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6 **UNITED STATES DISTRICT COURT**
78 EASTERN DISTRICT OF CALIFORNIA
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10 FREDERICK KARL JOST,

CASE NO. 1:09-cv-00507-GBC PC

11 v. Plaintiff,

ORDER DISMISSING COMPLAINT, WITH
PREJUDICE, FOR FAILURE TO STATE A
CLAIM AND DIRECTING CLERKS OFFICE
TO ENTER JUDGMENT

12 JERRY BROWN, et al.,

(Doc. 15)

13 Defendants.
1415 **I. Screening Requirement**16 Plaintiff Frederick Karl Jost (“Plaintiff”) is a state prisoner proceeding pro se and in forma
17 pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action was transferred from
18 the Central District of California on March 18, 2009. The Court issued an order dismissing the first
19 amended complaint, with leave to amend, for failure to state a claim on December 6, 2010. (Doc.
20 14.) Currently pending before the Court is the second amended complaint, filed December 22, 2010.
21 (Doc. 15.)22 The Court is required to screen complaints brought by prisoners seeking relief against a
23 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
24 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
25 “frivolous or malicious,” that “fails to state a claim on which relief may be granted,” or that “seeks
26 monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B).27 In determining whether a complaint states a claim, the Court looks to the pleading standard
28 under Federal Rule of Civil Procedure 8(a). Under Rule 8(a), a complaint must contain “a short and

1 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
2 “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it
3 demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Ashcroft v.
4 Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 555
5 (2007)).

6 Under section 1983, Plaintiff must demonstrate that each defendant personally participated
7 in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). This requires
8 the presentation of factual allegations sufficient to state a plausible claim for relief. Iqbal, 129 S. Ct.
9 at 1949-50; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). “[A] complaint [that]
10 pleads facts that are ‘merely consistent with’ a defendant’s liability . . . ‘stops short of the line
11 between possibility and plausibility of entitlement to relief.’” Iqbal, 129 S. Ct. at 1949 (quoting
12 Twombly, 550 U.S. at 557). Further, although a court must accept as true all factual allegations
13 contained in a complaint, a court need not accept a plaintiff’s legal conclusions as true. Iqbal, 129
14 S. Ct. at 1949. “Threadbare recitals of the elements of a cause of action, supported by mere
15 conclusory statements, do not suffice.” Id. (quoting Twombly, 550 U.S. at 555).

16 **II. Complaint Allegations**

17 Plaintiff is incarcerated at Avenal State Prison. He is bringing suit against Defendants Jerry
18 Brown, James Hartley, N. Grannis, E. McCant, and Paula Ransom, in their individual and official
19 capacities, for violations of the Eighth, Fourteenth, and Fifteenth Amendments. He is seeking
20 punitive damages in the amount of \$10,000. (Doc. 15, p. 12.)

21 Despite being previously informed that he was to submit a short and plain statement of the
22 facts without any legal citations or argument, Plaintiff’s complaint is thirteen pages of legal argument
23 and case citation, with some factual statements interspersed.

24 Plaintiff alleges that new shoes are given to inmates at least once per year. (Id., p. 7.) For
25 the last fourteen years, Plaintiff has been authorized to wear soft soled shoes due to ankle and knee
26 pain. (Id., pp. 5, 8.) Plaintiff filed an inmate appeal requesting he be issued a new pair of shoes due
27 to orthopedic necessity. (Id., pp. 5, 10.) Defendants Hartley, Grannis, McCant, and Ransom denied
28 Plaintiff’s request for soft soled shoes due to prison overcrowding and budgetary constraints. (Id.,

1 pp. 4-5, 9, 10.) Although Plaintiff was provided with the legal standards that apply to his claim in
2 the orders issued on June 22 and December 6, 2010, he has failed to state a cognizable claim.

3 **III. Discussion**

4 **A. Eighth Amendment**

5 To prove a violation of the Eighth Amendment the plaintiff must “objectively show that he
6 was deprived of something ‘sufficiently serious,’ and make a subjective showing that the deprivation
7 occurred with deliberate indifference to the inmate’s health or safety.” Thomas v. Ponder, 611 F.3d
8 1144, 1150 (9th Cir. 2010)(citations omitted). Deliberate indifference requires a showing that
9 “prison officials were aware of a “substantial risk of serious harm” to an inmates health or safety and
10 that there was no “reasonable justification for the deprivation, in spite of that risk..” Id. (quoting
11 Farmer v. Brennan, 511 U.S. 825, 837, 844 (1994)).

12 Plaintiff’s complaint, that he did not receive new shoes, fails to show that he was deprived
13 of something sufficiently serious or that he was at risk of serious harm. Additionally nothing
14 indicates that any named defendant was aware of a substantial risk of serious harm to Plaintiff by
15 not providing him with new shoes. Thomas, 611 F.3d at 1150. Therefore, the complaint fails to state
16 a cognizable claim.

17 **B. Equal Protection**

18 An equal protection claim may be established by showing that the defendant intentionally
19 discriminated against the plaintiff based on the plaintiff’s membership in a protected class, Lee, 250
20 F.3d at 686; Barren v. Harrington, 152 F.3d 1193, 1194 (1998), or that similarly situated individuals
21 were intentionally treated differently without a rational relationship to a legitimate state purpose,
22 Thornton v. City of St. Helens, 425 F.3d 1158, 1167 (2005); Village of Willowbrook v. Olech, 528
23 U.S. 562, 564 (2000).

24 Although he alleges that he is a disabled inmate, the disabled do not constitute a protected
25 class for equal protection purposes. Pierce v. County of Orange, 526 F.3d 1190, 1225 (9th Cir.
26 2008). Plaintiff has failed to state a cognizable claim because the complaint fails to show that any
27 similarly situated inmates intentionally received different treatment. Thornton, 425 F.3d at 1167;
28 Village of Willowbrook, 528 U.S. at 564.

1 **C. Americans With Disabilities Act**

2 To the extent that Plaintiff attempts to state a claim under Title II of the Americans with
3 Disabilities Act (“ADA”) he fails to state a cognizable claim. Title II provides that “no qualified
4 individual with a disability shall, by reason of such disability, be excluded from participation in or
5 be denied the benefits of the services, programs, or activities of a public entity, or be subject to
6 discrimination by such entity.” 42 U.S.C. § 12132. Title II of the ADA applies to inmates within
7 state prisons. Pennsylvania Dept. of Corrections v. Yeskey, 118 S. Ct. 1952, 1955 (1998); see also
8 Simmons v. Navajo County, Arizona, 609 F.3d 1011, 1021 (9th Cir. 2010). To establish a violation
9 of Title II of the ADA, a plaintiff must show that (1) he is a qualified individual with a disability;
10 (2) he was “excluded from participation in or denied the benefits of the public entity’s services,
11 programs, or activities, or was otherwise discriminated against by the public entity;” and (3) such
12 exclusion or discrimination, or denial of benefits was because of his disability.” Simmons, 609 F.3d
13 at 1021 (citations omitted). “The ADA prohibits discrimination because of disability, not inadequate
14 treatment for disability.” Id.

15 Plaintiff’s allegation that he is being denied new shoes because of budgetary constraints at
16 the prison does not state a cognizable claim under the Americans With Disabilities Act.

17 **D. Fifteenth Amendment**

18 Plaintiff fails to state a cognizable claim under the Fifteenth Amendment which provides for
19 the right to vote and is not implicated by prisoners medical needs.

20 **IV. Conclusion and Order**

21 Plaintiff’s complaint fails to state a claim upon which relief may be granted under section
22 1983. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend ‘shall be freely
23 given when justice so requires,’” Fed. R. Civ. P. 15(a), and “[l]eave to amend should be granted if
24 it appears at all possible that the plaintiff can correct the defect,” Lopez v. Smith, 203 F.3d 1122,
25 1130 (9th Cir. 2000) (internal citations omitted). However, in this action Plaintiff has been granted
26 two opportunities to amend the complaint, with guidance by the Court. Plaintiff has now filed three
27 complaints without alleging facts against any of the defendants sufficient to state a claim under §
28 1983. The Court finds that the deficiencies outlined above are not capable of being cured by

1 amendment, and therefore further leave to amend should not be granted. 28 U.S.C. §
2 1915(e)(2)(B)(ii); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).

3 This action is HEREBY ORDERED dismissed, with prejudice, for failure to state a claim
4 under section 1983, and the Clerk's Office shall enter judgment. This dismissal counts as a strike
5 under 28 U.S.C. § 1915(g).

6 IT IS SO ORDERED.

7 Dated: December 27, 2010

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UNITED STATES MAGISTRATE JUDGE