

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JERRY McDOWELL,

Plaintiff.

v

R. RIVERA, et al.

## Defendants.

CASE NO. 1:13-cv-01797-LJO-MJS (PC)

**FINDINGS AND RECOMMENDATION TO  
DISMISS ACTION FOR FAILURE TO  
OBEY COURT ORDER AND FAILURE TO  
PROSECUTE**

(ECF No. 31)

**FOURTEEN (14) DAY OBJECTION  
DEADLINE**

Plaintiff Jerry McDowell, a state prisoner proceeding *pro se* and *in forma pauperis*, filed this civil rights action pursuant to 42 U.S.C. § 1983 on November 6, 2013. (ECF No. 1.) This action proceeds on an Eighth Amendment claim against Defendants Sandoval, Garza, Fernandez, Guzman, Sanchez, and Acolla<sup>1</sup> (the “Defendants”) and on a First Amendment claim against Defendants Acala and Fernandez. (ECF Nos. 15 & 19.)

Defendants filed a motion for summary judgment on October 10, 2014, alleging that Plaintiff failed to exhaust his administrative remedies prior to bringing suit. (ECF No.

<sup>1</sup> In Plaintiff's complaint, he incorrectly spelled Defendant Acola's name. The correct spelling is Alcala. The Court will use the correct spelling.

1 25.) Plaintiff was granted three extensions of time to file an opposition to Defendants'  
2 motion for summary judgment. On February 12, 2015, Plaintiff was granted the final 30-  
3 day extension. (ECF No. 31.) Plaintiff was warned that no further extensions would be  
4 granted. Plaintiff did not file an opposition or statement of non-opposition as required  
5 under Local Rule 230(l) and the 30-day extension deadline has passed.

6 Local Rule 110 provides that “[f]ailure of counsel or of a party to comply with  
7 these Rules or with any order of the Court may be grounds for imposition by the Court of  
8 any and all sanctions . . . within the inherent power of the Court.” “District courts have  
9 inherent power to control their dockets . . . [and] [i]n the exercise of that power, they may  
10 impose sanctions. . . .” *Thompson v. Housing Auth.*, 782 F.2d 829, 831 (9th Cir. 1986). A  
11 court may dismiss an action based on a party’s failure to prosecute, failure to obey a  
12 court order, or failure to comply with local rules. See, e.g., *Ghazali v. Moran*, 46 F.3d 52,  
13 53-54 (9th Cir. 1995) (dismissal for noncompliance with local rule); *Ferdik v. Bonzelet*,  
14 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an order  
15 requiring amendment of a complaint); *Carey v. King*, 856 F.2d 1439, 1440-41 (9th Cir.  
16 1988) (dismissal for failure to comply with local rule requiring *pro se* plaintiffs to keep  
17 court apprised of address); *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir.  
18 1987) (dismissal for failure to comply with a court order); *Henderson v. Duncan*, 779  
19 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for lack of prosecution and failure to comply  
20 with local rules).

21 In determining whether to dismiss an action for lack of prosecution, failure to obey  
22 a court order, or failure to comply with local rules, the Court must consider several  
23 factors: (1) the public’s interest in expeditious resolution of litigation, (2) the Court’s need  
24 to manage its docket, (3) the risk of prejudice to the defendants, (4) the public policy  
25 favoring disposition of cases on their merits, and (5) the availability of less drastic  
26 alternatives. *Thompson*, 782 F.2d at 831; *Henderson*, 779 F.2d at 1423-24; *Malone*, 833  
27 F.2d at 130; *Ferdik*, 963 F.2d at 1260-61; *Ghazali*, 46 F.3d at 53.

28 In the instant case, the public’s interest in expeditiously resolving this litigation

1 and the Court's interest in managing its docket weigh in favor of dismissal. The third  
2 factor, risk of prejudice to Defendants, also weighs in favor of dismissal, since a  
3 presumption of injury arises from the occurrence of unreasonable delay in prosecuting  
4 this action. See *Anderson v. Air West*, 542 F.2d 522, 524 (9th Cir. 1976). The fourth  
5 factor – public policy favoring disposition of cases on their merits – is greatly outweighed  
6 by the factors in favor of dismissal discussed herein. Finally, as for the availability of  
7 lesser sanctions, at this stage in the proceedings there is little available which would  
8 constitute a satisfactory lesser sanction while preserving scarce Court resources.  
9 Plaintiff has not paid the filing fee for this action and is likely unable to pay, making  
10 monetary sanctions of little use.

11 Based on the foregoing, it is HEREBY RECOMMENDED that the action be  
12 dismissed, without prejudice, for failure to obey a court order and failure to prosecute.

13 These Findings and Recommendation are submitted to the United States District  
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
15 **fourteen** (14) days after being served with these Findings and Recommendation, any  
16 party may file written objections with the Court and serve a copy on all parties. Such a  
17 document should be captioned "Objections to Magistrate Judge's Findings and  
18 Recommendations." Any reply to the objections shall be served and filed within  
19 **fourteen** (14) days after service of the objections. The parties are advised that failure to  
20 file objections within the specified time may result in the waiver of rights on appeal.  
21 *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (*citing Baxter v. Sullivan*, 923  
22 F.2d 1391, 1394 (9th Cir. 1991)).

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24 IT IS SO ORDERED.

25 Dated: March 31, 2015

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UNITED STATES MAGISTRATE JUDGE

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