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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH MUNSON,

Plaintiff,

No. CIV S-09-0478 JAM EFB P

vs.

STATE OF CALIFORNIA,

Defendant.

FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff is a former prisoner proceeding with counsel in a civil rights action brought under 42 U.S.C. § 1983. On June 9, 2010, defendant moved to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons explained below, the motion must be granted in part and denied in part.

I. Facts

This action proceeds on the November 5, 2008 complaint in which plaintiff alleges the following:

Plaintiff is a paraplegic who uses a wheelchair for mobility. Dckt. No. 1, Compl. at 1. He was incarcerated at California Medical Facility in Vacaville (hereinafter “CMF”) at all times relevant to the complaint. The shower, bathing and restroom facilities there were allegedly not accessible to wheelchair users, including plaintiff. *Id.* at 3. As a result, plaintiff allegedly

1 injured himself trying to shower and was unable to adequately clean himself. *Id.* Plaintiff
2 claims that his requests for wheelchair-accessible shower facilities were denied. *Id.* He also
3 claims that he did not receive adequate treatment for injuries sustained in, or aggravated by, his
4 fall in the shower. *Id.* at 4.

5 The toilet in plaintiff's cell lacked grab bars. *Id.* at 3. Consequently, he claims that
6 "[p]laintiff was forced for months to lie in bed and use his fingers in his rectum to deal with his
7 defecation needs." *Id.* at 3-4. He adds that defendant denied plaintiff's requests for an
8 accessible toilet, *id.* at 4, and that defendant could have provided proper wheelchair-accessible
9 facilities without experiencing an undue financial or administrative burden. *Id.* at 5.

10 Plaintiff uses a condom catheter to urinate, but defendant allegedly refused to provide the
11 proper size catheter despite repeated requests. *Id.* The wrong-size catheters provided by
12 defendant caused plaintiff bladder infections. *Id.*

13 On June 29, 2007, plaintiff was transported from Mercy Hospital in Bakersfield to CMF
14 following treatment for ulcers on his feet and buttocks. *Id.* at 2. Plaintiff requested
15 transportation in a manner to avoid long contact on his feet or buttocks, but his requests were
16 denied. *Id.* Plaintiff asserts that defendant could easily have accommodated plaintiff without
17 any undue burden to defendant. *Id.* at 5. He contends that the long trip caused new injuries to
18 his feet and buttocks that were very painful and took months to heal. *Id.* at 2-3.

19 The canteen at CMF makes numerous items available for purchase to non-disabled
20 patrons that are not made available to disabled patrons. *Id.* at 4. Plaintiff's complaints regarding
21 this disparity were allegedly ignored. *Id.* Defendant could have provided non-discriminatory
22 access to canteen items without experiencing an undue financial or administrative burden. *Id.* at
23 5.

24 Plaintiff also alleges that defendant has failed to complete self-evaluation and transition
25 plans as required by the Code of Federal Regulations. *Id.* at 5-6.

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1 Plaintiff's asserts the following causes of action: (1) a violation of Title II of the
2 Americans with Disabilities Act (hereinafter "ADA"); (2) a violation of the Rehabilitation Act of
3 1973 (hereinafter "RA"); (3) a violation of California's Disabled Persons Act (hereinafter
4 "CDPA"); and (4) a violation of California's Unruh Civil Rights Act. *Id.* at 8-9. In its screening
5 order of May 21, 2010, the court declined to exercise supplemental jurisdiction over the Unruh
6 Act claim, but found that plaintiff had stated cognizable claims under the ADA, RA, and CDPA.
7 Dckt. No. 28. Defendant now seeks dismissal of the remaining claims.

8 **II. Standards on Motion to Dismiss**

9 In order to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must
10 contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.*
11 *v. Twombly*, 550 U.S. 544, 555-56, 563, 570 (2007). "A claim has facial plausibility when the
12 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
13 defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937,
14 1949 (2009) (citing *Twombly*, 550 U.S. at 556).

15 The court accepts the complaint's factual allegations as true. *Iqbal*, 129 S. Ct. at 1949.
16 However, to state a claim, the allegations must amount to "more than labels and conclusions" or
17 a "formulaic recitation of the elements of a cause of action" and instead include facts sufficient
18 "to raise a right to relief above the speculative level," because legal conclusions contained in the
19 complaint are not presumed true. *Id.* at 1949-50; *Twombly*, 550 U.S. at 555-56. "A complaint
20 may be dismissed as a matter of law for one of two reasons: (1) lack of a cognizable legal theory
21 or (2) insufficient facts under a cognizable legal claim." *Robertson v. Dean Witter Reynolds,*
22 *Inc.*, 749 F.2d 530, 534 (9th Cir. 1984)

23 **III. Analysis**

24 Defendant seeks dismissal of each of plaintiff's three remaining claims (brought under
25 the ADA, RA, and CDPA). Defendant contends that it is immune from ADA and RA liability
26 under the Eleventh Amendment, that plaintiff fails to state a claim under the ADA and RA, and

1 that it is immune from CDPA liability under California law. Should the court decline to dismiss
2 the ADA and RA claims outright, defendant seeks dismissal of plaintiff's requests for injunctive
3 relief thereunder. Defendant also argues that plaintiff lacks a private right to enforce the state's
4 obligation under the Code of Federal Regulations to complete self-evaluation and transition
5 plans. The court will address each argument in turn.

6 *A. Defendant's Eleventh Amendment Immunity Has Been Validly Abrogated*

7 Defendant concedes that it is well-settled in the Ninth Circuit that Congress has validly
8 abrogated the states' Eleventh Amendment immunity in enacting the ADA and RA. *See Clark v.*
9 *California*, 123 F.3d 1267 (9th Cir. 1997); *Video Gaming Techs., Inc. v. Bureau of Gambling*
10 *Control*, 621 F. Supp.2d 918, 920 (E.D. Cal. 2008). Defendant raises the argument "for purposes
11 of further appellate review." Def's Mot. to Dism., Dckt. No. 29 at 3 n.2. Accordingly, dismissal
12 of plaintiff's claims under the ADA and RA on grounds of Eleventh Amendment Immunity must
13 be denied.

14 *B. The Complaint Adequately States Claims under the ADA and RA*

15 Title II of the ADA requires public entities to provide equal access to services, activities,
16 and programs. 42 U.S.C. § 12132. The RA similarly bars discrimination on the basis of
17 disability in the provision of benefits by programs receiving federal funding. 29 U.S.C. § 794.
18 To establish a defendant's liability under these statutes, a plaintiff must show that: (1) he or she
19 is a qualified individual with a disability; (2) he or she was excluded from or denied services,
20 programs or activities, or was otherwise discriminated against by the public entity; and (3) such
21 exclusion, denial of benefits, or discrimination was by reason of his disability. *Weinrich v. L.A.*
22 *County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). To succeed on an RA claim,
23 the plaintiff must additionally show that the public entity received federal funding. *Id.* Where
24 the public entity in question is a prison, the plaintiff must also show that the conduct complained
25 of was not reasonably related to a legitimate penological interest. *Gates v. Rowland*, 39 F.3d
26 1439, 1446-47 (9th Cir. 1994).

1 Defendant first argues that plaintiff’s complaint fails to adequately allege that he was
2 excluded from or denied services, programs or activities. The court disagrees. The complaint
3 states that plaintiff was not provided wheelchair-accessible shower and bathroom facilities, was
4 denied adequate transportation, and was denied access to certain canteen items, and defendant
5 has cited no authority holding that such facilities are not “services, programs or activities” under
6 the ADA and RA. Moreover, these allegations suffice to state that plaintiff was “otherwise
7 discriminated against” by defendant.

8 Defendant next argues that plaintiff’s complaint fails to adequately allege that
9 defendant’s conduct was not reasonably related to a legitimate penological interest. Again, the
10 court cannot agree. The complaint states that defendant could have provided accessible
11 facilities, adequate transportation, and nondiscriminatory access to canteen items without
12 experiencing an “undue burden.” This allegation suffices at this stage of the proceedings – when
13 no discovery has been conducted and plaintiff cannot be expected to divine defendant’s reasons
14 for the alleged conduct – to state that the conduct was not reasonably related to a legitimate
15 penological interest.

16 Accordingly, defendant’s request for dismissal of the ADA and RA claims for failure to
17 state a claim upon which relief may be granted must be denied.

18 *C. Defendant Is Immune from CDPA Liability Under California Law*

19 Defendant argues that it is immune from liability under the CDPA under California
20 Government Code § 844.6, which states that a public entity is not liable for any injury to a
21 prisoner. Plaintiff has articulated no opposition to this argument. California courts have held
22 that the state is a “public entity” under § 844.6 and that public entities are immune from liability
23 for injury to a prisoner. *Teter v. City of Newport Beach*, 66 P.3d 1225, 1226 (Cal. 2003); *Savitt*
24 *v. Jordan*, 191 Cal. Rptr. 290, 291-92 (Cal. Ct. App. 1983). Thus, plaintiff’s CDPA claim
25 should be dismissed.

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1 D. *The Injunctive Relief Claims Are Moot*

2 Plaintiff concedes that his claims for injunctive relief under the ADA and RA are moot
3 because he has been released from prison. Accordingly, these claims must be dismissed.

4 E. *No Cause of Action Stated Regarding Self-Evaluation and Transition Plans*

5 Defendant argues that the provisions in the Code of Federal Regulations requiring it to
6 complete a self-evaluation plan and a transition plan, 28 C.F.R. §§ 35.105 and 35.150, do not
7 provide a privately-enforceable remedy. *See Lonberg v. City of Riverside*, 571 F.3d 846, 849-52
8 (9th Cir. 2009) (holding that § 35.150(d) does not create a private right of action). Plaintiff
9 concedes this point and states that the allegations in the complaint concerning those regulations
10 are intended not as a separate basis of liability but rather as evidence of defendant's indifference
11 to its statutory obligations to wheelchair users like plaintiff. Indeed, the complaint does not
12 contain a separate cause of action brought under these regulations. To the extent that it could be
13 construed to allege a claim to enforce § 35.105 and 35.150, however, such a claim should be
14 dismissed pursuant to *Lonberg*.

15 **IV. Conclusion and Recommendations**

16 For all of the above reasons, the court finds that defendant's motion to dismiss must be
17 granted as to plaintiff's claim under the California Disabled Persons Act, plaintiff's requests for
18 injunctive relief under the Americans with Disabilities Act and Rehabilitation Act, and any
19 possible claim to enforce 28 C.F.R. §§ 35.105 and 35.150. Because plaintiff has adequately
20 alleged discrimination on the basis of disability unsupported by a legitimate penological interest,
21 and because the state does not enjoy immunity under the 11th Amendment from liability under
22 the ADA and RA, the motion to dismiss should otherwise be denied.

23 Accordingly, it is hereby recommended that:

24 1. Defendant's June 9, 2010 motion to dismiss (Dckt. No. 29) be granted as to plaintiff's
25 claim under the California Disabled Persons Act, plaintiff's requests for injunctive relief under
26 the Americans with Disabilities Act and Rehabilitation Act, and any possible claim to enforce 28

1 C.F.R. §§ 35.105 and 35.150; and

2 2. In all other respects, defendant's motion to dismiss be denied.

3 These findings and recommendations are submitted to the United States District Judge
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
5 after being served with these findings and recommendations, any party may file written
6 objections with the court and serve a copy on all parties. Such a document should be captioned
7 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
8 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
9 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

10 Dated: January 24, 2011.

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12 EDMUND F. BRENNAN
13 UNITED STATES MAGISTRATE JUDGE
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