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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TROY HAYLES,

Plaintiff,

No. 2: 09-cv-3061 JFM (PC)

vs.

DR. ERICA WHEATHERFORD, et al.,

Defendants.

ORDER AND FINDINGS AND
RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding pro se with a civil rights complaint filed pursuant to 42 U.S.C. § 1983. On October 23, 2012, defendants filed a motion for summary judgment. On November 30, 2012, the court issued an order giving plaintiff fourteen days to file an opposition to the motion for summary judgment. Plaintiff was instructed that failure to file an opposition would be deemed a statement of non-opposition and would result in a recommendation that the action be dismissed pursuant to Federal Rule of Civil Procedure 41(b). To date, plaintiff has not responded to defendants’ motion for summary judgment or the court’s November 30, 2012 order.

“Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an action for failure to comply with any order of the court.” Ferdik v. Bonzelet, 963 F.2d 1258,

1 1260 (9th Cir. 1992). “In determining whether to dismiss a case for failure to comply with a
2 court order the district court must weigh five factors including: ‘(1) the public's interest in
3 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
4 prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits;
5 and (5) the availability of less drastic alternatives.’” Ferdik, 963 F.2d at 1260-61 (quoting
6 Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986)).

7 In determining to recommend that this action be dismissed, the court has
8 considered the five factors set forth in Ferdik. The first two Ferdik factors strongly support
9 dismissal of this action. The action has been pending for almost four years and has reached the
10 stage for resolution of defendants’ motion for summary judgment which has now been pending
11 for almost two months. Plaintiff’s failure to comply with the Local Rules and the court’s
12 November 30, 2012 order suggests that he has abandoned this action and that further time spent
13 by the court thereon will consume scarce judicial resources in addressing litigation which
14 petitioner demonstrates no intention to pursue.

15 The fifth factor also favors dismissal. The court granted plaintiff ample additional
16 time to oppose the pending motion to no avail. The court finds no suitable alternative to
17 dismissal of this action.

18 Under the circumstances of this case, the third factor, prejudice to defendants
19 from plaintiff’s failure to oppose the motion, should be given little weight. Plaintiff’s failure to
20 oppose the motion does not put defendants at any disadvantage in this action. See Ferdik, 963
21 F.2d at 1262. Indeed, defendants would only be “disadvantaged” by a decision by the court to
22 continue an action plaintiff has abandoned. The fourth factor, public policy favoring disposition
23 of cases on their merits, weighs against dismissal of this action as a sanction. However, for the
24 reasons set forth supra, the first, second, and fifth factors strongly support dismissal and the third
25 factor does not mitigate against it. Under the circumstances of this case, those factors outweigh
26 the general public policy favoring disposition of cases on their merits. See Ferdik, 963 F.2d at

1 1263.

2 Thus, it will be recommended that the action be dismissed pursuant to Federal
3 Rule of Civil Procedure 41(b).

4 On December 11, 2009, plaintiff consented to magistrate judge jurisdiction. (See
5 Dkt. No. 14.) To date, defendants have neither consented nor declined magistrate judge
6 jurisdiction. Thus, a district judge will be assigned to this action.

7 Accordingly, IT IS HEREBY ORDERED that the Clerk of Court is directed to
8 assign this action to a United States District Judge.

9 Furthermore, IT IS HEREBY RECOMMENDED that this action be dismissed
10 pursuant to Federal Rule of Civil Procedure 41(b).

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
13 days after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
16 objections shall be filed and served within fourteen days after service of the objections. The
17 parties are advised that failure to file objections within the specified time may waive the right to
18 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 DATED: January 7, 2013.

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22 UNITED STATES MAGISTRATE JUDGE

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