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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VITALY V. KONONOV,
Plaintiff,
v.
WAL-MART STORES, INC.; SHANNON
BENOIT; DANIEL ISLAS,
Defendants.

No. 2:16-cv-376-JAM-EFB PS

ORDER

Plaintiff seeks leave to proceed *in forma pauperis* pursuant to 28 U.S.C. 1915.¹ Plaintiff's declaration makes the showing required by 28 U.S.C. §1915(a)(1) and (2). *See* ECF No. 2. Accordingly, the request to proceed *in forma pauperis* is granted. 28 U.S.C. § 1915(a).

Determining that plaintiff may proceed *in forma pauperis* does not complete the required inquiry. Pursuant to § 1915(e)(2), the court must dismiss the case at any time if it determines the allegation of poverty is untrue, or if the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant. As discussed below, plaintiff's complaint fails to establish this court's jurisdiction and must therefore be dismissed.

¹ This case, in which plaintiff is proceeding *in propria persona*, was referred to the undersigned under Local Rule 302(c)(21). *See* 28 U.S.C. § 636(b)(1).

1 Although pro se pleadings are liberally construed, *see Haines v. Kerner*, 404 U.S. 519,
2 520-21 (1972), a complaint, or portion thereof, should be dismissed for failure to state a claim if it
3 fails to set forth “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
4 *Corp. v. Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41
5 (1957)); *see also* Fed. R. Civ. P. 12(b)(6). “[A] plaintiff’s obligation to provide the ‘grounds’ of
6 his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of
7 a cause of action’s elements will not do. Factual allegations must be enough to raise a right to
8 relief above the speculative level on the assumption that all of the complaint’s allegations are
9 true.” *Id.* (citations omitted). Dismissal is appropriate based either on the lack of cognizable
10 legal theories or the lack of pleading sufficient facts to support cognizable legal theories.
11 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

12 In reviewing a complaint under this standard, the court must accept as true the allegations
13 of the complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740 (1976),
14 construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in the
15 plaintiff’s favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). A pro se plaintiff must satisfy
16 the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure. Rule 8(a)(2)
17 requires a complaint to include “a short and plain statement of the claim showing that the pleader
18 is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds
19 upon which it rests.” *Twombly*, 550 U.S. at 555 (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

20 Plaintiff brings this action under 42 U.S.C. § 1983 against Walmart Stores, Inc., Shannon
21 Benoit, and Daniel Islas for purported violation of the First Amendment right to freedom of
22 speech. ECF No. 1 at 5. The complaint alleges that on January 23, 2016, plaintiff, who worked
23 at a Walmart store in Rocklin, California, was having a conversation with a coworker regarding
24 their personal relationships. *Id.* During the conversation, which occurred during a lunch break,
25 plaintiff used curse words. *Id.* Management overheard the inappropriate language and terminated
26 plaintiff’s employment for “Misconduct with Coaching.” *Id.* Plaintiff explained to Shannon
27 Bennoit and Daniel Islas, plaintiff’s supervisor, that inappropriate language was never used when
28 working with customers. *Id.* Although they agreed, these defendants concluded that plaintiff

1 violated company rules and regulations and therefore they terminated plaintiff's employment. *Id.*
2 at 7-8.

3 Although plaintiff's claim is styled as one brought under section 1983 for violation of
4 plaintiff's First Amendment rights, the allegations of the complaint fail to state a claim under that
5 statute. To state a claim under § 1983, a plaintiff must allege: (1) the violation of a federal
6 constitutional or statutory right; and (2) that the violation was committed by a person acting under
7 the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d
8 930, 934 (9th Cir. 2002). Here, none of the defendants appear to be state actors. Instead, the
9 individual defendants appear to be private citizens working in management positions for
10 Walmart, a corporation. Under the facts as alleged in the complaint, none of the defendants acted
11 under color of state law and the complaint fails to state a claim under section 1983 claim.

12 Furthermore, the complaint does not appear to otherwise invoke this court's subject matter
13 jurisdiction. Whatever plaintiff's disputes are with plaintiff's former employer, a federal court is
14 a court of limited jurisdiction, and may adjudicate only those cases authorized by the Constitution
15 and by Congress. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). The basic
16 federal jurisdiction statutes, 28 U.S.C. §§ 1331 & 1332, confer "federal question" and "diversity"
17 jurisdiction, respectively. Federal question jurisdiction requires that the complaint (1) arise under
18 a federal law or the U. S. Constitution, (2) allege a "case or controversy" within the meaning of
19 Article III, § 2 of the U. S. Constitution, or (3) be authorized by a federal statute that both
20 regulates a specific subject matter and confers federal jurisdiction. *Baker v. Carr*, 369 U.S. 186,
21 198 (1962). To invoke the court's diversity jurisdiction, a plaintiff must specifically allege the
22 diverse citizenship of all parties, and that the matter in controversy exceeds \$75,000. 28 U.S.C. §
23 1332(a); *Bautista v. Pan American World Airlines, Inc.*, 828 F.2d 546, 552 (9th Cir. 1987). A
24 case presumably lies outside the jurisdiction of the federal courts unless demonstrated otherwise.
25 *Kokkonen*, 511 U.S. at 376-78. Lack of subject matter jurisdiction may be raised at any time by
26 either party or by the court. *Attorneys Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593,
27 594-95 (9th Cir. 1996).

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1 As noted, plaintiff has not stated a claim under section 1983. Nor has plaintiff alleged any
2 other federal question claim. The complaint indicates that both plaintiff and the individual
3 defendants are citizens of California and therefore diversity jurisdiction is lacking. Accordingly,
4 the complaint must be dismissed. However, the dismissal is with leave to amend to accord
5 plaintiff an opportunity to allege a basis for this court’s jurisdiction, as well as a cognizable legal
6 theory against a proper defendant and sufficient facts in support of that claim. *Lopez v. Smith*,
7 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (district courts must afford pro se litigants an
8 opportunity to amend to correct any deficiency in their complaints). Should plaintiff choose to
9 file an amended complaint, the amended complaint shall clearly set forth the allegations against
10 defendant and shall specify a basis for this court’s subject matter jurisdiction. Any amended
11 complaint shall plead plaintiff’s claims in “numbered paragraphs, each limited as far as
12 practicable to a single set of circumstances,” as required by Federal Rule of Civil Procedure
13 10(b), and shall be in double-spaced text on paper that bears line numbers in the left margin, as
14 required by Eastern District of California Local Rules 130(b) and 130(c). Any amended
15 complaint shall also use clear headings to delineate each claim alleged and against which
16 defendant or defendants the claim is alleged, as required by Rule 10(b), and must plead clear facts
17 that support each claim under each header.


18 Additionally, plaintiff is informed that the court cannot refer to prior pleadings in order to
19 make an amended complaint complete. Local Rule 220 requires that an amended complaint be
20 complete in itself. This is because, as a general rule, an amended complaint supersedes the
21 original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Accordingly, once
22 plaintiff files an amended complaint, the original no longer serves any function in the case.
23 Therefore, “a plaintiff waives all causes of action alleged in the original complaint which are not
24 alleged in the amended complaint,” *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir.
25 1981), and defendants not named in an amended complaint are no longer defendants. *Ferdik v.*
26 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Finally, the court cautions plaintiff that failure to
27 comply with the Federal Rules of Civil Procedure, this court’s Local Rules, or any court order
28 may result in a recommendation that this action be dismissed. See Local Rule 110.

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Accordingly, IT IS ORDERED that:

1. Plaintiff's request for leave to proceed *in forma pauperis* (ECF No. 2) is granted.
2. Plaintiff's complaint is dismissed with leave to amend, as provided herein.
3. Plaintiff is granted thirty days from the date of service of this order to file an amended complaint. The amended complaint must bear the docket number assigned to this case and must be labeled "Amended Complaint." Failure to timely file an amended complaint in accordance with this order will result in a recommendation this action be dismissed.

DATED: June 7, 2016.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE