

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DONNELL COX, Plaintiff, v. NORTH KERN STATE PRISON OFFICIALS, Defendant.

Case No. 1:21-cv-00860-NONE-BAM (PC) FINDINGS AND RECOMMENDATIONS TO DISMISS ACTION, WITHOUT PREJUDICE, FOR FAILURE TO OBEY A COURT ORDER AND FAILURE TO PROSECUTE (ECF No. 7) FOURTEEN (14) DAY DEADLINE

I. Background

Plaintiff Donnell Cox (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action under 42 U.S.C. § 1983. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On June 15, 2021, the Court granted Plaintiff’s motion to amend the complaint and ordered Plaintiff to file a first amended complaint within thirty (30) days. (ECF No. 7.) The Court expressly warned Plaintiff that failure to comply with the Court’s order would result in dismissal of this action for failure to prosecute and failure to obey a court order. (*Id.* at 3.) The deadline has expired, and Plaintiff has failed to file a first amended complaint or otherwise communicate with the Court.

II. Failure to Prosecute and Failure to Obey a Court Order

A. Legal Standard

Local Rule 110 provides that “[f]ailure . . . of a party to comply with these Rules or with any order of the Court may be grounds for imposition by the Court of any and all sanctions . . .

1 within the inherent power of the Court.” District courts have the inherent power to control their
2 dockets and “[i]n the exercise of that power they may impose sanctions including, where
3 appropriate, . . . dismissal.” *Thompson v. Hous. Auth.*, 782 F.2d 829, 831 (9th Cir. 1986). A
4 court may dismiss an action, with prejudice, based on a party’s failure to prosecute an action,
5 failure to obey a court order, or failure to comply with local rules. *See, e.g., Ghazali v. Moran*, 46
6 F.3d 52, 53–54 (9th Cir. 1995) (dismissal for noncompliance with local rule); *Ferdik v. Bonzelet*,
7 963 F.2d 1258, 1260–61 (9th Cir. 1992) (dismissal for failure to comply with an order requiring
8 amendment of complaint); *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130–33 (9th Cir. 1987)
9 (dismissal for failure to comply with court order).

10 In determining whether to dismiss an action, the Court must consider several factors:
11 (1) the public’s interest in expeditious resolution of litigation; (2) the Court’s need to manage its
12 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of
13 cases on their merits; and (5) the availability of less drastic sanctions. *Henderson v. Duncan*, 779
14 F.2d 1421, 1423 (9th Cir. 1986); *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988).

15 **B. Discussion**

16 Here, Plaintiff’s first amended complaint is overdue and he has failed to comply with the
17 Court’s order. The Court cannot effectively manage its docket if Plaintiff ceases litigating his
18 case. Thus, the Court finds that both the first and second factors weigh in favor of dismissal.

19 The third factor, risk of prejudice to defendant, also weighs in favor of dismissal, since a
20 presumption of injury arises from the occurrence of unreasonable delay in prosecuting an action.
21 *Anderson v. Air W.*, 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor usually weighs against
22 dismissal because public policy favors disposition on the merits. *Pagtalunan v. Galaza*, 291 F.3d
23 639, 643 (9th Cir. 2002). However, “this factor lends little support to a party whose
24 responsibility it is to move a case toward disposition on the merits but whose conduct impedes
25 progress in that direction,” which is the case here. *In re Phenylpropanolamine (PPA) Products*
26 *Liability Litigation*, 460 F.3d 1217, 1228 (9th Cir. 2006) (citation omitted).

27 Finally, the Court’s warning to a party that failure to obey the court’s order will result in
28 dismissal satisfies the “considerations of the alternatives” requirement. *Ferdik*, 963 F.2d at 1262;

1 *Malone*, 833 at 132–33; *Henderson*, 779 F.2d at 1424. The Court’s June 15, 2021 order expressly
2 warned Plaintiff that his failure to comply with the Court’s order would result in a dismissal of
3 this action. (ECF No. 7.) Thus, Plaintiff had adequate warning that dismissal could result from
4 his noncompliance.

5 Additionally, at this stage in the proceedings there is little available to the Court that
6 would constitute a satisfactory lesser sanction while protecting the Court from further
7 unnecessary expenditure of its scarce resources. Plaintiff is proceeding *in forma pauperis* in this
8 action, making monetary sanctions of little use, and the preclusion of evidence or witnesses is
9 likely to have no effect given that Plaintiff has ceased litigating his case.

10 **III. Conclusion and Recommendation**

11 Accordingly, the Court finds that dismissal is the appropriate sanction and HEREBY
12 RECOMMENDS that this action be dismissed, without prejudice, for failure to obey a Court
13 order and for Plaintiff’s failure to prosecute this action.

14 These Findings and Recommendation will be submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**
16 **(14) days** after being served with these Findings and Recommendation, Plaintiff may file written
17 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
18 Findings and Recommendation.” Plaintiff is advised that failure to file objections within the
19 specified time may result in the waiver of the “right to challenge the magistrate’s factual
20 findings” on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v.*
21 *Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

22
23 IT IS SO ORDERED.

24 Dated: August 2, 2021

/s/ Barbara A. McAuliffe
25 UNITED STATES MAGISTRATE JUDGE