

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

RAFAEL S. ORDAZ,

Plaintiff,

v.

HAROLD TATE, et al.,

Defendants.

Case No. 1:07-CV-00634-BLW-MHW

**ORDER ADOPTING REPORT
AND RECOMMENDATION**

Because it was unclear whether Plaintiff was still pursuing this case and his mail was being returned to the Court as undeliverable, the Court ordered Plaintiff to file a change of address and a response to the Summary Judgment Motions in order to avoid dismissal of this action for failure to prosecute. Plaintiff has since filed a Notice of Change of Address and an Objection. (Dkt. 89 & 90.)

The Court has before it a Report and Recommendation filed by the United States Magistrate Judge. (Dkt. 62.) The Magistrate Judge recommends that Defendants' Motion to Dismiss (Dkt. 49) be denied. (*Id.*) Plaintiff and Defendants have filed timely Objections to the Report and Recommendation (Dkt. 63, 64 & 65), and the Court now reviews the Objections in accordance with 28 U.S.C. § 636(b)(1)(C).

Defendants argue that the Magistrate Judge is in error in determining that Plaintiff

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has, for the most part, complied with Defendants' discovery requests. They place great emphasis on the fact that Plaintiff failed to respond while he was not incarcerated, and that he had still not responded at the time of their objection. On the other hand, Plaintiff argues that his entire central file is in the possession of Defendants' counsel.

While Defendants' frustration is understandable, the Court agrees with the Magistrate Judge that dismissal of Plaintiff's case as a sanction is not warranted, given that Plaintiff is a pro se litigant and Defendants appear to have obtained Plaintiff's medical records and other items sufficient to support the filing of a motion for summary judgment.

Any prejudice that might occur to Defendants as a result of Plaintiff's failure to produce additional evidence can be alleviated by following the Magistrate Judge's suggestion that undisclosed evidence not be admitted at trial. Plaintiff earlier asserted that he had some medical documents in his possession that were not in his central file. Plaintiff is warned that, should this case proceed to trial, he will not be permitted to rely on those medical documents or any other evidence not provided to Defendants' counsel prior to the discovery deadline in this case.

Plaintiff objects to the Magistrate Judge's denial of the request for appointment of counsel. This Court agrees that counsel is not warranted presently. Here, Plaintiff has adequately represented himself to date. If, after reviewing the merits of Plaintiff's claims in conjunction with the Motion for Summary Judgment, the Magistrate Judge determines

that appointment of counsel would be appropriate, counsel will be appointed at that time.

Plaintiff is encouraged to seek his own counsel on a contingency or contract basis.

Plaintiff has also filed a Motion for Temporary Injunction Prohibiting Harassment. (Dkt. 66.) Plaintiff complains that defense counsel is harassing him with letters and requests in this matter. Based on the parties' filings, the Court concludes that the Motion is without an adequate factual basis and is subject to denial. Plaintiff and counsel are reminded to be professional and courteous to one another at all times, whether in person or in writing.

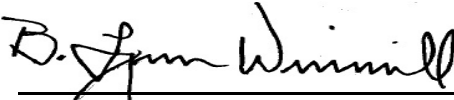
ORDER

IT IS ORDERED:

1. The Report and Recommendation (Docket No. 62) is ADOPTED in full.
2. Defendants' Motion to Dismiss (Docket No. 49) is DENIED.
3. Plaintiff's Motion for Temporary Injunction Prohibiting Harassment (Dkt. 66) is DENIED.
4. Nothing further shall be filed in this case until the Magistrate Judge enters a report and recommendation regarding the pending motions for summary judgment.



DATED: **August 10, 2010**


Honorable B. Lynn Winmill
Chief U. S. District Judge