

1  
2  
3  
4  
5  
6  
7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
9

10 RICHARD S. KINDRED,

11 Plaintiff,

12 vs.

13 CALIFORNIA DEPARTMENT OF  
14 MENTAL HEALTH, et al.,

15 Defendants.  
16  
17

1:08-cv-01321-AWI-GSA-PC

FINDINGS AND RECOMMENDATIONS  
TO DISMISS CASE, WITH PREJUDICE,  
FOR PLAINTIFF'S FAILURE TO  
COMPLY WITH COURT ORDER AND  
FAILURE TO PROSECUTE  
(Doc. 87.)

OBJECTIONS, IF ANY, DUE IN THIRTY  
DAYS

18 On December 19, 2013, the court issued an order requiring Plaintiff to file an opposition  
19 or a statement of non-opposition to Defendants' motion for summary judgment of October 10,  
20 2013, within thirty days. (Doc. 87.) The thirty day time period has expired, and plaintiff has  
21 not filed any response to the motion for summary judgment or otherwise responded to the  
22 court's order.

23 In determining whether to dismiss this action for failure to comply with the directives  
24 set forth in its order, "the Court must weigh the following factors: (1) the public's interest in  
25 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of  
26 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the  
27 public policy favoring disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d  
28 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

1           “The public’s interest in expeditious resolution of litigation always favors dismissal,”  
2 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the  
3 action has been pending since September 2008. Plaintiff’s failure to respond to the Court’s  
4 order may reflect Plaintiff’s disinterest in prosecuting this case. In such an instance, the Court  
5 cannot continue to expend its scarce resources assisting a litigant who will not help himself by  
6 defending his lawsuit against summary judgment. Thus, both the first and second factors weigh  
7 in favor of dismissal.

8           Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in  
9 and of itself to warrant dismissal.” Id. (citing Yourish at 991). However, “delay inherently  
10 increases the risk that witnesses’ memories will fade and evidence will become stale,” id., and it  
11 is Plaintiff’s failure to respond to the Court’s order that is causing delay. Therefore, the third  
12 factor weighs in favor of dismissal.

13           As for the availability of lesser sanctions, at this stage in the proceedings there is little  
14 available to the Court which would constitute a satisfactory lesser sanction while protecting the  
15 Court from further unnecessary expenditure of its scarce resources. Plaintiff is proceeding in  
16 forma pauperis in this action, making monetary sanctions of little use, and given the stage of  
17 these proceedings, the preclusion of evidence or witnesses is not available. The dismissal being  
18 considered in this case is with prejudice, which is the harshest possible sanction. However, the  
19 court finds this sanction appropriate in light of the fact that more than three months have passed  
20 since defendants filed their motion for summary judgment, and plaintiff has yet to respond.  
21 Moreover, plaintiff was forewarned in the court’s order of December 19, 2013 that this action  
22 would be dismissed with prejudice if he failed to prosecute this action.

23           Finally, because public policy favors disposition on the merits, this factor will always  
24 weigh against dismissal. Id. at 643.

25           Accordingly, the court **HEREBY RECOMMENDS** that this action be dismissed with  
26 prejudice, based on plaintiff’s failure to obey the Court’s order of December 19, 2013 and  
27 failure to prosecute this action.

28 ///

