

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

CHARLES G. REECE,

Plaintiff,

No. CIV S-10-0203 JAM EFB P

vs.

D.K. SISTO, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. This action is before the undersigned pursuant to Eastern District of California Local Rule 302(c)(17). *See* 28 U.S.C. § 636(b)(1). Presently before the court is defendants Mimis and Sisto’s (“defendants”) motion to dismiss plaintiff’s equal protection claim for failure to state a claim pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(6). Dckt. No. 17. Plaintiff opposes the motion. Dckt. No. 19. For the reasons stated herein, the undersigned recommends that the motion to dismiss be denied.

I. Plaintiff’s Allegations

This action proceeds on plaintiff’s January 26, 2010 complaint on plaintiff’s Eighth Amendment and Fourteenth Amendment equal protection claims against defendants. Dckt. Nos. 1, 6. Plaintiff alleges that California State Prison, Solano, where plaintiff is currently housed,

1 has a policy of only providing heat to inmates on one side of each housing unit during the winter
2 and that defendants intentionally denied him heat during the winter months from 2003 through
3 2010. Plaintiff alleges that as of December 2009, the heating ducts were not even connected to
4 air vents inside the dormitory and that it gets so cold, “the walls sweat.” Dckt. No. 1 at 13, 19.¹
5 Plaintiff alleges that in the winter it is often warmer outside than it is inside, where the
6 temperatures range from the high 40s to the low 50s. *Id.* at 40. Plaintiff claims to have been
7 “tortured” every winter by the lack of heat. *Id.* at 12. Plaintiff alleges that prison officials
8 informed him that they do not heat both sides of the housing units because “it will become too
9 stuffy.” *Id.* at 13, 18. Plaintiff claims that this violates his rights to equal protection.

10 **II. Defendants’ Motion to Dismiss**

11 Defendants Mimis and Sisto move to dismiss plaintiff’s equal protection claim pursuant
12 to Rule 12(b)(6), on the ground that plaintiff has not alleged that any defendant discriminated
13 against him based on his membership in a protected class. Dckt. No. 17.

14 **A. Legal Standards**

15 To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint
16 must contain more than a “formulaic recitation of the elements of a cause of action”; it must
17 contain factual allegations sufficient to “raise a right to relief above the speculative level.” *Bell*
18 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain something more
19 . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of
20 action.” *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-
21 236 (3d ed. 2004)). “[A] complaint must contain sufficient factual matter, accepted as true, to
22 ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949
23 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff
24 pleads factual content that allows the court to draw the reasonable inference that the defendant is

25
26 ¹ This and subsequent page number citations to plaintiff’s complaint are to the page
number reflected on the court’s CM/ECF system and not to page numbers assigned by plaintiff.

1 liable for the misconduct alleged.” *Id.* Dismissal is appropriate based either on the lack of
2 cognizable legal theories or the lack of pleading sufficient facts to support cognizable legal
3 theories. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

4 In considering a motion to dismiss, the court must accept as true the allegations of the
5 complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976), construe
6 the pleading in the light most favorable to the party opposing the motion, and resolve all doubts
7 in the pleader’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421, *reh’g denied*, 396 U.S. 869
8 (1969). The court will ““presume that general allegations embrace those specific facts that are
9 necessary to support the claim.”” *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256
10 (1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The court may
11 consider facts established by exhibits attached to the complaint. *Durning v. First Boston Corp.*,
12 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also consider facts which may be judicially
13 noticed, *Mullis v. U.S. Bankr. Ct.*, 828 F.2d at 1388, and matters of public record, including
14 pleadings, orders, and other papers filed with the court. *Mack v. South Bay Beer Distribs.*, 798
15 F.2d 1279, 1282 (9th Cir. 1986).

16 Pro se pleadings are held to a less stringent standard than those drafted by lawyers.
17 *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir.
18 1985). However, the court’s liberal interpretation of a pro se litigant’s pleading may not supply
19 essential elements of a claim that are not plead. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir.
20 1992); *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).
21 Furthermore, “[t]he court is not required to accept legal conclusions cast in the form of factual
22 allegations if those conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v.*
23 *Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). The court need not accept
24 unreasonable inferences, or unwarranted deductions of fact. *W. Mining Council v. Watt*, 643
25 F.2d 618, 624 (9th Cir. 1981). A pro se litigant is, however, entitled to notice of the deficiencies
26 in the complaint and an opportunity to amend, unless the complaint’s deficiencies could not be

1 cured by amendment. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

2 **B. Discussion**

3 “The Equal Protection Clause of the Fourteenth Amendment commands that no State
4 shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is
5 essentially a direction that all persons similarly situated should be treated alike.” *City of*
6 *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S.
7 202, 216 (1982)). To state a claim under § 1983 alleging violations of the equal protection
8 clause, a plaintiff must allege facts showing that he is a member of a protected class. *See Harris*
9 *v. McRae*, 448 U.S. 297, 323 (1980); *see also City of Cleburne*, 473 U.S. at 440-41 (listing
10 suspect classes). A plaintiff must also plead facts to demonstrate that the defendant acted with
11 an intent or purpose to discriminate against him based upon his membership in a protected class.
12 *See Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998), *cert. denied*, 525 U.S. 1154
13 (1999).

14 Alternatively, a plaintiff may allege facts showing that he has been intentionally treated
15 differently from others similarly situated without a rational basis for the difference in treatment.
16 *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 601 (2008); *Village of Willowbrook v. Olech*, 528
17 U.S. 562, 564 (2000) (per curiam); *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936,
18 944 (9th Cir. 2004), *overruled on other grounds by Action Apt. Ass’n v. Santa Monica Rent*
19 *Control Bd.*, 509 F.3d 1020, 1025 (9th Cir. 2007). That is, where state action does not implicate
20 a fundamental right or a suspect classification, a plaintiff can establish an equal protection “class
21 of one” claim by demonstrating that he “‘has been intentionally treated differently from others
22 similarly situated and that there is no rational basis for the difference in treatment.’” *Squaw*
23 *Valley Development Co.*, 375 F.3d at 944 (quoting *Village of Willowbrook*, 528 U.S. at 564).

24 Defendants are correct in arguing that plaintiff has not alleged that any defendant
25 discriminated against plaintiff based on his membership in a protected class. However, it does
26 not necessarily follow that no equal protection claim can be asserted. *See Engquist*, 553 U.S. at

1 601 (“an equal protection claim can in some circumstances be sustained even if the plaintiff has
2 not alleged class-based discrimination, but instead claims that she has been irrationally singled
3 out as a so-called ‘class of one’”). Construing plaintiff’s complaint liberally, as required, plaintiff
4 alleges a cognizable equal protection claim as a “class of one.” *See id.* at 602 (“When those who
5 appear similarly situated are nevertheless treated differently, the Equal Protection Clause
6 requires at least a rational reason for the difference”); *N. Pacifica LLC v. City of Pacifica*, 526
7 F.3d 478, 486 (9th Cir. Cal. 2008) (“In order to claim a violation of equal protection in a class of
8 one case, the plaintiff must establish that the [defendant] intentionally, and without rational
9 basis, treated the plaintiff differently from others similarly situated.”); *see also Tunstall v.*
10 *Knowles*, No. 2:08-cv-3176-WBS-JFM, 2010 U.S. Dist. LEXIS 79457, at *8-9 (E.D. Cal. Aug.
11 5, 2010). Plaintiff claims that unlike other inmates in his housing unit, defendants have
12 intentionally deprived him of heat during the winter months. Plaintiff claims further that the
13 heating ducts were not connected to the air vents inside his dormitory and that prison officials
14 claimed that it would be too “stuffy” to provide both sides of the housing unit with heat.
15 Although the rational basis test is not a difficult burden to satisfy, the court cannot say at this
16 stage in the proceedings that an absence of heating ducts or a feeling of “stiffness” would
17 provide a rational basis for treating plaintiff differently than other similarly situated inmates.
18 Accordingly, defendants’ motion to dismiss plaintiff’s equal protection claim pursuant to Rule
19 12(b)(6) because plaintiff has not alleged that defendants intentionally discriminated against him
20 based on his membership in a protected class, must be denied.

21 **III. Conclusion**

22 Accordingly, it is hereby recommended that defendants’ November 19, 2010 motion to
23 dismiss plaintiff’s equal protection claim pursuant to Rule 12(b)(6) be denied.

24 These findings and recommendations are submitted to the United States District Judge
25 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
26 after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
3 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*
4 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

5 Dated: August 8, 2011.

6 
7 EDMUND F. BRENNAN
8 UNITED STATES MAGISTRATE JUDGE
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26