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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF CALIFORNIA

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8 RAYMOND GUTHREY,  
9 Plaintiff,

1:10-cv-02177-OWW-GSA

MEMORANDUM DECISION REGARDING  
MOTION TO DISMISS (Doc. 8)

10  
11 v.

12 CALIFORNIA DEPARTMENT OF  
13 CORRECTIONS AND  
14 REHABILITATION,  
et al.,  
Defendants.

15 I. INTRODUCTION.

16 Plaintiff Raymond Guthrey ("Plaintiff") brings this employment  
17 discrimination action against the California Department of  
18 Corrections and Rehabilitation ("CDCR") and Michael Pate, Jr.  
19 ("Pate").

20 On December 16, 2010, Defendants filed a motion to dismiss  
21 Plaintiff's complaint. (Doc. 8). Plaintiff filed opposition to  
22 Defendants' motion on February 18, 2011. Defendants filed a reply  
23 on February 24, 2011. (Doc. 10).

24 II. FACTUAL BACKGROUND.

25 Plaintiff is a 56-year-old Caucasian male who subscribes to  
26 the Ananda Marga faith. Followers of the Ananda Marga believe in  
27 allowing the hair on their heads, faces, and bodies to grow  
28

1 naturally. In observance of his faith, Plaintiff maintains a full  
2 beard and long hair.

3 From 1984 until retirement in 2008, Plaintiff worked as a  
4 Correctional Counselor at Sierra Conservation Center, a CDCR  
5 facility. Throughout his employment, Plaintiff exceeded expected  
6 standards during his annual performance reviews.

7 During his employment, Defendant Pate, a CDCR employee,  
8 regularly called Plaintiff "Ragjeesh" and other slurs directed  
9 towards persons of Middle Eastern or South Asian ancestry.

10 Plaintiff was also accused of being homosexual because he did not  
11 identify with the "macho" male stereotype embraced by Pate and  
12 other CDCR employees. After wearing a kilt in honor of a colleague  
13 who was given an award, Plaintiff was told that "men don't wear  
14 dresses" and was derogatorily referred to as a woman by CDCR  
15 employees.

16 In early 2010, Plaintiff applied to participate in CDCR's  
17 retired annuitant program as a contract employee. On April 29,  
18 2010, Pate contacted Plaintiff and extended an offer of employment  
19 to him on behalf of the CDCR. Plaintiff accepted the offer and  
20 agreed to begin working on May 3, 2010. During the April 29, 2010  
21 phone call, Plaintiff discussed grooming standards with Pate. Pate  
22 stated "just don't wear a kilt." Pate also stated that Plaintiff  
23 had "gone south" at the time that Plaintiff instituted a counseling  
24 program at Sierra Conservation Center involving turban-wearing  
25 Ananda Marga clergy.

26 On May 3, 2010, Plaintiff arrived at Sierra Conservation  
27 Center to begin his position. Plaintiff was scheduled to attend a  
28 week-long training. Upon his arrival in the training classroom,

1 Plaintiff observed Pate gesturing wildly and jabbing his finger  
2 toward the door while staring at Plaintiff. Pate stomped toward  
3 Plaintiff, grabbed him by the arm, and forced him into the hallway.  
4 Pate physically blocked Plaintiff from entering the classroom.  
5 Pate told Plaintiff that "this" was not going to work and that  
6 Plaintiff was to leave the grounds immediately.

7 Plaintiff attempted to contact CDCR employees about the  
8 incident, but none of his telephone or email messages were  
9 returned.

### 10 **III. LEGAL STANDARD.**

11 Dismissal under Rule 12(b)(6) is appropriate where the  
12 complaint lacks sufficient facts to support a cognizable legal  
13 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699  
14 (9th Cir.1990). To sufficiently state a claim to relief and  
15 survive a 12(b)(6) motion, the pleading "does not need detailed  
16 factual allegations" but the "[f]actual allegations must be enough  
17 to raise a right to relief above the speculative level." *Bell Atl.*  
18 *Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d  
19 929 (2007). Mere "labels and conclusions" or a "formulaic  
20 recitation of the elements of a cause of action will not do." *Id.*  
21 Rather, there must be "enough facts to state a claim to relief that  
22 is plausible on its face." *Id.* at 570. In other words, the  
23 "complaint must contain sufficient factual matter, accepted as  
24 true, to state a claim to relief that is plausible on its face."  
25 *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173  
26 L.Ed.2d 868 (2009) (internal quotation marks omitted).

27 The Ninth Circuit has summarized the governing standard, in  
28 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to

1 survive a motion to dismiss, the nonconclusory factual content, and  
2 reasonable inferences from that content, must be plausibly  
3 suggestive of a claim entitling the plaintiff to relief." *Moss v.*  
4 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009) (internal  
5 quotation marks omitted). Apart from factual insufficiency, a  
6 complaint is also subject to dismissal under Rule 12(b)(6) where it  
7 lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or  
8 where the allegations on their face "show that relief is barred"  
9 for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct.  
10 910, 166 L.Ed.2d 798 (2007).

11 In deciding whether to grant a motion to dismiss, the court  
12 must accept as true all "well-pleaded factual allegations" in the  
13 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,  
14 however, "required to accept as true allegations that are merely  
15 conclusory, unwarranted deductions of fact, or unreasonable  
16 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988  
17 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss,  
18 if a district court considers evidence outside the pleadings, it  
19 must normally convert the 12(b)(6) motion into a Rule 56 motion for  
20 summary judgment, and it must give the nonmoving party an  
21 opportunity to respond." *United States v. Ritchie*, 342 F.3d 903,  
22 907 (9th Cir. 2003). "A court may, however, consider certain  
23 materials-documents attached to the complaint, documents  
24 incorporated by reference in the complaint, or matters of judicial  
25 notice-without converting the motion to dismiss into a motion for  
26 summary judgment." *Id.* at 908.

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1 **IV. Discussion**

2 **A. The CDCR's Eleventh Amendment Immunity**

3 Plaintiff's first, second, third, and seventh causes of action  
4 are advanced only against CDCR. As Plaintiff acknowledges, CDCR is  
5 a state entity. (Complaint at 1). The Eleventh Amendment of the  
6 United States Constitution grants state entities such as the CDCR  
7 immunity from suits for damages in federal court. *See, e.g.,*  
8 *Taylor v. List*, 880 F.2d 1040, 1045 (noting that Nevada Department  
9 of Corrections was a state agency immune from suit under the  
10 Eleventh Amendment).

11 Although Plaintiff's prayer for relief includes a request for  
12 injunctive relief, Plaintiff lacks standing to pursue the remedy he  
13 requests. The complaint seeks an injunction:

14 enjoining [Defendants] from discriminating against CDCR  
15 employees on the basis of religion, ancestry, or gender  
16 identity, and compelling Defendant CDCR to take  
affirmative steps to promote a culture of understanding  
and diversity among its employees.

17 (Complaint at 11). As Plaintiff is no longer working for the CDCR,  
18 he has no standing to seek injunctive relief tailored to benefit  
19 current employees. *See Walsh v. Nev. Dep't of Human Res.*, 471 F.3d  
20 1033, 1037 (9th Cir. 2006) (recognizing that former employees lack  
21 standing to seek injunctive relief because they would not stand to  
22 benefit from an injunction requiring the anti-discriminatory  
23 policies to cease at their former place of work) (citation omitted).

24 The first, second, third, and seventh causes of action fail to  
25 state cognizable claims; these claims are DISMISSED.

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1 **B. Federal Claims**

2 **1. Section 1981 Claim**

3 Plaintiff's fourth cause of action under section 1981 is  
4 advanced against "all Defendants." Plaintiff's section 1981 claim  
5 is based on his contention that he was "deprived [] of the...right  
6 to be free from intentional discrimination based on race, as  
7 provided in 42 U.S.C. § 1983."

8 Section 1981 guarantees "'all persons' the right to 'make and  
9 enforce contracts.'" *Johnson v. Riverside Healthcare Sys, LP*, 534  
10 F.3d 1116, 1122 (9th Cir. 2008) (quoting 42 U.S.C. § 1981(a)).  
11 "This right includes the right to the 'enjoyment of all benefits,  
12 privileges, terms, and conditions of the contractual relationship,'  
13 including the relationship between employer and employee." *Id.*  
14 (quoting section 1981(b)). In the employment context, courts apply  
15 Title VII standards to section 1981 claims. *See Manatt v. Bank of*  
16 *America, NA*, 339 F.3d 792, 797 (9th Cir. 2003) (the "legal  
17 principles guiding a court in a Title VII dispute apply with equal  
18 force in a § 1981 action"). Title VII makes it an "unlawful  
19 employment practice for an employer . . . to fail or refuse to hire  
20 or to discharge any individual, or otherwise to discriminate  
21 against any individual with respect to his compensation, terms,  
22 conditions, or privileges or employment, because of such  
23 individual's race." 42 U.S.C. § 2000e *et seq.*

24 As an initial matter, Plaintiff's fourth cause of action fails  
25 as to CDCR because section 1981 does not provide a cause of action  
26 against state entities. *See, e.g., Pittman v. Oregon*, 509 F.3d  
27 1065, 1074 (9th Cir. 2007) ("we hold that § 1981 does not contain  
28 a cause of action against states"). To the extent Plaintiff seeks

1 to sue Pate in his official capacity, such a claim is not  
2 cognizable, because an official capacity claim is in effect one  
3 against the state. See *Binum v. Warner*, 314 Fed. Appx. 914, 914-15  
4 (9th Cir. 2008) (unpublished) (official capacity suit against  
5 employee of state agency not cognizable under section 1981).

6 Plaintiff's only cognizable section 1981 claim is against Pate  
7 in his individual capacity. Defendants contend that the complaint  
8 fails to state a claim under section 1981 because its allegations  
9 are implausible. Defendants argue that "plaintiff's allegations  
10 regarding his interactions with Pate concerning the retired  
11 annuitant position do not suggest the influence of racially  
12 discriminatory animus." (Motion to Dismiss at 8). Defendants'  
13 discussion of the complaint's allegations is incomplete.

14 The complaint alleges that Pate used derogatory racial slurs  
15 to refer to Plaintiff. Specifically, the complaint alleges that  
16 Pate "regularly called Plaintiff 'Ragjeesh' and other slurs  
17 directed towards persons of Middle Eastern or South Asian  
18 ancestry." (Complaint at 3). The complaint also alleges that  
19 Pate's decision to take adverse employment action against Plaintiff  
20 was motivated by Pate's perception of Plaintiff's race. The  
21 complaint contains sufficient factual allegations to support an  
22 inference that Pate's adverse employment action against Plaintiff  
23 was motivated by racial animus; Plaintiff's allegations, accepted  
24 as true, "give rise to an inference of unlawful discrimination."  
25 See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253  
26 (1981) (discussing elements of employment discrimination claim); see  
27 also *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir.  
28 2003) (same). The credibility of Plaintiff's theory is a matter

1 for trial.

2 **2. Section 1983 Claim**

3 Plaintiff's fifth cause of action is a section 1983 employment  
4 discrimination claim. Section 1983 imposes liability upon any  
5 person who, acting under color of state law, deprives another of a  
6 federally protected right. *Karim-Panahi v. Los Angeles Police*  
7 *Dep't*, 839 F.2d 621, 624 (9th Cir. 1988); 42 U.S.C. § 1983.

8 The complaint does not allege any cognizable section 1983  
9 claim against the CDCR, as the CDCR is immune from damages suits in  
10 federal court and Plaintiff lacks standing to pursue the injunctive  
11 relief he requests. Plaintiff's only cognizable section 1983 claim  
12 is against Pate in his individual capacity.

13 Defendants contend that Plaintiff's section 1983 claim is  
14 subject to dismissal because Plaintiff has not alleged a protected  
15 property interest in employment with the CDCR. Defendants'  
16 argument is misplaced. The cases Defendants cite, such as *Squaw*  
17 *Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 948 (9th Cir.2004),  
18 *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62  
19 (9th Cir.1994), *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 142-43  
20 (3d Cir.2000), and *Lum v. Jensen*, 876 F.2d 1385, 1389 -1390 (9th  
21 Cir.1989) all concern due process claims under section 1983, not  
22 employment discrimination claims. Although the complaint alleges  
23 violation of Plaintiff's due process rights based on his  
24 termination, the complaint also alleges an equal protection  
25 violation.

26 Plaintiff's opposition to the motion to dismiss argues that  
27 Plaintiff's section 1983 claim survives because section 1983  
28 provides relief for alleged violations of his federal statutory



1 rights under Title VII. To the extent Plaintiff's claim is based  
2 on purported violations of Title VII, Plaintiff's claim is not  
3 cognizable. Title VII provides the exclusive federal remedy for  
4 violation of its own terms. *See, e.g., Mummelthie v. City of Mason*  
5 *City*, 873 F. Supp. 1293, 1323 (N.D. Iowa 1995) (citing *Johnston v.*  
6 *Harris County Flood Control Dist.*, 869 F.2d 928, 933 (5th Cir.  
7 1988); *see also Learned v. Bellevue*, 860 F.2d 928, 933 (9th Cir.  
8 1988) ("Violation of rights created by Title VII cannot form the  
9 basis of section 1983 claims") (citing *Great Am. Fed. Sav. & Loan*  
10 *Ass'n v. Novotny*, 442 U.S. 366, 378 (1979) *superceded on other*  
11 *grounds by statute as stated in Alexander v. Gerhardt Enters.*, 40  
12 F.3d 187, 192 (7th Cir. 1994)).

### 13 **C. Remaining Claims**

14 Plaintiff's sixth and seventh causes of action assert claims  
15 under California Government Code section 12940, California's Fair  
16 Employment and Housing Act ("FEHA"). CDCR is immune. *Freeman v.*  
17 *Oakland Unified Sch. Dist.*, 179 F.3d 846, 847 (9th Cir. 1999)  
18 ("California has not waived its immunity to FEHA actions in federal  
19 court"). Pate is not subject to claims under section 12940, as  
20 only an individual's employer may be held liable under FEHA.  
21 *Janken v. GM Huges Electronics*, 46 Cal. App. 4th 55, 80 (Cal. Ct.  
22 App. 1996).

23 Plaintiff's eighth cause of action is for termination in  
24 violation of public policy; this claim is not cognizable against a  
25 state entity or its employees. *Miklosy v. Regents of University of*  
26 *California*, 44 Cal. 4th 876, 900 (Cal. 2008).

27 Plaintiff concedes the sixth, seventh, and eighth causes of  
28 action are subject to dismissal. These claims are DISMISSED, with

1 prejudice.

2 **ORDER**

3 For reasons stated above, IT IS ORDERED:

4 1) Plaintiff's first, second, third, and fifth causes of  
5 action are DISMISSED, without prejudice;

6 2) Plaintiff's sixth, seventh, and eighth causes of action are  
7 DISMISSED WITH PREJUDICE;

8 3) Plaintiff shall submit an amended complaint within 20 days  
9 of electronic service of this order; Defendants shall file  
10 responsive pleading within 30 days of service of any amended  
11 complaint; and

12 4) Defendants shall file a form of order consistent with this  
13 memorandum decision within 5 days of electronic service of  
14 this decision.

15 IT IS SO ORDERED.

16 **Dated: March 29, 2011**

**/s/ Oliver W. Wanger**  
**UNITED STATES DISTRICT JUDGE**