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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Richard P Zuckerman,
10 Plaintiff,

11 v.

12 Lisa Joyner, et al.,
13 Defendants.
14

No. CV-21-01874-PHX-SMM

ORDER

15 Pending before the Court is Defendants Lisa Joyner and Arizona State
16 University's Motion to Dismiss. (Doc. 50).

17 **I. Background and Procedural History**

18 The following allegations from Plaintiff's Amended Complaint are construed in
19 the light most favorable to Plaintiff. At some point in the last few years, Plaintiff Richard
20 Zuckerman attended an Arizona State University (ASU) open-house event, which
21 included a walking tour of campus. (Doc. 48 at 7). During this tour, an as-yet-
22 unidentified representative of ASU told the tour members that "ASU gives more financial
23 aid to students than any other college or university in Arizona." (Id.) Seemingly on the
24 basis, in part, of this statement, Plaintiff applied to ASU, was accepted, and enrolled and
25 attended summer classes during the 2021 summer semester. (Id. at 8).

26 Ahead of the summer semester, Plaintiff emailed the instructor of an ASU
27 nutrition course that he was considering taking. (Id.) The main purpose of the email was
28 to ask whether the instructor, who Plaintiff noted had a Russian-sounding name, spoke

1 clear and fluent English. (Doc. 48-1 at 3). Much of the email, however, consists of asides
2 and tangents discussing Plaintiff’s political views, medical history, and semi-
3 conspiratorial historical tidbits. (Id.) Among these, Plaintiff’s email states that “I’m
4 White (White, an active Republican, MAGA voter, and proud of it and I do not support
5 giving any special preference to Blacks and Spanish!!!!!! As far as I’m concerned, they
6 breed to much, anyway, and they are a STREET CRIME PROBLEM....)” (Id.)

7 After receiving Plaintiff’s email, the nutrition instructor emailed an unidentified
8 ASU official that she was upset at Plaintiff’s email. (Doc. 48 at 9). Subsequently, then-
9 Assistant Dean of Students Benjamin Davis informed Plaintiff, via email, of a student
10 disciplinary hearing into whether Plaintiff’s email to the nutrition instructor constituted
11 discrimination or harassment. (Id.) Davis informed Plaintiff that ASU would not provide
12 a student legal representative and that it was Plaintiff’s responsibility to produce such an
13 advocate, if he wanted one. (Id.) During the hearing, Plaintiff told those in attendance that
14 the email constituted constitutionally protected speech, that he would not apologize, and
15 that he would send the email again. (Id.) Plaintiff also complained of ASU’s COVID
16 policy, including their frequent online “health checks,” and described COVID-19 as a
17 “gross overreaction.” (Id.)

18 Soon afterward, on August 4, 2021, Davis emailed Plaintiff with the findings of
19 the hearing. (Doc. 48-1 at 4). The ASU office responsible for the investigation and
20 hearing determined that Plaintiff “more likely than not . . . sent an email with
21 discriminatory language regarding the possibly [sic] ethnicity and cultural background of
22 the [nutrition instructor]. The comments were not germane to the class, and very
23 inappropriate.” (Id.) As a result, Plaintiff was found to have violated two sections of
24 ASU’s student code of conduct. (Id.) Plaintiff was required to attend two online
25 educational video courses (on diversity and on civility and respect), was given an official
26 warning, and was placed on administrative probation until graduation. (Id.)

27 That same day, Plaintiff received an email from the Dean of Students Office,
28 informing Plaintiff that he had been selected for COVID-19 Community Assessment

1 testing, which consisted of a free, on-campus saliva test. (Doc. 48-1 at 5-6). Plaintiff took
2 the test. (Doc. 48 at 10-11).

3 At some point later, Plaintiff emailed the ASU Provost a Notice of Appeal,
4 presumably appealing the findings of the hearing. (Doc. 48 at 10). In response, Davis
5 informed Plaintiff, via email, that no appeal was permitted. (Id.) Plaintiff did not watch
6 the online educational video courses. (Id.) At some point, Davis informed Plaintiff, again
7 via email, that his attendance at ASU was on hold until Plaintiff watched the video
8 courses. (Id.) Plaintiff attempted to withdraw from ASU, using the university's website.
9 (Id. at 11). It is unclear if Plaintiff successfully withdrew. Since then, Plaintiff began
10 receiving letters—it is unclear from whom—warning him to begin making payments on
11 the federal student loan he had taken out to attend ASU for the 2021 summer semester.
12 (Id.) He also received letters from ASU's Business Office, informing him that he owed
13 over \$1,7000 and that that number that would increase if he did not begin making loan
14 payments. (Id.)

15 On August 30, 2021, Plaintiff delivered an Arizona Tort Claims Act Notice of
16 Claim to the Arizona Board of Regents. (Doc. 48 at 11). On October 4, 2021, the Arizona
17 Department of Administration sent Plaintiff a letter denying Plaintiff's claims. (Doc. 48-1
18 at 8).

19 On November 5, 2021, Plaintiff filed a *pro se* Complaint in this Court, naming
20 Davis and the Arizona Board of Regents as Defendants. (Doc. 1). On September 2, 2022,
21 Plaintiff filed an Amended Complaint, this time naming as defendants ASU, Lisa Joyner
22 (a Dean of Students at ASU), and the Arizona Board of Regents.¹ (Doc. 48). The
23 Amended Complaint seeks monetary damages, a declaratory judgment, and injunctive
24 relief—seeking ASU to change its regulations. (Id. at 4).

25 On September 23, 2022, Defendants moved to dismiss Plaintiff's Amended
26 Complaint for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6). (Doc. 50 at 1).

27 ¹ Although Plaintiff's Amended Complaint lists the Arizona Board of Regents as a
28 defendant, the Arizona Board of Regents had already been dismissed from the case after
the Court granted Plaintiff's Motion to Dismiss Arizona Board of Regents as a party.
(Doc. 47).

1 Defendants also argue that Defendant Joyner cannot be sued in either her personal or
2 official capacities and that ASU is a non-jural entity that cannot be subject to suit. (Id.)
3 Plaintiff did not file a response to this motion and the time to do so has long since passed.
4 See LRCiv. 7.2(c) (opposing party has 14 days after service within which to serve and
5 file a responsive memorandum).

6 Under LRCiv. 7.2(i), if an unrepresented party “does not serve the required
7 answering memoranda, . . . such non-compliance may be deemed a consent to the denial
8 or granting of the motion and the Court may dispose of the motion summarily.” *Id.*
9 Because Plaintiff failed to respond to Defendant's motion to dismiss, the Court will
10 construe this as consent to granting the motion. Moreover, the Court finds that the bases
11 for the Motion are meritorious, as discussed below.

12 **II. Legal Standard**

13 A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of a
14 complaint. Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011) (citation omitted). Rule
15 12(b)(6) must be read in conjunction with Rule 8, which requires “a short and plain
16 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
17 8(a)(2); see also Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003). A
18 complaint need not provide detailed factual allegations but must provide more than
19 “labels and conclusions.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). It must
20 contain factual allegations sufficient to raise a right to relief above the speculative level
21 and to “state a claim that is plausible on its face.” Id. at 555, 570. “A claim has facial
22 plausibility when the pleaded factual content allows the court to draw the reasonable
23 inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556
24 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 556). A court may dismiss a claim
25 either because it lacks “a cognizable legal theory” or because it fails to allege sufficient
26 facts to support a cognizable legal claim. See SmileCare Dental Group v. Delta Dental
27 Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996).

28 When a court is deciding a motion to dismiss, “[a]ll allegations of material fact are

1 taken as true and construed in the light most favorable to the nonmoving party.” Smith v.
2 Jackson, 84 F.3d 1213, 1217 (9th Cir. 1996) (citing Everest & Jennings v. American
3 Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994)). However, legal conclusions
4 couched as factual allegations are not given a presumption of truthfulness, and
5 “conclusory allegations of law and unwarranted inferences are not sufficient to defeat a
6 motion to dismiss.” Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998).

7 Further, where the petitioner is *pro se*, particularly in civil rights cases, [courts
8 have an obligation] to construe the pleadings liberally and to afford the [plaintiff] the
9 benefit of the doubt.” Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc)
10 (citing Jones v. Cmty. Redevelopment Agency, 733 F.2 646, 649 (9th Cir. 1984)).

11 **III. Discussion**

12 The Amended Complaint’s “Basis for Jurisdiction” section lists fourteen state and
13 federal statutes and constitutional provisions. (Doc. 48 at 3). The “Statement of Claim”
14 section lists nine different causes of action, some specific, some vague: “I claim common
15 law tort, state constitutional tort, and federal constitutional tort, for violation of my rights
16 to freedom of speech and expression on college/university campus, retaliation, content
17 discrimination, viewpoint discrimination, and misrepresentation....” (Id. at 4). The Court
18 does its best to match these claims to the statutes and constitutional provisions listed in
19 the “Basis for Jurisdiction” section and liberally construes the Amended Complaint as
20 pleading the causes of action addressed below. However, despite the many claims,
21 statutes, and constitutional provisions provided, the Court finds that Plaintiff’s Amended
22 Complaint fails to state a plausible claim and must be dismissed.

23 **A. Plaintiff’s Amended Complaint Fails to State a Claim**

24 **1. Section 1983**

25 Plaintiff’s Amended Complaint alleges a violation of 42 U.S.C. § 1983. (Doc. 48
26 at 3). To succeed on a § 1983 claim, a plaintiff must show that (1) acts by the defendants;
27 (2) under color of state law; (3) deprived plaintiff of federal rights, privileges or
28 immunities; and (4) thereby caused him damage. Thornton v. City of St. Helens, 425 F.3d

1 1158, 1164 (9th Cir. 2005) (quotation omitted).

2 Section 1983 does not itself provide any substantive rights but rather provides “a
3 method for vindicating federal rights elsewhere conferred.” Albright v. Oliver, 510 U.S.
4 266, 271 (1994) (citation and quotation marks omitted). The Amended Complaint
5 references two federal rights: the Fourteenth Amendment’s right to due process and the
6 First Amendment’s right to freedom of speech and expression. (Doc. 48 at 3). The Court
7 addresses each in turn.

8 **(a) Due Process**

9 The Amended Complaint states that the Fourteenth Amendment’s due process
10 clause serves as a basis for federal question jurisdiction. (Doc. 48 at 3). The Amended
11 Complaint, however, goes no further than this in developing any argument for a claim
12 under that clause. Although the Court can see some potential connection between
13 procedural due process and the process by which Plaintiff was disciplined by ASU, it is
14 unable to reasonably infer based on the pleadings that Defendants are liable under this
15 theory. Plaintiff has failed to provide a cognizable legal theory centered around the denial
16 of due process.

17 **(b) Freedom of Speech and Expression**

18 Plaintiff appears to allege that his right to free speech was violated when ASU
19 disciplined him for his email to the nutrition instructor. The Amended Complaint,
20 however, provides no theory as to how exactly Defendants did so, or what portions of his
21 email constituted constitutionally protected speech and how.

22 To establish a First Amendment free speech violation, a plaintiff must provide
23 evidence that (1) he engaged in protected speech, (2) defendants’ actions would chill or
24 silence a person of ordinary firmness from future First Amendment activities, and (3)
25 defendants intended to interfere with the plaintiff’s First Amendment rights. Mendocino
26 Env’t Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1300 (9th Cir. 1999). Evidence of intent
27 may be direct or circumstantial. Id. at 1300-1301.

28 The Amended Complaint does not allow the Court to reasonably infer that

1 Defendants are liable for a violation of Plaintiff’s right to free speech. Plaintiff’s assertion
2 that “[m]y rant in the email to the Nutrition Instructor included matters of public concern
3 which are protected under...federal Constitution Amendment 1 freedom speech,” read
4 alongside his factual pleadings, is insufficient in meeting the above-stated elements of a
5 free speech violation. Similarly, his assertion—quoting an English case—that the student
6 disciplinary findings and “punishment[s]” have “disproportionally interfered with [my]
7 right of freedom of expression” is also insufficient in meeting the elements of a free
8 speech violation. Plaintiff does not specify which portions of his email constitute
9 protected speech, does not show how such portions constitute protected speech, does not
10 allege any intent on Defendants’ part to inhibit speech, and does not allege that either he
11 or a person of ordinary firmness would be silenced or have their speech chilled by
12 Defendants’ actions.

13 **(c) Retaliation**

14 In addition, Defendant lists “retaliation” under the Amended Complaint’s
15 “Statement of Claim” section. (Doc. 48 at 4). Although it is unclear under what statute
16 this retaliation claim is made, the Court assumes that this is a § 1983 retaliation claim.
17 However, such a claim can only be made in the employment context. See Surrell v. Cal.
18 Water Serv. Co., 518 F.3d 1097, 1108 (9th Cir. 2008) (citation omitted). To establish a §
19 1983 retaliation claim, a plaintiff must provide evidence that (1) he engaged in a
20 protected activity; (2) he suffered an adverse employment action; and (3) there was a
21 causal connection between the two. Id. Here, Plaintiff’s employment is entirely irrelevant
22 and thus Plaintiff cannot state a plausible § 1983 retaliation claim.

23 **2. Other Federal Claims**

24 The Amended Complaint lists three other federal statutes under its Basis for
25 Jurisdiction section: 20 U.S.C. § 1011(a), 42 U.S.C. § 12101 et seq., and 28 U.S.C. §
26 1367. (Doc. 48 at 3). The latter does not provide a cause of action but instead provides
27 federal courts with supplemental jurisdiction over state law claims in certain situations.
28 These statutes are not addressed elsewhere in the Amended Complaint. However, due to

1 its obligation to construe *pro se* Plaintiff’s pleadings liberally, the Court will read the
2 Amended Complaint as alleging causes of action based on both 20 U.S.C. § 1011(a) and
3 42 U.S.C. § 12101 et seq.

4 **(a) 20 U.S.C. § 1011(a)**

5 20 U.S.C. § 1011(a) provides that “institutions of higher education receiving
6 Federal financial assistance may not use such assistance...to undertake any study or
7 project or fulfil the terms of any contract containing an express or implied provision that
8 any person...of a particular race, religion, sex, or national origin be barred from
9 performing such study, project, or contract....” This provision is part of the Drug Free
10 Schools and Communities Act, which does not provide a private cause of action. D.D. v.
11 Stockton Univ., CV18-13506, 2019 WL 3369709 (D. N.J. July 26, 2019). Further, even
12 when viewing Plaintiff’s factual pleadings liberally, the Court cannot find any connection
13 between those facts and this statute. Plaintiff has failed to present a cognizable legal
14 theory or allege sufficient facts to support a cognizable legal claim under this statute. As
15 such, the Court dismisses Plaintiff’s claim based on 20 U.S.C. § 1011(a), if indeed one is
16 alleged.

17 **(b) ADA**

18 42 U.S.C. § 12101 et seq. is the Americans With Disabilities Act (“ADA”). The
19 ADA provides multiple causes of action and relevant to these factual pleadings is a
20 failure to accommodate claim. See, e.g., Alvarado v. Cajun Operating Co., 588 F.3d
21 1261, 1269 (9th Cir. 2009) (listing the elements of an ADA retaliation claim in the
22 employment context, which is not relevant here). To establish a prima facie failure to
23 accommodate claim under the ADA in a non-employment context such as this, a plaintiff
24 must show that (1) he is disabled within the meaning of the ADA, (2) he was denied a
25 reasonable accommodation that he needs in order to enjoy meaningful access to the
26 benefits of public services, and (3) the program providing the benefit is a public entity.
27 Csutoras v. Paradise High Sch., 12 F.4th 960, 968-69 (9th Cir. 2021) (citation omitted).
28 When the plaintiff is a private plaintiff seeking monetary damages, as is the case here, he

1 must prove a *mens rea* of intentional discrimination, which may be met by showing
2 deliberate indifference. *Id.* at 969 (quoting A.G. v. Paradise Valley Unified Sch. Dist. No
3 69, 815 F.3d 1195, 1204 (9th Cir. 2016)).

4 To establish the first element, that a plaintiff is disabled within the meaning of the
5 ADA, a plaintiff must show that he has a physical or mental impairment that substantially
6 limits one of more of his major life activities. Coons v. Sec’y of U.S. Dep’t of Treasury,
7 383 F.3d 879, 994 (9th Cir. 2004). Here, Plaintiff—in his email to the nutrition
8 instructor—claims that he has been given the status “Disabled American Veteran rated
9 100% BiPolar Disorder from 20 years ago...” (Doc. 48-1 at 3). It is unclear if Plaintiff
10 alleges that he still has a mental illness. Because a motion to dismiss requires the Court to
11 consider Plaintiff’s factual allegations in the light most favorable to him and because we
12 must liberally construe his *pro se* pleadings, the Court finds that Plaintiff’s Amended
13 Complaint has sufficiently pled the first element.

14 The Amended Complaint, however, does not otherwise provide factual or legal
15 allegations sufficient for this Court to reasonably infer that Defendants are liable under
16 this theory. Plaintiff does not point to any accommodation that he sought or was denied.
17 Even under the liberal pleadings standards this Court must apply, the fact that he may
18 suffer from a mental illness is insufficient to hold up a legally cognizable theory under
19 the ADA. The Court therefore dismisses without prejudice any claims that the Amended
20 Complaint makes under the ADA.

21 **3. State Law Claims**

22 The Court thus dismisses Plaintiff’s federal claims, leaving a handful of state law
23 claims. A district court may decline to exercise supplemental jurisdiction over
24 supplemental state law claims if “the district court has dismissed all claims over which it
25 has original jurisdiction.” 28 U.S.C. § 1367(c)(3). Generally, when federal claims are
26 dismissed before trial, pendant state claims should also be dismissed. Religious Tech. Ctr.
27 V. Wollersheim, 971 F.2d 364, 367-68 (9th Cir. 1992) (quoting Jones v. Cmty.
28 Redevelopment Agency, 733 F.2d at 651). Because this Court dismisses Plaintiff’s

1 federal law claims, it will also dismiss his state law claims.

2 **B. Lisa Joyner**

3 Plaintiff is suing Defendant Lisa Joyner in both her personal and official
4 capacities. (Doc. 48 at 4). Defendants argue that Joyner should be dismissed with
5 prejudice as a party in both capacities. (Doc. 50 at 4). However, Defendants base their
6 argument solely around Plaintiff's § 1983 claims. (Id. at 4-5). Because Plaintiff asserts
7 non-§ 1983 claims and Defendants' arguments here focus exclusively on that statute, the
8 Court will not dismiss Joyner as a party.

9 **C. ASU is a Non-Jural Entity**

10 Finally, Defendants move to dismiss ASU with prejudice because it is a non-jural
11 entity and not subject to suit. (Doc. 50 at 6). Under Arizona law, a governmental agency
12 may only be sued if the state statute that created the agency provides as such. Cohen v.
13 Ariz. State Univ., CV21-1178-PHX-GMS, 2022 WL 1747776, at *8 (D. Ariz. May 31,
14 2022); Braillard v. Maricopa Cnty., 232 P.3d 1263, 1269 (Ariz. Ct. App. 2010). The
15 statute responsible for creating ASU does not so provide. A.R.S. § 15-1601; Cohen at *8.
16 Consequently, ASU may not be sued. Cohen at *8; Krist v. Arizona, No. CV17-2524
17 PHX DGC, 2018 WL 1570260, at *2 (D. Ariz. Mar. 30, 2018).

18 Even if the Amended Complaint did plausibly state a claim, ASU is a non-jural
19 entity that may not be sued. The Court will dismiss it from the case with prejudice.

20 **IV. Conclusion**

21 In light of the foregoing, and because when granting a 12(b)(6) motion to dismiss,
22 a District Court must sua sponte give Plaintiff leave to amend if any amendment would
23 not be futile, Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc),

24 **IT IS HEREBY ORDERED granting** Defendants' Motion to Dismiss. (Doc.
25 50).

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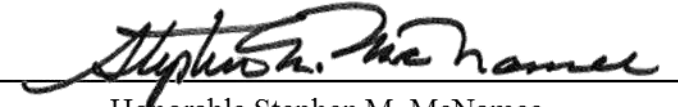
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IT IS FURTHER ORDERED dismissing with prejudice Defendant Arizona State University as a defendant and **directing** the Clerk of the Court to dismiss Arizona State University as a Defendant.

IT IS FURTHER ORDERED dismissing without prejudice and with leave to amend Plaintiff's Amended Complaint. (Doc. 48).

IT IS FURTHER ORDERED that Plaintiff has until December 23, 2022 to file a second amended complaint.

Dated this 9th day of December, 2022.



Honorable Stephen M. McNamee
Senior United States District Judge