

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

QUETZAL CONTRERAZ,

1:04-cv-06039-LJO-GSA-PC

Plaintiff,

ORDER VACATING FINDINGS AND
RECOMMENDATIONS
(Doc. 67.)

vs.

D. ADAMS, et al.,

ORDER GRANTING PLAINTIFF'S MOTION
FOR LEAVE TO FILE OPPOSITION
NUNC PRO TUNC
(Doc. 72.)

Defendants.

ORDER DENYING DEFENDANTS'
MOTION TO STRIKE PLAINTIFF'S
OPPOSITION
(Doc. 71.)

DEFENDANTS' REPLY TO OPPOSITION,
IF ANY, DUE IN THIRTY DAYS

_____ /

I. BACKGROUND

Quetzal Contreras ("plaintiff") is a prisoner proceeding pro se with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on July 30, 2004. (Doc. 1.) This action now proceeds on the Second Amended Complaint filed on January 22, 2009, against defendants Derral Adams, Michael Raymond, and Darrow Hetebrink, on Plaintiff's claims for violation his right to Free Exercise under the First Amendment, and his right to Equal Protection under the Fourteenth Amendment, for denying Plaintiff a religious diet, the right to wear

1 facial hair, and accommodations to perform a full moon ritual, consistent with religious tenets of the
2 Olin Pyramid Religion.¹ (Doc. 32.)

3 On July 7, 2011, Findings and Recommendations issued, recommending that this action be
4 dismissed for Plaintiff's failure to obey the Court's order of April 27, 2011 which required him to
5 respond to Defendants' motion to dismiss.² (Doc. 67.) On July 25, 2011, Plaintiff filed an untimely
6 opposition to the motion to dismiss. (Doc. 70.) On July 28, 2011, Defendants filed a motion to
7 strike Plaintiff's opposition. (Doc. 71.) On August 1, 2011, Plaintiff filed a motion for leave to file
8 an opposition to the motion to dismiss. (Doc. 72.)

9 **II. DISCUSSION**

10 In the Findings and Recommendations, the undersigned found that Plaintiff failed to comply
11 with the Court's order of April 27, 2011, which granted Plaintiff a sixth extension of time to respond
12 to Defendants' motion to dismiss. Based on Plaintiff's failure to comply, the Court recommended
13 that this action be dismissed.

14 Plaintiff has not filed objections to the Findings and Recommendations. Instead, Plaintiff has
15 attempted to comply with the Court's order of April 27, 2011 by filing an untimely opposition to
16 Defendants' motion to dismiss, and a motion for leave to file the untimely opposition. Plaintiff
17 argues that the Court should allow his untimely opposition because he was unable to meet the
18 Court's prior deadline due to his lack of access to legal materials while he was detained in
19 segregation at the California Substance Abuse Treatment Facility. Plaintiff asserts in a verified
20 declaration that he was transferred to High Desert State Prison on June 8, 2011 and his legal
21 materials were returned to him on July 7, 2011, enabling him to file the opposition on July 25, 2011.
22 (Declaration of Contreras, Doc. 72 at 4.)

23 As the Court described in the Findings and Recommendations, Plaintiff has a history in this

25 ¹Defendant Michael J. Raymond waived service on March 19, 2011, but has not yet appeared in this action. (Doc.
26 62.)

27 ²On May 17, 2010, defendant Adams filed a motion to dismiss for failure to exhaust. (Doc. 44.) On November 2,
28 2010, defendant Hetebrink joined the motion to dismiss. (Doc. 54.)

1 case of failing to meet court deadlines and then afterward requesting an extension of time. This
2 conduct is in violation of Rule 6 of the Federal Rules of Civil Procedure, which requires Plaintiff to
3 file a request for extension of time “before the original time or its extension expires,” unless Plaintiff
4 shows excusable neglect. Fed. R. Civ. P. 6(b). "Requests for Court-approved extensions brought on
5 the required filing date for the pleading or other document are looked upon with disfavor.” L.R.
6 144(d). Plaintiff is advised that the Court has the authority to dismiss Plaintiff’s entire action for
7 failure to comply with court rules or a court order. L.R. 110; see Pagtalunan v. Galaza, 291 F.3d
8 639, 642 (9th Cir. 2002).

9 Plaintiff has submitted evidence that he was unable to prepare and file a timely opposition
10 due to difficulties in gaining access to his legal materials, and that upon return of his legal materials,
11 he promptly filed the opposition. Therefore, the Court shall grant Plaintiff's motion for leave to file
12 the opposition. In light of this decision, the Court's Findings and Recommendations shall be vacated,
13 and Defendants' motion to strike Plaintiff's opposition shall be denied.

14 Plaintiff is cautioned that if he requires any further extensions of time in this action, he
15 should file a motion for extension of time prior to the expiration of the current deadline.

16 **III. CONCLUSION**

17 Accordingly, IT IS HEREBY ORDERED that:

- 18 1. The Findings and Recommendations of July 7, 2011 are VACATED;
- 19 2. Plaintiff's motion for leave to file an untimely opposition is GRANTED nunc pro tunc
20 to July 25, 2011;
- 21 3. Defendants' motion to strike Plaintiff's opposition is DENIED; and
- 22 4. Defendants are granted thirty days in which to file a reply to Plaintiff's opposition to
23 the motion to dismiss.

24
25 IT IS SO ORDERED.

26 **Dated: September 1, 2011**

26 /s/ Gary S. Austin
27 UNITED STATES MAGISTRATE JUDGE