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

JAMES ARMSTEAD,

Plaintiff,

No. 2: 11-cv-1054 JAM KJN P

vs.

TIM V. VIRGA, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. On November 3, 2011, defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff has not opposed the motion.

On September 22, 2011, the court advised plaintiff of the requirements for opposing a motion and that failure to oppose such a motion may be deemed a waiver of opposition.

On December 8, 2011, plaintiff was ordered to file an opposition to the pending motion within thirty days. In the same order, plaintiff was informed that failure to file an opposition would result in a recommendation that this action be dismissed pursuant to Fed. R. Civ. P. 41(b). The thirty day period has now expired and plaintiff has not responded to the court's order.

1 “Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss
2 an action for failure to comply with any order of the court.” Ferdik v. Bonzelet, 963 F.2d 1258,
3 1260 (9th Cir. 1992). “In determining whether to dismiss a case for failure to comply with a
4 court order the district court must weigh five factors including: ‘(1) the public’s interest in
5 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
6 prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits;
7 and (5) the availability of less drastic alternatives.’” Ferdik, 963 F.2d at 1260-61 (quoting
8 Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986)); see also Ghazali v. Moran, 46
9 F.3d 52, 53 (9th Cir. 1995).

10 In determining to recommend that this action be dismissed, the court has
11 considered the five factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly
12 support dismissal of this action. Plaintiff’s failure to comply with the Local Rules and the
13 court’s September 22, 2011 order suggests that he has abandoned this action and that further time
14 spent by the court thereon will consume scarce judicial resources in addressing litigation which
15 plaintiff demonstrates no intention to pursue.

16 The fifth factor also favors dismissal. The court has advised plaintiff of the
17 requirements under the Local Rules and granted ample additional time to oppose the pending
18 motion, all to no avail. The court finds no suitable alternative to dismissal of this action.

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

1 the general public policy favoring disposition of cases on their merits. See Ferdik, 963 F.2d at
2 1263.

3 For the foregoing reasons, IT IS HEREBY RECOMMENDED that this action be
4 dismissed pursuant to Federal Rule of Civil Procedure 41(b).

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

13 DATED: January 20, 2012

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15 
16 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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