and Recommendation (to which no objections have been filed) and will dismiss the first amended complaint without prejudice for failure to state a claim on which relief can be granted. As recommended by the Magistrate Judge, however, the Court will grant plaintiff leave to file a second amended complaint to cure the deficiencies by a date certain.

Because this will be plaintiff's second opportunity to amend his complaint to rectify pleading deficiencies, however, the Court advises plaintiff that it generally will not be well disposed toward another dismissal which is without prejudice and with leave to amend if plaintiff files a second amended complaint which still does not state an Eighth Amendment claim on which relief could be granted. "[A] district court's discretion over amendments is especially broad 'where the court has already given a plaintiff one or more opportunities

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to amend his complaint.” *Ismail v. County of Orange*, 917 F. Supp.2d 1060, ___ (C.D. Cal. 2012) (Valerie Baker Fairbank, J.) (quoting *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 n.3 (9th Cir. 1987) (quoting *Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980))); *see also Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). *See, e.g., Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994) (“Kaplan has already amended the complaint twice”) (citing *DCD Programs*); *Zavala v. Bartnik*, 348 F. App’x 211, 213 (9th Cir. 2009) (Kleinfeld, M. Smith, Ikuta) (“Dismissal with prejudice was proper because Zavala was given two prior opportunities to amend his complaint in order to correct the deficiencies identified by the district court but failed to do so.”); *Smith v. Solis*, 331 F. App’x 482, 482-83 (9th Cir. 2009) (Harry Pregerson, Canby, Berzon) (“The district court properly dismissed the action with prejudice because Smith’s second amended complaint did not state a claim for deliberate indifference and Smith failed to correct the defects.”); *Arlow v. Calif. Dep’t of Corrs.*, 168 F. App’x 249, 250 (9th Cir. 2006) (“Because the district court had already allowed Arlow an opportunity to cure the deficiencies in his original complaint and had provided specific instructions on appropriate pleading [of an Eighth Amendment claim], we cannot say that the district court abused its discretion by dismissing [*pro se* former prisoner] Arlow’s amended complaint without granting leave to amend.”).

ORDER

The first amended complaint is **DISMISSED without prejudice** for failure to state a claim on which relief can be granted. If plaintiff wishes to continue pursuing this action, he **MAY FILE** a second amended complaint no later than Monday, September 9, 2013.

If plaintiff fails timely to file a second amended complaint, the dismissal will be converted to a with-prejudice dismissal due to lack of prosecution and failure to comply with court order.

Likewise, if plaintiff does file a second amended complaint but the second amended complaint still does not state a claim on which relief can be granted, the dismissal will be converted to a with-prejudice dismissal.

This is not a final and immediately appealable order.

IT IS SO ORDERED.

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