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

DONALD M. BIRD,  
Plaintiff,  
vs.  
JENNIFER GUARINO,  
Defendant.

No. 2:17-cv-0554-MCE-CMK

FINDINGS AND RECOMMENDATION

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Plaintiff, proceeding pro se, brings this civil action. Pending<sup>1</sup> before the court is defendant’s motion to dismiss (Doc. 4). Plaintiff filed an opposition to the motion, and defendant filed a reply. A hearing on the motion to dismiss was held on August 9, 2017, before the undersigned in Redding, California. Plaintiff appeared pro se; Attorney Kara L. DiBiasio appeared on behalf of defendants.

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<sup>1</sup> Defendant filed the motion to dismiss prior to the court screening the complaint pursuant to 28 U.S.C. § 1915(e)(2), prior to the issuance of a summons, and prior to proper service of the complaint. To the extent the defendant moves to dismiss the action based on failure to effect proper service of process, that basis is moot based on the findings herein.



1 court must also construe the alleged facts in the light most favorable to the plaintiff. See Scheuer  
2 v. Rhodes, 416 U.S. 232, 236 (1974); see also Hosp. Bldg. Co. v. Rex Hosp. Trustees, 425 U.S.  
3 738, 740 (1976); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam). All  
4 ambiguities or doubts must also be resolved in the plaintiff's favor. See Jenkins v. McKeithen,  
5 395 U.S. 411, 421 (1969). However, legally conclusory statements, not supported by actual  
6 factual allegations, need not be accepted. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50  
7 (2009). In addition, pro se pleadings are held to a less stringent standard than those drafted by  
8 lawyers. See Haines v. Kerner, 404 U.S. 519, 520 (1972). “Although a pro se litigant ... may be  
9 entitled to great leeway when the court construes his pleadings, those pleadings nonetheless must  
10 meet some minimum threshold in providing a defendant with notice of what it is that it allegedly  
11 did wrong.” Brazil v. United States Dept of Navy, 66 F.3d 193, 199 (9th Cir. 1995).

12 Rule 8(a)(2) requires only “a short and plain statement of the claim showing that  
13 the pleader is entitled to relief” in order to “give the defendant fair notice of what the . . . claim is  
14 and the grounds upon which it rests.” Bell Atl. Corp v. Twombly, 550 U.S. 544, 555 (2007)  
15 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, in order to survive dismissal for  
16 failure to state a claim under Rule 12(b)(6), a complaint must contain more than “a formulaic  
17 recitation of the elements of a cause of action;” it must contain factual allegations sufficient “to  
18 raise a right to relief above the speculative level.” Id. at 555-56. The complaint must contain  
19 “enough facts to state a claim to relief that is plausible on its face.” Id. at 570. “A claim has  
20 facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
21 reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S. Ct. at  
22 1949. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more  
23 than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting Twombly, 550 U.S.  
24 at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability,  
25 it ‘stops short of the line between possibility and plausibility for entitlement to relief.’” Id.  
26 (quoting Twombly, 550 U.S. at 557).

1 In deciding a Rule 12(b)(6) motion, the court generally may not consider materials  
2 outside the complaint and pleadings. See Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998);  
3 Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). The court may, however, consider: (1)  
4 documents whose contents are alleged in or attached to the complaint and whose authenticity no  
5 party questions, see Branch, 14 F.3d at 454; (2) documents whose authenticity is not in question,  
6 and upon which the complaint necessarily relies, but which are not attached to the complaint, see  
7 Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001); and (3) documents and materials  
8 of which the court may take judicial notice, see Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir.  
9 1994).

10 Finally, leave to amend must be granted “[u]nless it is absolutely clear that no  
11 amendment can cure the defects.” Lucas v. Dep’t of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per  
12 curiam); see also Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc).

## 13 **B. DISCUSSION**

### 14 1. Motion

15 Defendants argue the court should dismiss this action for failure to state a claim,  
16 as plaintiff’s complaint does not plead a single cause of action. Plaintiff alleges discrimination  
17 and violations of the Declaration of Independence, the Constitution and his civil rights, but fails  
18 to plead sufficient facts to state a claim.

#### 19 a. Declaration of Independence

20 Plaintiff alleges this action involves his rights under the Declaration of  
21 Independence. While he is not explicit as to what rights he is entitled to under the Declaration of  
22 Independence, and how those rights were violated, he does attach a copy of the Declaration of  
23 Independence. As such, it appears that he is alleging he has a right under the Declaration of  
24 Independence to the pursuit of happiness, and he states he is not happy. However, as the  
25 defendant argues in her motion, the Declaration of Independence does not provide a private right  
26 of action. See Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting). Therefore, any

1 claim that his right to the pursuit of happiness under the Declaration of Independence was  
2 violated must be dismissed.

3 b. Federal Rights

4 Next, plaintiff appears to allege his Federal Constitutional and Civil Rights have  
5 been violated, but again he fails to specify what rights and how they were violated. He alleges he  
6 was discriminated against, but does not allege under what provision of the law he was protected  
7 or how the actions of the defendant violated that protection.

8 The Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.*, protects people from  
9 discrimination in education, employment, housing, government benefits and services, healthcare  
10 services, land use and zoning, lending and credit, public accommodations, transportation, and  
11 voting on the basis of age, disability, ethnicity, gender, marital status, national origin, race,  
12 religion and sexual orientation. Here, plaintiff fails to allege he was discriminated against based  
13 on his membership in one of the protected classes, nor that he was discriminated against in any of  
14 the protected settings. Rather, he alleges Home Depot, a non-governmental business entity, has  
15 an in store policy to provide a discount to service related veterans which has been inconsistently  
16 applied. There are simply no facts alleged in the complaint, nor does there appear to be any facts  
17 which could be alleged, on which the plaintiff can base a discrimination claim.

18 To the extent plaintiff is claiming discrimination based on his status as a veteran,  
19 the defendant allows that there are laws protecting veterans. However, both the Vietnam Era  
20 Veterans' Readjustment Assistance Act of 1974 and the Unformed Services Employment and  
21 Reemployment Rights Act apply only to employment discrimination. Plaintiff does not allege he  
22 was discriminated against in his employment.

23 Therefore, the complaint fails to state a claim for discrimination under the Civil  
24 Rights Act of 1964, and any such claim should be dismissed.

25 c. States Rights

26 Finally, plaintiff argued at the hearing that the Unruh Act applies to this action,

1 and he is protected from discrimination in business services.

2           The Unruh Civil Rights Act, California Civil Code Section 51, states: “All  
3 persons within the jurisdiction of this state are free and equal, and no matter what their sex, race,  
4 color, religion, ancestry, national origin, disability, medical condition, genetic information,  
5 marital status, or sexual orientation are entitled to the full and equal accommodations,  
6 advantages, facilities, privileges, or services in all business establishments of every kind  
7 whatsoever.” The Unruh Act aims to eliminate discriminatory practices in business  
8 establishments.

9           “Federal courts are courts of limited jurisdiction.” Kokkonen v. Guardian Life  
10 Ins. Co. of Am., 511 U.S. 375, 377 (1994). “It is to be presumed that a cause lies outside this  
11 limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting  
12 jurisdiction.” Id. (citations omitted). Federal courts have jurisdiction to hear cases involving  
13 federal questions and cases between citizens of different states. 28 U.S.C. § 1331 provides that  
14 “district courts shall have original jurisdiction of all civil actions arising under the Constitution,  
15 laws, or treaties of the United States.” Section 1332 provides, in relevant part, that “district  
16 courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds  
17 the sum or value of \$75,000, . . . and is between citizens of different States . . . .” Only where  
18 there is a valid federal claim will the federal court exercise jurisdiction over a state law claim.  
19 See Hunter v. United Van Lines, 746 F.3d 635, 649 (9th Cir. 1984). As there is no well plead  
20 federal claim in this case, the court should not exercise supplemental jurisdiction over the state  
21 law claim, to the extent one may be sufficiently plead in this case.

22           Even if this court was to exercise jurisdiction over this state law claim, plaintiff’s  
23 allegations fail to establish discrimination under the Unruh Act as he again fails to allege that he  
24 is a member of a protected class. As stated above, the Unruh Act protects against discrimination  
25 in businesses practices based on sex, race, color, religion, ancestry, national origin, disability,  
26 medical condition, genetic information, marital status, or sexual orientation. There is no

1 indication in the Act that veterans are a protected class, nor has the plaintiff pointed the court to  
2 any case law to suggest as much.

3 As there are no valid federal claims stated in the complaint, the court should  
4 decline supplemental jurisdiction over any state law claim. Even if the court were to exercise  
5 jurisdiction over any claim under the Unruh Act, plaintiff fails to state a claim as he is not a  
6 member of a protected class. Any such claim should be dismissed.

7 **IV. CONCLUSION**

8 Based on the facts alleged, and the discussion above, plaintiff's complaint fails to  
9 state a claim, and it is clear that no amendment can cure the defects.

10 Based on the foregoing, the undersigned recommends that:

- 11 1. Defendant's motion to dismiss (Doc. 4) be granted;
  - 12 2. Plaintiff's complaint be dismissed without leave to amend; and
  - 13 3. The Clerk of the Court be directed to enter judgment and close this case.
- 14

15 These findings and recommendations are submitted to the United States District  
16 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
17 after being served with these findings and recommendations, any party may file written  
18 objections with the court. Responses to objections shall be filed within 14 days after service of  
19 objections. Failure to file objections within the specified time may waive the right to appeal.

20 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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22 DATED: October 26, 2017

23   
24 **CRAIG M. KELLISON**  
25 UNITED STATES MAGISTRATE JUDGE  
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