

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 24 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ALBERT J. HAMILTON,

Plaintiff-Appellant,

v.

JURBAN, RN, in individual capacity; et al.,

Defendants-Appellees.

No. 18-55762

D.C. No. 2:17-cv-05297-ODW-SS
Central District of California,
Los Angeles

ORDER

Before: FARRIS, BYBEE, and N.R. SMITH, Circuit Judges.

The district court certified that this appeal is not taken in good faith and revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). On June 29, 2018, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record and response to the court's June 29, 2018 order, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 7), and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUN 29 2018

MOLLY C. DWYER, CLERK
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Defendants-Appellees.

No. 18-55762

D.C. No.
2:17-cv-05297-ODW-SS

Central District of California,
Los Angeles

ORDER

A review of the district court's docket reflects that the district court has certified that this appeal is not taken in good faith and has revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). This court may dismiss a case at any time, if the court determines the case is frivolous. *See* 28 U.S.C. § 1915(e)(2).

Within 35 days after the date of this order, appellant must:

- (1) file a motion to dismiss this appeal, *see* Fed. R. App. P. 42(b), or
- (2) file a statement explaining why the appeal is not frivolous and should go

forward.

If appellant files a statement that the appeal should go forward, appellant also must:

- (1) file in this court a motion to proceed in forma pauperis, OR
- (2) pay to the district court \$505.00 for the filing and docketing fees for this appeal AND file in this court proof that the \$505.00 was paid.

If appellant does not respond to this order, the Clerk will dismiss this appeal for failure to prosecute, without further notice. *See* 9th Cir. R. 42-1. If appellant files a motion to dismiss the appeal, the Clerk will dismiss this appeal, pursuant to Federal Rule of Appellate Procedure 42(b). If appellant submits any response to this order other than a motion to dismiss the appeal, the court may dismiss this appeal as frivolous, without further notice. If the court dismisses the appeal as frivolous, this appeal may be counted as a strike under 28 U.S.C. § 1915(g).

The briefing schedule for this appeal is stayed.

The Clerk shall serve on appellant: (1) a form motion to voluntarily dismiss the appeal, (2) a form statement that the appeal should go forward, and (3) a Form 4 financial affidavit. Appellant may use the enclosed forms for any motion to dismiss the appeal, statement that the appeal should go forward, and/or motion to proceed in forma pauperis.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Corina Orozco
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 ALBERT JOHN HAMILTON, JR., Case No. CV 17-5297 ODW (SS)
12 Plaintiff,
13 v. **JUDGMENT**
14 J. URBAN, et al.,
15 Defendants.

17 Pursuant to the Court's Order Accepting Findings,
18 Conclusions and Recommendations of United States Magistrate
19 Judge,

21 IT IS HEREBY ADJUDGED that the above-captioned action is
22 dismissed with prejudice.

DATED: April 17, 2018

OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 ALBERT JOHN HAMILTON, JR.,
12 Plaintiff,
13 v.
14 J. URBAN, et al.,
15 Defendants.

Case No. CV 17-5297 ODW (SS)

**ORDER ACCEPTING FINDINGS,
CONCLUSIONS AND RECOMMENDATIONS
OF UNITED STATES MAGISTRATE
JUDGE**

17
18 Pursuant to 28 U.S.C. § 636, the Court has reviewed the
19 First Amended Complaint, all the records and files herein and the
20 Report and Recommendation of the United States Magistrate Judge.
21 The time for filing Objections to the Report and Recommendation
22 has passed and no Objections have been received. Accordingly,
23 the Court accepts and adopts the findings, conclusions and
24 recommendations of the Magistrate Judge.

25 \\
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1 **IT IS ORDERED** that Judgment shall be entered dismissing this
2 action with prejudice.

3

4 **IT IS FURTHER ORDERED** that the Clerk serve copies of this
5 Order and the Judgment herein on Plaintiff at his current address
6 of record.

7

8 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

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10 DATED: April 17, 2018

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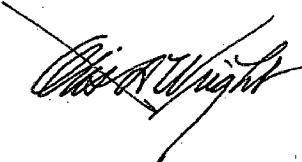
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OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 ALBERT JOHN HAMILTON, JR.,
12 Plaintiff,
13 v.
14 J. URBAN, et al.,
15 Defendants.

Case No. CV 17-5297 ODW (SS)

**REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE**

17 This Report and Recommendation is submitted to the Honorable
18 Otis D. Wright, II, United States District Judge, pursuant to 28
19 U.S.C. § 636 and General Order 05-07 of the United States District
20 Court for the Central District of California.

21
22 **I.**

23 **INTRODUCTION**

25 On July 18, 2017, Plaintiff Albert John Hamilton, Jr.
26 ("Plaintiff"), a state prisoner proceeding pro se, filed a civil
27 rights Complaint pursuant to 42 U.S.C. § 1983 and Title II of the
28 Americans with Disabilities Act, 42 U.S.C. § 12132. (Dkt. No. 1).

1 Plaintiff alleged that he was wrongfully subjected to a TB skin
2 test by a prison nurse and that the response to his administrative
3 appeal challenging the propriety of that test contained a factual
4 inaccuracy. On August 11, 2017, the Court issued a Memorandum and
5 Order Dismissing Complaint with Leave to Amend due to various
6 pleading defects.¹ (Dkt. No. 7). The Court noted in the Order
7 that Plaintiff "has filed several actions at the same time [that]
8 appear to lack substance in fact and law" and advised him that
9 "filing frivolous motions or actions will ultimately result in a
10 recommendation that he be barred from filing as a vexatious
11 litigant."² (Id. at 14). The Court further warned Plaintiff that
12

13 ¹ Magistrate Judges may dismiss a complaint with leave to amend
14 without approval of the District Judge. See McKeever v. Block,
932 F.2d 795, 798 (9th Cir. 1991).

15 ² Plaintiff filed five habeas petitions and civil rights complaints
16 in this Court in 2017 in addition to the instant action, two of
17 which are still pending. See Albert J. Hamilton, Jr. v. Warden,
18 CV 17-0987 SS (pending habeas action in which Petitioner has
requested a stay (Dkt. No. 41) due to inclusion of unexhausted
claims in the Petition); Albert John Hamilton, Jr. v. Dep't of
19 Corrections, CV 17-1387 ODW (SS) (habeas action dismissed with
prejudice for lack of subject matter jurisdiction and
untimeliness); Albert John Hamilton, Jr. v. Dep't of Corrections,
20 CV 17-3090 ODW (SS) (habeas action dismissed without prejudice
because the Petition did not challenge the fact or duration of
Petitioner's confinement); Albert John Hamilton, Jr. v. C. Steeb,
21 Warden, CV 17-5161 ODW (SS) (habeas action alleging civil rights
violations voluntarily dismissed); Albert John Hamilton, Jr. v. C.
22 Steeb, CV 17-5300 ODW (SS) (pending civil rights/ADA action
alleging improper handcuffing).

23 In addition, Plaintiff filed a civil rights action in 2012, Albert
24 John Hamilton, Jr. v. LAPD Chief Charlie Beck, CV 12-9088 UA (SS),
25 which Plaintiff voluntarily dismissed after IFP was denied for
failure to include a trust statement, and a habeas action in 2013,
26 Albert John Hamilton, Jr. v. People of the State of California, CV
27 13-4379 GHK (SS), which Petitioner voluntarily dismissed after the
28 Court issued an Order to Show Cause Why This Action Should Not Be

1 the failure to file an amended complaint correcting the
2 deficiencies identified in the Order by the Court's thirty-day
3 deadline would result in a recommendation that this action be
4 dismissed with prejudice for failure to prosecute. (See id.).

5

6 Plaintiff subsequently a First Amended Complaint. ("FAC,"
7 Dkt. No. 10). On February 9, 2018, the Court issued another
8 Memorandum and Order Dismissing the First Amended Complaint with
9 Leave to Amend. ("Order," Dkt. No. 20). The Court noted that
10 "[t]he facts underlying the Complaint and the FAC are largely the
11 same" and expressed doubt that Plaintiff would be able to state a
12 constitutional claim based on these facts. (Id. at 2). The Court
13 further stated:

14

15 [T]he FAC repeats nearly all of the material defects
16 that required dismissal of the original Complaint.
17 Nonetheless, the Court will grant Plaintiff one more
18 opportunity to attempt to state a claim. Plaintiff is
19 cautioned that if any future amended pleading does not
20 cure the defects that the Court has now twice identified
21 in the original Complaint and the FAC, the Court may
22 conclude that further attempts at amendment would be
23 futile and recommend that this action be dismissed with
24 prejudice for failure to state a claim.

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26 \\

27 _____
28 Dismissed Pursuant to the Younger Abstention Doctrine. (Id., Dkt.
Nos. 4, 9-10).

1 (Id.). The Court once again cautioned Plaintiff that the "failure
2 to timely file a Second Amended Complaint, or failure to correct
3 the deficiencies described above, will result in a recommendation
4 that this action be dismissed with prejudice for failure to
5 prosecute and obey Court orders pursuant to Federal Rule of Civil
6 Procedure 41(b)." (Id. at 15).

7

8 Pursuant to the Court's Order, Plaintiff's Second Amended
9 Complaint was due by March 12, 2018. (Id.). As of today, however,
10 Plaintiff has filed neither a Second Amended Complaint nor a
11 request for an extension of time in which to do so. Accordingly,
12 for the reasons stated below, it is recommended that the Court
13 DISMISS this action with prejudice for failure to prosecute and
14 obey court orders pursuant to Rule 41(b). See Edwards v. Marin
15 Park, Inc., 356 F.3d 1058, 1064-65 (9th Cir. 2004). ("The failure
16 of the plaintiff eventually to respond to the court's ultimatum
17 -- either by amending the complaint or by indicating to the court
18 that it will not do so -- is properly met with the sanction of a
19 Rule 41(b) dismissal.").

20

II.

22

DISCUSSION

22

24 Federal Rule of Civil Procedure 41(b) grants district courts
25 the authority .to sua sponte dismiss actions for failure to
26 prosecute or for failure to comply with court orders. See Link v.
27 Wabash R.R. Co., 370 U.S. 626, 629-30 (1962) ("The power to invoke
28 this sanction is necessary in order to prevent undue delays in the

1 disposition of pending cases and to avoid congestion in the
2 calendars of the District Courts."). Dismissal, however, is a
3 harsh penalty and is to be imposed only in extreme circumstances.
4 Dreith v. Nu Image, Inc., 648 F.3d 779, 788 (9th Cir. 2011) (citing
5 Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992)).

6

7 In considering whether to dismiss an action for failure to
8 prosecute, the Court must weigh five factors: "(1) the public's
9 interest in expeditious resolution of litigation; (2) the court's
10 need to manage its docket; (3) the risk of prejudice to
11 defendants/respondents; (4) the availability of less drastic
12 alternatives; and (5) the public policy favoring disposition of
13 cases on their merits." Pagtalunan v. Galaza, 291 F.3d 639, 642
14 (9th Cir. 2002) (citing Ferdik, 963 F.2d at 1260-61). The Ninth
15 Circuit will "affirm a dismissal where at least four factors
16 support dismissal, or where at least three factors strongly support
17 dismissal." Dreith, 648 F.3d at 788 (quoting Yourish v. Cal.
18 Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)).

19

20 **A. The Five Factors Support Dismissal**

21

22 **1. Expeditious Resolution And The Court's Need To Manage**
23 **Its Docket**

24

25 In the instant action, the first two factors, i.e., the
26 public's interest in expeditious resolution of litigation and the
27 Court's need to manage its docket, favor dismissal. In dismissing
28 the Complaint and then the First Amended Complaint with leave to

1 amend, the Court twice identified in some detail the same pleading
2 defects and gave Plaintiff thirty days to correct the errors. The
3 Court repeatedly warned Plaintiff that the failure to respond would
4 result in dismissal of his case. Nonetheless, Plaintiff has
5 neither filed a Second Amended Complaint nor otherwise communicated
6 with the Court since the Order dismissing the First Amended
7 Complaint with leave to amend issued.

8

9 Plaintiff's conduct hinders the Court's ability to move this
10 case toward disposition and indicates that Plaintiff does not
11 intend to litigate this action diligently. As a result, the first
12 two factors favor dismissal here. See Ash v. Cvetkov, 739 F.2d
13 493, 496-97 (9th Cir. 1984) (affirming dismissal of action for
14 failure to prosecute where plaintiff's failure to respond to court
15 order resulted in month-long delay that impaired the trial court's
16 ability to manage its caseload and reflected plaintiff's loss of
17 interest in the litigation).

18

19 **2. The Risk Of Prejudice To Defendants**

20

21 The third factor, prejudice to Defendants, also favors
22 dismissal. "Unreasonable delay is the foundation upon which a
23 court may presume prejudice." Southwest Marine Inc. v. Danzig,
24 217 F.3d 1128, 1138 (9th Cir. 2000); see also Pagtalunan, 291 F.3d
25 at 643 (unnecessary delay caused by plaintiff's inaction
26 "inherently increases the risk that witnesses' memories will fade
27 and evidence will become stale"). Risk of prejudice to a defendant

28

1 is related to the plaintiff's reason for failure to prosecute an
2 action. See id. at 642 (citing Yourish, 191 F.3d at 991).

3

4 Here, Plaintiff has not offered any excuse or explanation for
5 his failure to file a Second Amended Complaint or otherwise
6 communicate with the Court. Where a party offers a poor excuse
7 for failing to comply with a court's order, the prejudice to the
8 opposing party is sufficient to favor dismissal. See Yourish, 191
9 F.3d at 991-92. Therefore, this factor favors dismissal.

10

11 **3. Less Drastic Alternatives**

12

13 The fourth factor, availability of less drastic alternatives,
14 also favors dismissal. The Court has attempted to avoid outright
15 dismissal of this action by twice giving Plaintiff notice of the
16 defects in his pleadings with ample time to correct the
17 deficiencies. The Court has also repeatedly warned Plaintiff that
18 failure to respond by the Court's deadline would result in a
19 recommendation of dismissal. See Henderson v. Duncan, 779 F.2d
20 1421, 1424 (9th Cir. 1986) ("The district court need not exhaust
21 every sanction short of dismissal before finally dismissing a case,
22 but must explore possible and meaningful alternatives.").
23 Plaintiff nonetheless failed to comply with the Court's Orders.
24 Alternatives to dismissal do not appear to be appropriate given
25 Plaintiff's failure to participate in this case.

26 \\

27 \\

28 \\

1 **4. Public Policy Favoring Disposition On The Merits**

2

3 The fifth factor, the public policy favoring the disposition
4 of cases on their merits, ordinarily weighs against dismissal. See
5 Dreith, 648 F.3d at 788. However, it is the responsibility of the
6 moving party to prosecute the action at a reasonable pace and to
7 refrain from dilatory and evasive tactics. See Morris v. Morgan
8 Stanley & Co., 942 F.2d 648, 652 (9th Cir. 1991). Here, Plaintiff
9 has failed to discharge his responsibility to prosecute this action
10 despite the Court's repeated and express warnings about the
11 possibility of dismissal. Under these circumstances, the public
12 policy favoring the resolution of disputes on the merits does not
13 outweigh Plaintiff's failure to file a Second Amended Complaint
14 and diligently prosecute his claims.

15

16 **B. Dismissal Of This Action Is Appropriate**

17

18 For the above-stated reasons, the Court concludes dismissal
19 of this action is warranted under Rule 41(b), which states:

20

21 [A] dismissal under this subdivision (b) and any
22 dismissal not under this rule -- except one for lack of
23 jurisdiction, improper venue, or failure to join a party
24 under Rule 19 -- operates as an adjudication on the
25 merits.

26

27 Fed. R. Civ. P. 41(b).

28

1 The Court recommends dismissal of this action due to
2 Plaintiff's failure to prosecute and obey Court orders. As this
3 ground for dismissal does not fall into one of the three exceptions
4 noted above, the dismissal will operate as an adjudication on the
5 merits. The dismissal will thus be with prejudice to Plaintiff's
6 refiling a new action in federal court based on the same
7 allegations. See Stewart v. U.S. Bancorp, 297 F.3d 953, 956 (9th
8 Cir. 2002) (dismissal interpreted as an adjudication on the merits
9 unless one of the Rule 41(b) exceptions applies).

10

11 Plaintiff was expressly warned about the possibility of
12 dismissal with prejudice in the event of his failure to file a
13 Second Amended Complaint or to explain to the Court why he is
14 unable or unwilling to do so. Edwards, 356 F.3d at 1064-65.
15 Plaintiff will have an opportunity to file Objections to this
16 Report and Recommendation if he wishes to challenge this dismissal.

17

III

RECOMMENDATION

21 IT IS RECOMMENDED that the District Court issue an Order
22 (1) accepting and adopting this Report and Recommendation
23 and (2) directing that Judgment be entered dismissing this action
24 with prejudice for failure to prosecute and obey Court orders.

26 | DATED: March 26, 2018

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

NOTICE

3 Reports and Recommendations are not appealable to the Court
4 of Appeals, but may be subject to the right of any party to file
5 objections as provided in Local Civil Rule 72 and review by the
6 District Judge whose initials appear in the docket number. No
7 Notice of Appeal pursuant to the Federal Rules of Appellate
8 Procedure should be filed until entry of the Judgment of the
9 District Court.