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

BRYN RAU,

Plaintiff,

No. 2:13-cv-00371-KJM-CMK

v.

MISSION RANCH PRIMARY CARE,  
MARCIA F. NELSON,

Defendants.

ORDER

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This matter is before the court on defendants’ motion to dismiss for failure to prosecute (ECF 25), on which the court held a hearing on March 28, 2014. Joann Pheasant appeared for plaintiff and Eunice Majam-Simpson appeared for defendants. Also before the court is plaintiff’s motion to amend the complaint (ECF 32), which the court submitted on the briefs. For the reasons below, the court GRANTS defendants’ motion and DENIES plaintiff’s motion as moot.

I. ALLEGED FACTS AND PROCEDURAL BACKGROUND

Plaintiff worked for defendant Mission Ranch Primary Care (“MRPC”) and defendant Dr. Marcia Nelson as a medical assistant in Chico, California. (Compl. at 1–3, Defs.’ Pet. for Removal, Ex. A, ECF 1.) Plaintiff alleges defendants violated several state labor codes by denying her regular and overtime wages, and meal and rest periods. (Compl. at 3:16-

1 20.) She also asserts defendants fired her shortly after defendants confirmed with another  
2 employee that she had become pregnant, (*id.* at 3:27-28), and that defendant Nelson  
3 inappropriately accessed her medical records. (*Id.* at 4:2-3.) Plaintiff seeks injunctive relief  
4 and restitution, (*id.* at 6:18-23), and compensatory and punitive damages, (*id.* at 19:15, 23).  
5 She asserts eleven total causes of action. (Compl.)

6 Plaintiff filed a complaint on January 22, 2013 in the Superior Court of  
7 California for Butte County and defendants filed notice of removal on February 25, 2013.  
8 (Defs.' Pet. for Removal, ECF 1.) On March 4, 2013, the parties stipulated to plaintiff's filing  
9 an amended complaint by March 25, 2013. (ECF 5.) The parties also stipulated defendants  
10 would not need to file a responsive pleading to the original complaint and would have fourteen  
11 days to file a responsive pleading upon plaintiff's filing the first amended complaint. (ECF 5.)  
12 Plaintiff still had not filed an amended complaint by April 12, 2013, when defendants filed  
13 their first motion to dismiss, to strike, and for a more definite statement. (ECF 8.) On June 21,  
14 2013 the court granted the motion to dismiss plaintiff's eighth, ninth, and twelfth claims,  
15 denied the motion for a more definite statement, and granted the motion to strike plaintiff's  
16 seventh claim. (ECF 12.) The court also ordered plaintiff to file an amended complaint within  
17 21 days.

18 On July 31, 2013, the court issued plaintiff's counsel an order to show cause  
19 why she should not be sanctioned for not filing an amended complaint as ordered by the court.  
20 (ECF 15.) Plaintiff's counsel still had not responded to this first OSC by August 27, 2013,  
21 when the court issued a second OSC. (ECF 18.) Plaintiff's timely response to the second OSC  
22 stated she has been overwhelmed with a personal illness in her family. (ECF 19-1 at 2.) She  
23 also averred she had secured help in managing her practice so that further problems would not  
24 surface. (*Id.*) That same day, plaintiff attempted to file a first amended complaint, which the  
25 court struck because plaintiff did not comply with Federal Rule of Civil Procedure 15. (ECF  
26 22.) The court also sanctioned plaintiff's counsel \$250 for repeated noncompliance with the  
27 courts' orders. (*Id.*)

1           By October 22, 2013, more than a month after the deadline, plaintiff's counsel  
2 had yet to pay her \$250 sanction. The court issued a third order to show cause why she should  
3 not be sanctioned an additional \$500 for not paying the earlier sanction. (ECF 23.) The court  
4 warned plaintiff's counsel that failure to pay within seven days would result in the court  
5 reporting her to the State Bar of California. (*Id.*) Three weeks later, on January 16, 2014,  
6 plaintiff's counsel paid the \$250 sanction without comment. In a minute order issued that same  
7 day, the court gave plaintiff's counsel an additional seven days to respond to its third order to  
8 show cause. (ECF 24.) Plaintiff's counsel still had not responded seven days later when  
9 defendants filed the pending motion. (ECF 25.) On January 30, 2014, plaintiff's counsel  
10 responded to the court's third OSC. (ECF 26.) In that response, she stated she did not see the  
11 court's orders because of a computer problem. (ECF 26-1 at 1.) She also said she has been  
12 caring for her mother in Seattle during her mother's cancer surgery, and that her disabled  
13 spouse has been in the hospital for surgery, for which her spouse has needed significant care.  
14 (*Id.* at 2.) Finally, plaintiff's counsel attested that the individual who was going to assist with  
15 or take over her cases was unable to do so due to her own workload. (*Id.*) Based on these  
16 representations, the court discharged its third OSC. (ECF 27.)

17           On February 18, 2014, the court on its own motion continued the hearing on the  
18 defendants' motion to dismiss, which was calendared for February 28, because plaintiff had not  
19 filed a response as required by the Local Rules. (ECF 29.) The court also ordered both  
20 plaintiff's and defendants' counsel to serve several documents on plaintiff Rau herself, to  
21 ensure Rau was apprised of the course of this litigation. (*Id.*) On February 26, 2014,  
22 defendants filed a certificate of service indicating they had served plaintiff as ordered. (ECF  
23 30.) Plaintiff's counsel did not respond to the court's order regarding service and still did not  
24 respond to defendants' motion, which the court reset for hearing on March 28, 2014.

25           On March 21, 2014, defendants filed a notice of plaintiff's non-opposition to the  
26 pending motion, noting plaintiff's lack of any response whatsoever. (ECF 31.) That same day  
27 — nine months after plaintiff first had been ordered to file an amended complaint and one week  
28 before the continued hearing on the motion to dismiss — plaintiff filed a motion to amend the

1 complaint. (ECF 32.) In the motion to amend, plaintiff's counsel simply references Federal  
2 Rule of Civil Procedure 15 and asserts defendants will not be prejudiced by permitting  
3 amendment because this case is in its infancy and no discovery has been conducted. (*See id.*)  
4 She does not provide a proposed amended complaint, although at hearing she clarified the  
5 amendment would be consistent with the amended complaint she attempted to file in  
6 September 2013. Also at hearing she reported she was still attempting to locate co-counsel.

7 II. ANALYSIS

8           Upon a motion to dismiss for failure to prosecute under Rule 41(b), the court  
9 must consider the factors outlined in *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994), namely:  
10 (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its  
11 docket; (3) the risk of prejudice to defendants; (4) the policy favoring disposition of cases on  
12 their merits; and (5) the availability of less drastic sanctions.

13           The court finds here that the *Eisen* factors overall support dismissal. First, the  
14 public has an interest in expeditious resolution of litigation. Here, plaintiff did not respond to  
15 the instant motion to dismiss for failure to prosecute, despite being given a second opportunity.  
16 At hearing, plaintiff's counsel stated she did not oppose the motion because she thought  
17 defendants' arguments were "good." Plaintiff only now has moved to file an amended  
18 complaint, nine months after the court directed its filing. *See Yourish v. California Amplifier*,  
19 191 F.3d 983, 990 (9th Cir. 1999) ("[T]he public's interest in expeditious resolution of  
20 litigation always favors dismissal."); FED. R. CIV. P. 1 (the public has an overriding interest in  
21 securing "the just, speedy, and inexpensive determination of every action").

22           Second, the court has an inherent interest in managing its docket. Plaintiff's  
23 counsel has repeatedly failed to respond to this court's orders. While the court sympathizes  
24 with plaintiff's counsel's personal difficulties, it cannot overlook the continuing deficiencies in  
25 her performance. As plaintiff tacitly acknowledged in her recent motion for leave to amend,  
26 this case has been stalled for nearly a year. Although the complaint was filed over fifteen  
27 months ago, no discovery has occurred; the case remains in its "infancy" based on counsel's  
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1 not having moved it forward. (ECF 32-2 at 2.) *See Yourish*, 191 F.3d at 990 (upholding  
2 district court’s dismissal under Rule 41(b) for these reasons).

3 Third, a defendant’s ability to defend itself is prejudiced by the unnecessary  
4 passage of time. “A defendant suffers prejudice if the plaintiff’s actions impair the defendant’s  
5 ability to go to trial or threaten to interfere with the rightful decision of the case.” *In re*  
6 *Phenylpropanolamine (PPA) Products Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006)  
7 (quotation marks and citation omitted). The law also presumes prejudice from unreasonable  
8 delay. *Id.* (citations omitted). In the instant case, defendants have been unable to move  
9 forward or to conduct any discovery in light of plaintiff’s counsel’s absenteeism. There also  
10 are accruing litigation costs.

11 Overall, the third factor only slightly supports dismissal because the delay has  
12 not been enormous, defendant has not produced evidence of actual prejudice beyond litigation  
13 costs, and plaintiff’s counsel’s excuses for delay are not frivolous. *See In re Eisen*, 31 F.3d at  
14 1453 (quoting *Nealey v. Transportacion Maritima Mexicana, S. A.*, 662 F.2d 1275, 1281 (9th  
15 Cir. 1980) (setting forth the shifting burdens in proving prejudice and stating courts “consider  
16 prejudice and delay together to determine ‘whether there has been *sufficient* delay or prejudice  
17 to justify a dismissal of the plaintiff’s case’”) (original emphasis). However, the “failure to  
18 prosecute diligently is sufficient by itself to justify dismissal, even in the absence of a showing  
19 of actual prejudice to the defendant from the failure.” *Morris v. Morgan Stanley & Co.*, 942 F.  
20 2d 648, 651 (9th Cir. 1991) (alteration in original) (quotation marks and citation omitted); *see*  
21 *also Toyota Landscape Co., Inc. v. Building Materials & Dump Truck Drivers Local 420*, 726  
22 F. 2d 525, 528 (9th Cir. 1984) (upholding dismissal of a claim under Rule 41(b) after plaintiffs  
23 did not file an amended complaint).

24 Fourth, although public policy strongly favors disposition of actions on their  
25 merits, this consideration as in *Yourish* “is outweighed by the other four factors which support  
26 dismissal of this action.” *Yourish*, 191 F.3d at 992; *cf. In re Eisen*, 31 F.3d at 1454 (“Even if  
27 the plaintiff has an obviously strong case, dismissal would be appropriate if the plaintiff has  
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1 clearly ignored his responsibilities to the court in prosecuting the action and the defendant had  
2 suffered prejudice as a result thereof.”) (quotation marks and citation omitted).

3 Finally, this court has pursued less drastic alternatives for the past nine months.  
4 The court has given plaintiff no fewer than four opportunities to file an amended complaint, has  
5 issued three OSCs warning dismissal may occur, has sanctioned plaintiff’s counsel \$250, has  
6 considered a further sanction but deferred decision in light of plaintiff’s silence in face of an  
7 OSC, and has continued by one month the hearing date on the instant motion to give plaintiff  
8 additional opportunity to respond. All to no avail. While plaintiff has filed a generic motion to  
9 amend, the motion does not acknowledge the motion to dismiss is pending. Plaintiff’s  
10 counsel’s appearance at hearing, however belated, is credited, and persuades the court that  
11 dismissal should be without prejudice.

12 III. CONCLUSION

13 Defendants’ motion to dismiss for failure to prosecute is GRANTED without  
14 prejudice. Plaintiff’s motion to amend is DENIED as moot. This case is CLOSED.

15 IT IS SO ORDERED.

16 DATED: April 14, 2014.

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20 UNITED STATES DISTRICT JUDGE  
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