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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ALBERT HAYES,  
Plaintiff,  
v.  
SCOTT KERNAN, et al.,  
Defendants.

**CASE NO. 1:16-cv-01235-AWI-MJS  
(PC)**  
**ORDER GRANTING REQUESTS TO  
DISMISS DEFENDANT KERNAN  
FROM THE COMPLAINT**  
**(ECF Nos. 34 & 36)**  
**FINDINGS AND  
RECOMMENDATIONS TO DISMISS  
CASE FOR FAILURE TO STATE A  
CLAIM**  
**(ECF No. 35)**  
**FOURTEEN DAY OBJECTION  
DEADLINE**

Plaintiff Albert Hayes, a prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on August 22, 2016. (ECF No. 1.) Plaintiff has declined Magistrate Judge jurisdiction. (ECF No. 11). No other parties have appeared.

On March 23, 2017, the Court screened Plaintiff's second amended complaint (ECF No. 24) and dismissed it for failure to state a claim. (ECF No. 26.) The Court found that amendment of his Due Process and Equal Protection claims or his claims against

1 Defendant Kernan would be futile, but granted Plaintiff thirty days to amend his retaliation  
2 and ADA claims against Defendants Corral and Voong only. (Id.) Before the Court for  
3 screening is Plaintiff's third amended complaint. (ECF No. 35.)

4 On June 8, 2017, Plaintiff filed a motion to voluntarily dismiss Defendant Kernan  
5 from the complaint. (ECF No. 34.) Plaintiff also filed a motion seeking leave to name the  
6 "right" defendant, in which he asks to remove Defendant Kernan from the complaint and  
7 name only Defendants Corral and Voong. (ECF No. 36.)

8 **I. Miscellaneous Filings**

9 Plaintiff moves to voluntarily dismiss Defendant Kernan from the complaint. (ECF  
10 No. 34.) The Court's March 23, 2017 screening order of Plaintiff's second amended  
11 complaint advised Plaintiff that it would not entertain any further claims against Kernan  
12 based on Plaintiff's failure, on two separate occasions, to allege any violations committed  
13 by him. Nonetheless, under Federal Rule of Civil Procedure 41(a)(1)(A)(i), a plaintiff may  
14 voluntarily dismiss an action or a portion thereof without a Court order by filing a notice of  
15 dismissal before the opposing party serves either an answer or a motion for summary  
16 judgment. On Plaintiff's motion, Defendant Kernan will thus be terminated from the  
17 action.

18 ECF No. 36 reiterates Plaintiff's desire to dismiss Kernan from the complaint. He  
19 also raises several other concerns: he reminds that Court that he has had to rely on other  
20 inmates to draft his filings and asks again that the Court appoint him counsel; he objects  
21 to the Court's denial of leave to amend certain claims in its March 23, 2017 screening  
22 order; and he reiterates and expounds on the allegations of his civil rights complaint.

23 First, for the reasons already stated, Defendant Kernan will be dismissed from the  
24 complaint. Second, Plaintiff has twice been informed (See ECF Nos. 7 & 37) that at this  
25 juncture in the proceedings, the Court cannot provide the relief Plaintiff seeks.

26 Next, to the extent Plaintiff takes issue with the Magistrate Judge's findings in prior  
27 screening orders, he may raise them in his objections to the instant findings and  
28 recommendations. Finally, since a civil rights complaint must be complete in itself (Local

1 Rule 220), in screening Plaintiff’s pleading, the Court will not consider the current  
2 reiteration and elaboration of his allegations or other factual allegations in extraneous  
3 filings.

4 **II. Screening Requirement**

5 The Court is required to screen complaints brought by prisoners seeking relief  
6 against a governmental entity or an officer or employee of a governmental entity. 28  
7 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner  
8 has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon  
9 which relief may be granted, or that seek monetary relief from a defendant who is  
10 immune from such relief. 28 U.S.C. § 1915A(b)(1), (2). “Notwithstanding any filing fee,  
11 or any portion thereof, that may have been paid, the court shall dismiss the case at any  
12 time if the court determines that . . . the action or appeal . . . fails to state a claim upon  
13 which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

14 **III. Pleading Standard**

15 A complaint must contain “a short and plain statement of the claim showing that  
16 the pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations  
17 are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported  
18 by mere conclusory statements, do not suffice,” Ashcroft v. Iqbal, 556 U.S. 662, 678  
19 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)), and courts “are  
20 not required to indulge unwarranted inferences,” Doe I v. Wal-Mart Stores, Inc., 572 F.3d  
21 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). While factual  
22 allegations are accepted as true, legal conclusions are not. Iqbal, 556 U.S. at 678.

23 Under section 1983, Plaintiff must demonstrate that each defendant personally  
24 participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir.  
25 2002). This requires the presentation of factual allegations sufficient to state a plausible  
26 claim for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962,  
27 969 (9th Cir. 2009). Prisoners proceeding pro se in civil rights actions are entitled to  
28 have their pleadings liberally construed and to have any doubt resolved in their favor,

1 Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (citations omitted), but nevertheless,  
2 the mere possibility of misconduct falls short of meeting the plausibility standard, Iqbal,  
3 556 U.S. at 678; Moss, 572 F.3d at 969.

#### 4 **IV. Plaintiff's Allegations**

5 Plaintiff is currently incarcerated at the California Substance Abuse Treatment  
6 Facility ("CSTAF") in Corcoran, California, where his claims arose. Plaintiff brings this  
7 action against M. Voong, CDCR's acting Chief Inmate Appeal Officer; and J.P. Corral,  
8 CSATF Appeal Coordinator. He sues each Defendant "in his or her individual and official  
9 capacity, respectively." He alleges violations of the First, Eighth, and Fourteenth  
10 Amendments, as well as violations of the Americans with Disabilities Act ("ADA"), the  
11 Rehabilitation Act ("RA"), and related federal regulations.<sup>1</sup>

12 Plaintiff's allegations may be summarized as follows:<sup>2</sup>

13 Plaintiff is 69 years old, wheelchair-bound, of limited education, and hearing  
14 impaired. He also has a speech impediment, has difficulty expressing himself in writing,  
15 and cannot communicate well using American Sign Language. He has also been  
16 diagnosed with schizophrenia. Plaintiff struggles to comprehend complex written words  
17 and has difficulty putting words together into intelligible thoughts. Because of his difficulty  
18 communicating, Plaintiff's attempts at conveying his problems always result in significant  
19 miscommunication and misunderstanding.

20 On November 10, 2014, Plaintiff submitted an administrative grievance  
21 complaining that his personal property was missing. On November 18, 2014, the  
22 grievance was returned with a notice stating it was rejected because it contained  
23 "pointless verbiage that the staff could not reasonably be expected to understand to  
24 identify the issue under appeal." The grievance was described as rambling, lengthy, and  
25 pointless. Plaintiff was also informed that he needed to attach a copy of the receipt for his  
26 lost property to his grievance and remove several handwritten pages. Plaintiff complied

27 <sup>1</sup> See 28 C.F.R. §§ 35.104(1) and 35.160(b)(2).

28 <sup>2</sup> Plaintiff refers to various attachments—presumably exhibits—throughout his factual narrative. There are no exhibits attached to the complaint filed with the Court.

1 and resubmitted the appeal, explaining that he was never given a property receipt and  
2 requesting assistance from someone who was qualified to read and interpret the  
3 incomprehensible grievance. Plaintiff also cited to sections 3084.1(c) and 3084.5(b)(1) of  
4 the California Code of Regulations.<sup>3</sup>

5 On December 23, 2014, Corral canceled the resubmitted grievance, citing the fact  
6 that Plaintiff did not attach a copy of his property receipt. He ignored Plaintiff's request for  
7 staff assistance. A few days later, Plaintiff submitted a second appeal appealing the  
8 cancellation of his first appeal. Corral rejected the second appeal for failure to attach a  
9 copy of the cancelled first appeal documents. Plaintiff therefore resubmitted the second  
10 appeal with the first appeal documents attached. Plaintiff again requested staff  
11 assistance. The second appeal was accepted by Corral at the second level of the review.

12 On February 20, 2015, Plaintiff received notice that his second appeal was  
13 cancelled on timeliness grounds, even though it was timely submitted. Corral again  
14 ignored Plaintiff's request for staff assistance. Plaintiff believes Corral intentionally  
15 discriminated against Plaintiff on the basis of his disabilities when he failed to assign staff  
16 assistance to Plaintiff in filing his appeals.

17 Plaintiff submitted the second appeal to Defendant Voong at the third level of  
18 review, complaining that it was wrongfully cancelled and alleging that Corral  
19 discriminated against Plaintiff on the basis of his disability by not assigning him a staff  
20 assistant. Voong's response to the second appeal was that he could not address the  
21 disability discrimination issue or Corral's failure to provide assistance.

22 Plaintiff believes Corral and/or Voong should have conducted an inquiry to  
23 determine what sort of accommodation would allow Plaintiff to effectively communicate

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24 <sup>3</sup> The regulations state:  
25 "When an appeal indicates the inmate or parolee has difficulty describing the problem in writing or has a  
26 primary language other than English, the appeals coordinator shall ensure that the inmate or parolee  
27 receives assistance in completing and/or clarifying the appeal." Cal. Code Regs. tit. 15, § 3084.5(b)(1)  
28 (West).  
"Department staff shall ensure that inmates and parolees, including those who have difficulties  
communicating, are provided equal access to the appeals process and the timely assistance necessary to  
participate throughout the appeal process." Cal. Code Regs. tit. 15, § 3084.1(c) (West).

1 his grievance. Plaintiff seeks injunctive and monetary relief.

2 **V. Discussion**

3 Plaintiff was granted leave to amend his ADA and retaliation<sup>4</sup> claims only. Plaintiff  
4 was informed in the Court's March 23, 2017 screening order that he should not attempt to  
5 amend his Fourteenth Amendment Equal Protection and Due Process claims, as he had  
6 already been given two opportunities to plead these claims and further attempts at  
7 amendment would be futile. (ECF No. 26 at 7, 9, and 11.) Therefore, to the extent Plaintiff  
8 repeats the allegations pertaining to those potential claims in his third amended  
9 complaint, they will not be addressed again here—if Plaintiff disagrees with the  
10 Magistrate Judge's findings regarding those claims, he may so state in his objections to  
11 these findings and recommendations.

12 For the reasons set forth below, the undersigned will recommend Plaintiff's  
13 complaint be dismissed with prejudice for failure to state a claim.

14 First, Plaintiff states in his third amended complaint that he has no intention of  
15 stating a claim for retaliation. (ECF No. 35 at 14.) Any allegations that could relate to a  
16 retaliation claim are therefore disregarded.

17 Second, Plaintiff was previously advised of the requirements for a claim for  
18 violation of the ADA and RA. (ECF No. 16 at 8-9.) Title II of the ADA and § 504 of the RA  
19 prohibit discrimination on the basis of disability. 42 U.S.C. § 12132 (West); 29 U.S.C. §  
20 794 (West); Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002).

21 To establish a violation of Title II of the ADA, a plaintiff must show that (1) [he] is a  
22 qualified individual with a disability; (2) [he] was excluded from participation in or  
23 otherwise discriminated against with regard to a public entity's services, programs,  
24 or activities; and (3) such exclusion or discrimination was by reason of [his]  
25 disability, [and] [t]o establish a violation of § 504 of the RA, a plaintiff must show  
26 that (1) [he] is handicapped within the meaning of the RA; (2) [he] is otherwise  
qualified for the benefit or services sought; (3) [he] was denied the benefit or  
services solely by reason of [his] handicap; and (4) the program providing the  
benefit or services receives federal financial assistance.”

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27 <sup>4</sup> Although Plaintiff never expressly made a claim for retaliation, his second amended complaint alluded to a  
28 circumstance in which Defendant Corral threatened to place Plaintiff on the “blacklist” if he continued to file  
grievances. (ECF No. 24 at 7.) Plaintiff was advised to make this claim more explicit in his third amended  
complaint if he so chose.

1            Lovell, 303 F.3d at 1052; *accord* Simmons v. Navajo Cnty., 609 F.3d 1011, 1021-  
2 22 (9th Cir. 2010). The “duty to provide reasonable accommodations under the ADA and  
3 the [RA] arises when a policy discriminates *on the basis of disability.*” Weinreich v. Los  
4 Angeles Cty. Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997) (emphasis in  
5 original). Suits against individuals in their personal capacities are precluded under the  
6 ADA and RA. Vinson v. Thomas, 288 F.3d 1145, 1156 (9th Cir. 2002) ([A] plaintiff cannot  
7 bring an action under 42 U.S.C. § 1983 against a State official in [his or] her individual  
8 capacity to vindicate rights created by Title II of the ADA or section 504 of the  
9 Rehabilitation Act.”); *see also* A.W. v. Jersey City Pub. Sch., 486 F.3d 791, 804 (3d Cir.  
10 2007); Heinke v. Cnty. of Tehama Sheriff’s Dept., No. CIV S-12-2433 LKK-KJN, 2013 WL  
11 3992407, at \*7 (E.D. Cal. Aug. 1, 2013); White v. Smyers, No. 2:12-cv-2868 MCE AC P,  
12 2012 WL 6518064, at \*6 (E.D. Cal. Dec. 13, 2012). Furthermore, “compensatory  
13 damages are not available under Title II or § 504 absent a showing of discriminatory  
14 intent.” Lovell, 303 F.3d at 1056 (internal quotations omitted).

15            Based on the phrasing of Plaintiff’s complaint, he appears to sue Voong in his  
16 individual capacity and Corral in his official capacity. Plaintiff was twice advised of the  
17 requirements for pleading an official capacity claim (ECF Nos. 16 and 26), yet failed to  
18 cite to an unlawful policy or practice of the state as necessary to support such a claim  
19 against Corral. *See* Hafer v. Melo, 502 U.S. 21, 25 (1991) (“Because the real party in  
20 interest in an official-capacity suit is the governmental entity and not the named official,  
21 the entity’s ‘policy or custom’ must have played a part in the violation of federal law.”)  
22 (internal quotations omitted.) Plaintiff was informed that, given his failure to adhere to the  
23 pleading standards, the Court would not entertain any further iterations of his official  
24 capacity claims. (ECF No. 26 at 6-7.)

25            Even if the Court were to consider Plaintiff’s official capacity claim against Corral,  
26 Plaintiff still identifies no policy or practice of the state that led to the perceived violations.  
27 Plaintiff is thus left with only his individual capacity claims against Voong. Plaintiff  
28 continues to point to the individual actions of Corral and Voong, and not an institutional

1 policy or practice, as the cause of the alleged ADA and RA violations. As Plaintiff cannot  
2 maintain his claims for violating the ADA or RA against individual defendants, they must  
3 be dismissed. Leave to further amend would be futile and should be denied.

4 **VI. Conclusion**

5 For the reasons set forth above and in its prior screening orders, the Court finds  
6 Plaintiff fails to state a claim. Further leave to amend would be futile and should be  
7 denied.

8 Accordingly, IT IS HEREBY ORDERED THAT:

9 At Plaintiff's request, Defendant Scott Kernan is TERMINATED from this action;

10 And IT IS HEREBY RECOMMENDED THAT:

11 This action be DISMISSED with prejudice for failure to state a claim.

12 These Findings and Recommendations are submitted to the United States District  
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
14 **fourteen** (14) days after being served with these Findings and Recommendation, Plaintiff  
15 may file written objections with the Court. Such a document should be captioned  
16 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file  
17 objections within the specified time may result in the waiver of rights on appeal.  
18 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923  
19 F.2d 1391, 1394 (9th Cir. 1991)).

20  
21 IT IS SO ORDERED.

22 Dated: June 27, 2017

23 /s/ Michael J. Seng  
24 UNITED STATES MAGISTRATE JUDGE

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