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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARQUISE WALKER,

Plaintiff,

v.

HOWARD, et al.,

Defendants.

Case No. 1:20-cv-01575-DAD-EPG (PC)

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE BE
DISMISSED, WITHOUT PREJUDICE,
BECAUSE OF PLAINTIFF’S FAILURE
TO COMPLY WITH COURT ORDERS
AND TO PROSECUTE THIS CASE

(ECF Nos. 13 & 22)

OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN DAYS

Marquise Walker (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action filed pursuant to 42 U.S.C. § 1983.

Given Plaintiff’s failures to comply with court orders and to prosecute this case, the Court will recommend that this case be dismissed, without prejudice, for failure to comply with court orders and failure to prosecute this case.

Plaintiff filed the complaint commencing this action on November 3, 2020. (ECF No. 1). On November 20, 2020, the Court issued a screening order. (ECF No. 9). The Court found that Plaintiff failed to state any cognizable claims and gave Plaintiff thirty days to either “a. File a First Amended Complaint; or b. Notify the Court in writing that he wants to stand on his complaint.” (*Id.* at 6-7). Plaintiff failed to respond to the screening order, so on January 11, 2021, the Court issued findings and recommendations, recommending that “[t]his action be dismissed, with prejudice, for failure to state a claim, failure to prosecute, and failure to comply

1 with a court order.”

2 Plaintiff failed to respond to the findings and recommendations, and on February 23,
3 2021, this case was “dismissed, with prejudice, for failure to prosecute and failure to comply
4 with a court order.” (ECF No. 13, p. 2).

5 On April 9, 2021, Plaintiff filed a motion for reconsideration. (ECF No. 19). On April
6 16, 2021, Plaintiff lodged a First Amended Complaint. (ECF No. 20). “Based on plaintiff’s
7 representation that he did not receive the court’s order and out of an abundance of caution and
8 in the interest of justice,” the Court reopened the case and granted Plaintiff an opportunity to
9 respond to the screening order. (ECF No. 21, p. 3).

10 As the case was reopened, the Court screened Plaintiff’s First Amended Complaint,
11 found that Plaintiff’s First Amendment free exercise claim against defendant Howard should
12 proceed past screening, and gave Plaintiff thirty days to either: “a. File a Second Amended
13 Complaint; b. Notify the Court in writing that he does not want to file an amended complaint
14 and instead wants to proceed only on his First Amendment free exercise claim against
15 defendant Howard; or c. Notify the Court in writing that he wants to stand on his complaint.”
16 (ECF No. 22, pgs. 8-9). The Court warned Plaintiff that “[f]ailure to comply with this order
17 may result in the dismissal of this action.” (*Id.* at 10).

18 The thirty-day deadline has passed, and Plaintiff failed to respond to the Court’s
19 screening order.

20 Accordingly, the Court will recommend that this case be dismissed, without prejudice,
21 for failure to comply with court orders and to prosecute this case.

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

28 ““The public’s interest in expeditious resolution of litigation always favors dismissal.””

1 Id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)). Accordingly,
2 this factor weighs in favor of dismissal.

3 As to the Court’s need to manage its docket, “[t]he trial judge is in the best position to
4 determine whether the delay in a particular case interferes with docket management and the
5 public interest.... It is incumbent upon the Court to manage its docket without being subject to
6 routine noncompliance of litigants....” Id. Plaintiff failed to respond to both of the Court’s
7 screening orders. These failures have, and continue to, delay this case and interfere with docket
8 management. Therefore, the second factor weighs in favor of dismissal.

9 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in
10 and of itself to warrant dismissal.” Id. (citing Yourish, 191 F.3d at 991). However, “delay
11 inherently increases the risk that witnesses’ memories will fade and evidence will become
12 stale,” id. at 643, and it is Plaintiff’s failure to comply with court orders and to prosecute this
13 case that is causing delay. Therefore, the third factor weighs in favor of dismissal.

14 As for the availability of lesser sanctions, given that Plaintiff has chosen not to
15 prosecute this action and has failed to comply with the Court’s orders, despite having his case
16 dismissed once already and being warned that it may be dismissed again, there is little available
17 to the Court which would constitute a satisfactory lesser sanction while protecting the Court
18 from further unnecessary expenditure of its scarce resources. Considering Plaintiff’s
19 incarceration and *in forma pauperis* status, it appears that monetary sanctions are of little use.
20 And given the stage of these proceedings, the preclusion of evidence or witnesses is not
21 available.

22 Finally, because public policy favors disposition on the merits, this factor weighs
23 against dismissal. Id.

24 After weighing the factors, the Court finds that dismissal without prejudice is
25 appropriate. Accordingly, the Court HEREBY RECOMMENDS that:

- 26 1. This case be dismissed, without prejudice, because of Plaintiff’s failure to
27 comply with court orders and to prosecute this case; and
- 28 2. The Clerk of Court be directed to close this case.

1 These findings and recommendations will be submitted to the United States district
2 judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
3 fourteen (14) days after being served with these findings and recommendations, Plaintiff may
4 file written objections with the Court. The document should be captioned “Objections to
5 Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file
6 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.
7 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394
8 (9th Cir. 1991)).

9
10 IT IS SO ORDERED.

11 Dated: October 27, 2021

12 /s/ Eric P. Grogan
13 UNITED STATES MAGISTRATE JUDGE
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