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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT J. WEHR,)
)
 Plaintiff,)
)
 v.)
)
 MICHAEL J. ASTRUE,)
 Commissioner of Social)
 Security,)
)
 Defendant.)

1:09-cv-02124-SMS

**ORDER DETERMINING THAT
PLAINTIFF HAS STATED A CLAIM
AGAINST THE COMMISSIONER**

**ORDER DIRECTING CLERK TO
ISSUE AND SERVE SCHEDULING
ORDER AND NEW CASE DOCUMENTS**

**ORDER DIRECTING PLAINTIFF TO
SUBMIT COMPLETED SERVICE
DOCUMENTS TO THE COURT**

**ORDER DIRECTING CLERK TO
FORWARD ANY SERVICE DOCUMENTS
SUBMITTED TO THE MARSHAL FOR
SERVICE OF PROCESS**

**ORDER DIRECTING THE MARSHAL
TO SERVE PROCESS UPON RECEIPT
OF SERVICE DOCUMENTS**

**ORDER DIRECTING PLAINTIFF
TO IMMEDIATELY INFORM THE
COURT OF HIS CURRENT
TELEPHONE NUMBER OR WITHIN
FOURTEEN DAYS**

Plaintiff is proceeding pro se with an action in which he seeks judicial review of a final decision of the Commissioner of Social Security denying his application for benefits.

1 On December 7, 2009, plaintiff filed his complaint, as well
2 as a motion to proceed in forma pauperis. On January 6, 2010,
3 the Court granted plaintiff's motion to proceed in forma
4 pauperis.

5 I. Screening of the Complaint

6 In cases wherein the plaintiff is proceeding in forma
7 pauperis, the Court is required to screen cases and shall dismiss
8 the case at any time if the Court determines that the allegation
9 of poverty is untrue, or the action or appeal is frivolous or
10 malicious, fails to state a claim upon which relief may be
11 granted, or seeks monetary relief against a defendant who is
12 immune from such relief. 28 U.S.C. 1915(e)(2).

13 Fed. R. Civ. P. 8(a) provides:

14 A pleading that states a claim for relief must
15 contain:

- 16 (1) a short and plain statement of the grounds
17 for the court's jurisdiction, unless the court
18 already has jurisdiction and the claim needs no
19 new jurisdictional support;
20 (2) a short and plain statement of the claim
21 showing that the pleader is entitled to relief;
22 and
23 (3) a demand for the relief sought, which may
24 include relief in the alternative or different
25 types of relief.

26 Rule 8(a)'s simplified pleading standard applies to all civil
27 actions, with limited exceptions," none of which applies to
28 section 1983 actions. Swierkiewicz v. Sorema N. A., 534 U.S.
506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a
complaint must contain "a short and plain statement of the claim
showing that the pleader is entitled to relief...." Fed. R. Civ.
P. 8(a). "Such a statement must simply give the defendant fair
notice of what the plaintiff's claim is and the grounds upon

1 which it rests." Swierkiewicz, 534 U.S. at 512. However, "the
2 liberal pleading standard...applies only to a plaintiff's factual
3 allegations." Neitze v. Williams, 490 U.S. 319, 330 n.9 (1989).

4 In reviewing a complaint under this standard, the Court
5 must accept as true the allegations of the complaint in question,
6 Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740
7 (1976), construe the pro se pleadings liberally in the light most
8 favorable to the plaintiff, Resnick v. Hayes, 213 F.3d 443, 447
9 (9th Cir. 2000), and resolve all doubts in the plaintiff's favor,
10 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

11 Although a complaint attacked by a Rule 12(b)(6) motion
12 to dismiss does not need detailed factual allegations, a
13 plaintiff does not meet his or her obligation to provide the
14 grounds of entitlement to relief by supplying only conclusions,
15 labels, or a formulaic recitation of the elements of a claim.
16 Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964-65 (2007).
17 Factual allegations must be sufficient, when viewed in light of
18 common experience, to raise a right to relief above the
19 speculative level, and to provide plausible grounds to suggest
20 and infer the element, or to raise a reasonable expectation that
21 discovery will reveal evidence of the required element. Bell,
22 127 S.Ct. at 1965. Once a claim has been stated adequately, it
23 may be supported by showing any set of facts consistent with the
24 allegations of the complaint, and it may not be dismissed based
25 on a court's assessment that the plaintiff will fail to find
26 evidence to support the allegations or prove the claim to the
27 satisfaction of the finder of fact. Bell, 127 S.Ct. at 1969.

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1 If the Court determines that the complaint fails to
2 state a claim, leave to amend should be granted to the extent
3 that the deficiencies of the complaint can be cured by amendment.
4 Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc).
5 Dismissal of a pro se complaint for failure to state a claim is
6 proper only where it is obvious that the plaintiff cannot prevail
7 on the facts that he has alleged, and that an opportunity to
8 amend would be futile. Lopez v. Smith, 203 F.3d at 1128.

9 A claim is frivolous if it lacks an arguable basis
10 either in law or fact. Neitzke v. Williams, 490 U.S. 319, 324
11 (1989). A frivolous claim is based on an inarguable legal
12 conclusion or a fanciful factual allegation. Id. A federal
13 court may dismiss a claim as frivolous if it is based on an
14 indisputably meritless legal theory or if the factual contentions
15 are clearly baseless. Id.

16 The test for malice is a subjective one that requires
17 the Court to determine whether the applicant is proceeding in
18 good faith. Kinney v. Plymouth Rock Squab. Co., 236 U.S. 43, 46
19 (1915); see Wright v. Newsome, 795 F.2d 964, 968 n. 1 (11th Cir.
20 1986). A lack of good faith is most commonly found in repetitive
21 suits filed by plaintiffs who have used the advantage of cost-
22 free filing to file a multiplicity of suits. A complaint may be
23 inferred to be malicious if it suggests an intent to vex the
24 defendants or abuse the judicial process by re-litigating claims
25 decided in prior cases, Crisafi v. Holland, 655 F.2d 1305, 1309
26 (D.C.Cir. 1981); if it threatens violence or contains
27 disrespectful references to the Court, id.; or, if it contains
28 untrue material allegations of fact or false statements made with

1 knowledge and an intent to deceive the Court, Horsev v. Asher,
2 741 F.2d 209, 212 (8th Cir. 1984).

3 Here, plaintiff has stated a claim against the
4 Commissioner of Social Security for review of a specific,
5 unfavorable decision by the Commissioner of Social Security.

6 II. Issuance and Service of Scheduling Order and New
7 Case Documents, Including Service Documents, on
8 Plaintiff

9 Because plaintiff has previously established his
10 entitlement to proceed in forma pauperis, and because plaintiff
11 has stated a claim against the Commissioner, the Clerk is
12 DIRECTED to issue and serve plaintiff with a scheduling order, as
13 well as all customary new case documents, including but not
14 limited to USM-285 instructions and forms.

15 Upon plaintiff's return of the completed service
16 documents to the Court, the Clerk is DIRECTED to forward same on
17 to the United States Marshal, together with a copy of this order.

18 III. Directions to Plaintiff to Complete and Return
19 Completed Service Documents to the Clerk

20 Plaintiff is DIRECTED to complete and return to the
21 Court, without delay, the service documents that will be served
22 on plaintiff so that the Clerk may then forward them, together
23 with a copy of this order, to the United States Marshal for
24 service of process.

25 IV. Service of the Complaint by the Marshal

26 Because plaintiff has stated a claim, the United States
27 Marshal shall serve the complaint on the Commissioner when
28 appropriate service documents are forwarded to the Marshal.

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1 V. Directions to Plaintiff to Provide a Telephone Number
2 to the Court within Fourteen Days

3 Local Rule 182(f) requires that each party appearing in
4 propria persona is under a continuing duty to notify the Clerk
5 and all other parties of any change of address or telephone
6 number of the party; absent such notice, service of documents at
7 the prior address of the party shall be fully effective.

8 The Court notes that plaintiff has not provided a
9 telephone number on any pleadings filed with the court thus far,
10 as required by Local Rule 131(a). Accordingly, plaintiff is
11 DIRECTED to immediately provide the Court with a current
12 telephone number or certainly within fourteen (14) days from the
13 date of service of this order.

14 IT IS SO ORDERED.

15 **Dated:** February 10, 2010

16 /s/ Sandra M. Snyder
17 UNITED STATES MAGISTRATE JUDGE
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