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

TYRONE MORGAN,
Plaintiff

No. CIV S-09-2155 WBS GGH P

vs.

JOHN W. HAVILAND, Warden
Defendant.

ORDER &
FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding pro se. He seeks relief pursuant to Title II of the Americans with Disabilities Act (ADA) and has requested authority pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis. This proceeding was referred to this court by Local Rule 72-302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). Plaintiff has been without funds for six months and is currently without funds. Accordingly, the court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1). Plaintiff is obligated to make monthly payments of twenty percent of the preceding

1 month's income credited to plaintiff's prison trust account. These payments shall be collected
2 and forwarded by the appropriate agency to the Clerk of the Court each time the amount in
3 plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

4 The court is required to screen complaints brought by prisoners seeking relief
5 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
6 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised
7 claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be
8 granted, or that seek monetary relief from a defendant who is immune from such relief. 28
9 U.S.C. § 1915A(b)(1),(2).

10 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
11 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
12 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
13 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
14 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
15 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
16 Cir. 1989); Franklin, 745 F.2d at 1227.

17 A complaint must contain more than a "formulaic recitation of the elements of a
18 cause of action;" it must contain factual allegations sufficient to "raise a right to relief above the
19 speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).
20 "The pleading must contain something more...than...a statement of facts that merely creates a
21 suspicion [of] a legally cognizable right of action." Id., quoting 5 C. Wright & A. Miller, Federal
22 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). "[A] complaint must contain sufficient
23 factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft
24 v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127 S.Ct.
25 1955). "A claim has facial plausibility when the plaintiff pleads factual content that allows the
26 court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

1 Id.

2 In reviewing a complaint under this standard, the court must accept as true the
3 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
4 738, 740, 96 S.Ct. 1848 (1976), construe the pleading in the light most favorable to the plaintiff,
5 and resolve all doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct.
6 1843 (1969).

7 The complaint states a colorable claim for relief against the California Department
8 of Corrections and Rehabilitation (CDCR), pursuant to Title II of the ADA, and this court by
9 concurrent Order, has found this defendant appropriate for service. Plaintiff has also named
10 warden Haviland as a defendant.

11 Title II of the ADA "prohibit[s] discrimination on the basis of disability." Lovell
12 v. Chandler, 303 F.3d 1039, 1052 (9th Cir.2002). Title II provides that "no qualified individual
13 with a disability shall, by reason of such disability, be excluded from participation in or be denied
14 the benefits of the services, programs, or activities of a public entity, or be subject to
15 discrimination by such entity." 42 U.S.C. § 12132. Title II of the ADA applies to inmates within
16 state prisons. Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 118 S.Ct. 1952, 1955,
17 141 L.Ed.2d 215 (1998); see also Armstrong v. Wilson, 124 F.3d 1019, 1023 (9th Cir.1997);
18 Duffy v. Riveland, 98 F.3d 447, 453-56 (9th Cir.1996).

19 As defined in the ADA, a "public entity" is "any State or local government; [or]
20 (B) any department, agency, special purpose district, or other instrumentality of a State or States
21 or local government..." 42 U.S.C. § 12131. However, individuals may only be sued under the
22 ADA in their official, rather than, their individual capacities. Vinson v. Thomas, 288 F.3d 1145,
23 1156 (9th Cir.2002) (plaintiff cannot sue state officials in their individual capacities to vindicate
24 rights created by Title II of the ADA). Thus, plaintiff may not pursue an ADA claim against
25 Haviland in his individual capacity.

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1 Accordingly, IT IS HEREBY ORDERED that:

- 2 1. Plaintiff's request to proceed in forma pauperis is granted;
3 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.

4 The fee shall be collected and paid in accordance with this court's order to the Director of the
5 California Department of Corrections and Rehabilitation filed concurrently herewith.

6 IT IS HEREBY RECOMMENDED that defendant Haviland be dismissed from
7 this action for the reasons stated above.

8 These findings and recommendations will be submitted to the United States
9 District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
10 twenty-one days after being served with these findings and recommendations, petitioner may file
11 written objections with the court. The document should be captioned "Objections to Findings
12 and Recommendations." Petitioner is advised that failure to file objections within the specified
13 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
14 (9th Cir. 1991).

15 DATED: November 4, 2009

/s/ Gregory G. Hollows

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17 GREGORY G. HOLLOWES
18 UNITED STATES MAGISTRATE JUDGE

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