

1 **II. Screening Requirement**

2 When a plaintiff proceeds *in forma pauperis*, the Court is required to review the complaint, and
3 shall dismiss the case at any time if the Court determines that the allegation of poverty is untrue, or the
4 action or appeal is “frivolous, malicious or fails to state a claim on which relief may be granted; or . . .
5 seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. 1915(e)(2). A
6 claim is frivolous “when the facts alleged arise to the level of the irrational or the wholly incredible,
7 whether or not there are judicially noticeable facts available to contradict them.” *Denton v. Hernandez*,
8 504 U.S. 25, 32-33 (1992).

9 The Court must screen the First Amended Complaint because an amended complaint
10 supersedes the previously filed complaints. See *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th
11 Cir. 1997); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

12 **III. Pleading Standards**

13 General rules for pleading complaints are governed by the Federal Rules of Civil Procedure. A
14 pleading stating a claim for relief must include a statement affirming the court’s jurisdiction, “a short
15 and plain statement of the claim showing the pleader is entitled to relief; and . . . a demand for the
16 relief sought, which may include relief in the alternative or different types of relief.” Fed. R. Civ. P.
17 8(a). The Federal Rules adopt a flexible pleading policy, and *pro se* pleadings are held to “less
18 stringent standards” than pleadings by attorneys. *Haines v. Kerner*, 404 U.S. 519, 521-21 (1972).

19 A complaint must give fair notice and state the elements of the plaintiff’s claim in a plain and
20 succinct manner. *Jones v. Cmty Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Further, a
21 plaintiff must identify the grounds upon which the complaint stands. *Swierkiewicz v. Sorema N.A.*, 534
22 U.S. 506, 512 (2002). The Supreme Court noted,

23 Rule 8 does not require detailed factual allegations, but it demands more than an
24 unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers
25 labels and conclusions or a formulaic recitation of the elements of a cause of action will
not do. Nor does a complaint suffice if it tenders naked assertions devoid of further
factual enhancement.

26 *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (internal quotation marks and citations omitted).

27 Conclusory and vague allegations do not support a cause of action. *Ivey v. Board of Regents*, 673 F.2d
28 266, 268 (9th Cir. 1982). The Court clarified further,

1 [A] complaint must contain sufficient factual matter, accepted as true, to “state a claim
2 to relief that is plausible on its face.” [Citation]. A claim has facial plausibility when
3 the plaintiff pleads factual content that allows the court to draw the reasonable
4 inference that the defendant is liable for the misconduct alleged. [Citation]. The
5 plausibility standard is not akin to a “probability requirement,” but it asks for more than
6 a sheer possibility that a defendant has acted unlawfully. [Citation]. Where a complaint
7 pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of
8 the line between possibility and plausibility of ‘entitlement to relief.’

9 *Iqbal*, 566 U.S. at 678 (citations omitted). When factual allegations are well-pled, a court should
10 assume their truth and determine whether the facts would make the plaintiff entitled to relief; legal
11 conclusions in the pleading are not entitled to the same assumption of truth. *Id.*

12 The Court has a duty to dismiss a case at any time it determines an action fails to state a claim,
13 “notwithstanding any filing fee that may have been paid.” 28 U.S.C. § 1915e(2). Accordingly, a court
14 “may act on its own initiative to note the inadequacy of a complaint and dismiss it for failure to state a
15 claim.” *See Wong v. Bell*, 642 F.2d 359, 361 (9th Cir. 1981) (citing 5 C. Wright & A. Miller, *Federal
16 Practice and Procedure*, § 1357 at 593 (1963)). However, leave to amend a complaint may be granted
17 to the extent deficiencies of the complaint can be cured by an amendment. *Lopez v. Smith*, 203 F.3d
18 1122, 1127-28 (9th Cir. 2000) (en banc).

19 **IV. Factual Allegations**

20 Plaintiff alleges only: “On or about July 8, 2013, to September 7, 2016, [he] was denied a
21 reasonable accommodation, suspended, and then discharged... because of [his] disability and in
22 retaliation in violation of the Americans with [D]isabilities Act of 1990.” (Doc. 4 at 5) In addition,
23 Plaintiff attached a list of exhibits to his amended complaint, indicating he made charges of
24 discrimination with California’s Department of Fair Employment and Housing and the Equal
25 Employment Opportunity Commission and, which issued a “Notice of Rights to Sue.” (*Id.* at 12)

26 **V. Discussion and Analysis**

27 “The ADA prohibits discrimination against a qualified individual with a disability in regards to
28 terms, conditions and privileges of employment.” *Gribben v. UPS*, 528 F.3d 1166, 1169 (9th Cir.
2008); *see also* 42 U.S.C. § 12132. To state a cognizable claim for discrimination in violation of the
ADA, a plaintiff must show that, within the meaning of the ADA, he: “(1) is disabled; (2) is qualified;
and (3) suffered an adverse employment action because of [his] disability.” *Snead v. Metro. Prop. &*

1 *Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001). Thus, to recover under the ADA, a plaintiff must
2 demonstrate that he is disabled under the act. 42 U.S.C. § 12102(1)(A) (defining disability as “a
3 physical or mental impairment that substantially limits one or more major activities of [an] individual”).

4 The failure to provide a reasonable accommodation to a qualified individual with a disability
5 can constitute discrimination under the ADA. 42 U.S.C. § 12112(b)(5)(A); *EEOC v. UPS Supply*
6 *Chain Solutions*, 620 F.3d 1103, 1110 (9th Cir. 2010). As relevant here, the term “reasonable
7 accommodation” means “[m]odifications or adjustments that enable a covered entity's employee with a
8 disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly
9 situated employees without disabilities.” 29 C.F.R. § 1630.2(o)(1)(iii); *UPS Supply Chain Solutions*,
10 620 F.3d at 1110. While there is no comprehensive list, some “reasonable accommodations” include:
11 job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition
12 or modification of equipment or devices, appropriate adjustment or modifications of examinations,
13 training materials or policies, the provision of qualified readers or interpreters, and other similar
14 accommodations. 42 U.S.C. § 12111(9). *Bates v. UPS*, 511 F.3d 974 (9th Cir. 2007). In order for an
15 accommodation to be “reasonable,” it must be effective in enabling the employee to perform his job
16 duties. *UPS Supply Chain Solutions*, 620 F.3d at 1110; *Humphrey v. Mem’l Hosps. Assn.*, 239 F.3d
17 1128, 1137 (9th Cir. 2001).

18 Once an employee requests an accommodation, “the employer must engage in an interactive
19 process with the employee to determine the appropriate reasonable accommodation.” *UPS Supply*
20 *Chain Solutions*, 620 F.3d at 1110; *Zivkovic v. Southern Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir.
21 2002). This interactive process requires: “(1) direct communication between the employer and
22 employee to explore in good faith the possible accommodations; (2) consideration of the employee’s
23 request; and (3) offering an accommodation that is reasonable and effective.” *Id.*, 620 F.3d at 1110-11;
24 *Zivkovic*, 302 F.3d at 1089. An employer who fails to engage in the interactive process in good faith
25 faces “liability for the remedies imposed by the statute if a reasonable accommodation would have been
26 possible.” *Humphrey*, 239 F.3d at 1137-38; *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir.
27 2000) (en banc); *EEOC v. Creative Networks, LLC*, 912 F.Supp.2d 828, 837 (D. Ariz. 2012).

28 Here, Plaintiff fails to allege facts sufficient to support his claim for discrimination and failure

1 to accommodate in violation of the ADA. For example, Plaintiff offers the conclusion that he is
2 disabled, but fails to offer any *facts* supporting that statement, such as by explaining if or how his
3 impairment(s) limit major activities. *See* 42 U.S.C. § 12102(1)(A). Further, Plaintiff fails to state any
4 facts related to the alleged limitations he had that required accommodation, such as whether a physical
5 impairment caused him to need lifting limitations that were denied by his employer, options to stand
6 and walk, or any other limitation.

7 Without Plaintiff's explanation of what occurred—including what accommodation was
8 requested, whether any accommodation was made or how by his employer—the Court is unable to find
9 that Plaintiff states a cognizable claim for failure to accommodate. As the Court previously informed
10 Plaintiff, it is his obligation to plead *facts* that support his claim, not simply offer legal conclusions.

11 **VI. Conclusion and Order**

12 Given the lack of factual allegations, the Court is unable to find Plaintiff states a cognizable
13 claim. However, it is not clear whether the factual deficiencies may be cured by amendment. *See Noll*
14 *v. Carlson*, 809 F.2d 1446, 1448-49 (9th Cir. 1987); *see also Lopez*, 203 F.3d at 1128 (dismissal of a
15 *pro se* complaint without leave to amend for failure to state a claim is proper only where it is obvious
16 that an opportunity to amend would be futile).

17 Plaintiff is again advised that an amended complaint supersedes the original complaint.
18 *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997); *King v. Atiyeh*, 814 F.2d 565, 567 (9th
19 Cir. 1987). In addition, the amended complaint must be “complete in itself without reference to the
20 prior or superseded pleading.” Local Rule 220. Once Plaintiff files an amended complaint, the
21 original pleading no longer serves any function in the case. The amended complaint must bear the
22 docket number assigned this case and must be labeled “Second Amended Complaint.” Finally,
23 Plaintiff is warned that “[a]ll causes of action alleged in an original complaint which are not alleged in
24 an amended complaint are waived.” *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1986) (citing *London*
25 *v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981).

26 In the Second Amended Complaint, Plaintiff **SHALL** include a statement of facts that inform
27 the Court of the basis for his claims. If Plaintiff fails to allege *facts* and again offers only legal
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1 conclusions in support of his claims, the Court will find he is unable to do so and recommend
2 dismissal of the action.

3 Based upon the foregoing, the Court **ORDERS**:

- 4 1. Plaintiff's request to proceed *in forma pauperis* is **GRANTED**;
- 5 2. Plaintiff's First Amended Complaint is **DISMISSED** with leave to amend; and
- 6 3. Within thirty days from the date of service of this order, Plaintiff **SHALL** file a Second
7 Amended Complaint.

8 **If Plaintiff fails to comply with this order to file a Second Amended Complaint, the action may**
9 **be dismissed for failure to prosecute and failure to obey the Court's order.**

10
11 IT IS SO ORDERED.

12 Dated: May 5, 2017

13 /s/ Jennifer L. Thurston
14 UNITED STATES MAGISTRATE JUDGE