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**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF CALIFORNIA**

ANTHONY NUNO,	)	Case No.: 1:17-cv-0978 -AWI-JLT
Plaintiff,	)	
v.	)	FINDINGS AND RECOMMENDATIONS
	)	DISMISSING THE ACTION WITHOUT
CALIFORNIA STATE UNIVERSITY	)	PREJUDICE FOR PLAINTIFF'S FAILURE TO
BAKERSFIELD, et al.	)	COMPLY WITH THE COURT'S ORDER AND
	)	FAILURE TO PROSECUTE
Defendants.	)	

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Anthony Nuno asserts that he has been subjected to harassment and retaliation based upon his race and national origin, and sought to state claims for violations of his Title VII rights. Because Plaintiff has failed to comply with the Court’s order to file an amended complaint and failed to prosecute the action, it is recommended the action be **DISMISSED** without prejudice.

**I. Relevant Background**

Plaintiff initiated this action by filing a complaint on July 24, 2017. (Doc. 1) The Court reviewed the complaint, and found Plaintiff failed “to set forth sufficient factual allegations to support the claims alleged.” (Doc. 3) Therefore, the Court dismissed the complaint with leave to amend, and granted Plaintiff thirty days from the date of service to file an amended complaint. (*Id.* at 6) On October 19, 2017, Plaintiff filed a motion for an extension of time to file an amended complaint. (Doc. 4) The Court granted the request and ordered Plaintiff to file an amended complaint no later than November 20, 2017. (Doc. 5)

1 Plaintiff failed to file an amended complaint, after which the Court issued an order to Plaintiff  
2 to show cause why the action should not be dismissed for failure to comply with the Court’s order and  
3 failure to prosecute the action, or in the alternative to file an amended complaint. (Doc. 6) To date,  
4 Plaintiff has not responded to the Court’s order, or taken any additional action to prosecute the matter.

5 **II. Failure to Prosecute and Obey the Court’s Orders**

6 The Local Rules, corresponding with Fed. R. Civ. P. 11, provide: “Failure of counsel or of a  
7 party to comply with . . . any order of the Court may be grounds for the imposition by the Court of any  
8 and all sanctions . . . within the inherent power of the Court.” LR 110. “District courts have inherent  
9 power to control their dockets,” and in exercising that power, a court may impose sanctions including  
10 dismissal of an action. *Thompson v. Housing Authority of Los Angeles*, 782 F.2d 829, 831 (9th Cir.  
11 1986). A court may dismiss an action for a party’s failure to prosecute an action or failure to obey a  
12 court order. *See, e.g. Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure  
13 to comply with an order to file an amended complaint); *Malone v. U.S. Postal Service*, 833 F.2d 128,  
14 130 (9th Cir. 1987) (dismissal for failure to comply with a court order); *Henderson v. Duncan*, 779  
15 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for failure to prosecute and to comply with local rules).

16 **III. Discussion and Analysis**

17 To determine whether to dismiss an action for failure to prosecute and failure to obey a Court  
18 order, the Court must consider several factors, including: “(1) the public’s interest in expeditious  
19 resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the  
20 defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability  
21 of less drastic sanctions.” *Henderson*, 779 F.2d at 1423-24; *see also Ferdik*, 963 F.2d at 1260-61;  
22 *Thomson*, 782 F.2d at 831.

23 **A. Public interest and the Court’s docket**

24 In the case at hand, the public’s interest in expeditiously resolving this litigation and the  
25 Court’s interest in managing the docket weigh in favor of dismissal. *See Yourish v. Cal. Amplifier*,  
26 191 F.3d 983, 990 (9th Cir. 1999) (“The public’s interest in expeditious resolution of litigation always  
27 favors dismissal”); *Ferdik*, 963 F.2d at 1261 (recognizing that district courts have inherent interest in  
28 managing their dockets without being subject to noncompliant litigants). This Court cannot, and will

1 not hold, this case in abeyance based upon Plaintiff’s failure to comply with the Court’s orders and  
2 failure to take action to continue prosecution in a timely manner. *See Morris v. Morgan Stanley &*  
3 *Co.*, 942 F.2d 648, 652 (9th Cir. 1991) (explaining a plaintiff has the burden “to move toward...  
4 disposition at a reasonable pace, and to refrain from dilatory and evasive tactics”). Accordingly, these  
5 factors weigh in favor of dismissal of the action.

6 **B. Prejudice to Defendant**

7 To determine whether the defendant suffers prejudice, the Court must “examine whether the  
8 plaintiff’s actions impair the ... ability to go to trial or threaten to interfere with the rightful decision of  
9 the case.” *Malone*, 833 F.2d at 131 (citing *Rubin v. Belo Broadcasting Corp.*, 769 F.2d 611, 618 (9th  
10 Cir. 1985)). Significantly, a presumption of prejudiced arises when a plaintiff unreasonably delays the  
11 prosecution of an action. *See Anderson v. Air West*, 542 F.2d 522, 524 (9th Cir. 1976). Here, Plaintiff  
12 has not taken any action to further prosecuting the action, despite being ordered by the Court to do so.  
13 Therefore, this factor weighs in favor of dismissal.

14 **C. Consideration of less drastic sanctions**

15 The Court “abuses its discretion if it imposes a sanction of dismissal without first considering  
16 the impact of the sanction and the adequacy of less drastic sanctions.” *United States v. Nat’l Medical*  
17 *Enterprises, Inc.*, 792 F.2d 906, 912 (9th Cir. 1986). However, the Ninth Circuit has determined that a  
18 court’s warning to a party that his failure to obey could result in dismissal satisfies the “consideration  
19 of alternatives” requirement. *See Malone*, 833 F.2d at 133; *Ferdik*, 963 F.2d at 1262. As the Ninth  
20 Circuit explained, “a plaintiff can hardly be surprised” by a sanction of dismissal “in response to  
21 willful violation of a pretrial order.” *Malone*, 833 F.2d at 133.

22 Here, the Court warned Plaintiff in the order dismissing the complaint with leave to amend that  
23 failure to comply with the Court’s order “**will result in a recommendation that this action be**  
24 **dismissed pursuant to Local Rule 110.**” (Doc. 3 at 6, emphasis in original) In the order to show  
25 cause, Plaintiff was again warned that the Court may dismiss the action for “failure to prosecute an  
26 action or failure to obey a court order, or failure to comply with local rules.” (Doc. 6 at 2) Importantly,  
27 the Court need only warn a party once that the matter could be dismissed for failure to comply to  
28 satisfy the requirements of Rule 41. *Ferdik*, 963 F.2d at 1262; *see also Titus v. Mercedes Benz of North*

1 *America*, 695 F.2d 746, 749 n.6 (3rd Cir. 1982) (identifying a “warning” as an alternative sanction).  
2 Accordingly, the warnings to Plaintiff satisfied the requirement that the Court consider lesser sanctions,  
3 and this factor weighs in favor of dismissal of the action. *See Ferdik*, 963 F.2d at 1262; *Henderson*,  
4 779 F.2d at 1424; *Titus*, 695 F.2d at 749 n.6.

5 **D. Public policy**

6 Given Plaintiff’s failure to prosecute the action and failure to comply with the Court’s orders,  
7 the policy favoring disposition of cases on their merits is outweighed by the factors in favor of  
8 dismissal. *See Malone*, 833 F.2d at 133, n.2 (explaining that although “the public policy favoring  
9 disposition of cases on their merits . . . weighs against dismissal, it is not sufficient to outweigh the  
10 other four factors”).

11 **IV. Findings and Recommendations**

12 Plaintiff has failed to comply with the Court’s orders dated October 24, 2017 (Doc. 5) and  
13 November 27, 2017 (Doc. 6). In doing so, Plaintiff has also failed to prosecute this action.

14 Based upon the foregoing, the Court **RECOMMENDS**:

- 15 1. This action be **DISMISSED** without prejudice; and
- 16 2. The Clerk of Court be **DIRECTED** to close the action.

17 These Findings and Recommendations are submitted to the United States District Judge  
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local  
19 Rules of Practice for the United States District Court, Eastern District of California. Within fourteen  
20 days after being served with these Findings and Recommendations, any party may file written  
21 objections. Such a document should be captioned “Objections to Magistrate Judge’s Findings and  
22 Recommendations.” Plaintiff is advised that failure to file objections within the specified time may  
23 waive the right to appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991);  
24 *Wilkerson v. Wheeler*, 772 F.3d 834, 834 (9th Cir. 2014).

25  
26 IT IS SO ORDERED.

27 Dated: December 16, 2017

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE