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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRAISURE EARL SMITH,
Plaintiff,
v.
WAL-MART ASSOC. INC., WAL-MART
STORE #3708, and MIKE PHILLIPS,
Defendants.

No. 2:17-cv-968-GEB-EFB PS

ORDER

Plaintiff seeks leave to proceed *in forma pauperis* pursuant to 28 U.S.C. 1915.¹ His 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 must be dismissed failure to state a claim.

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

20 Additionally, a federal court is a court of limited jurisdiction, and may adjudicate only
21 those cases authorized by the Constitution and by Congress. *Kokkonen v. Guardian Life Ins. Co.*,
22 511 U.S. 375, 377 (1994). The basic federal jurisdiction statutes, 28 U.S.C. §§ 1331 & 1332,
23 confer “federal question” and “diversity” jurisdiction, respectively. Federal question jurisdiction
24 requires that the complaint (1) arise under a federal law or the U. S. Constitution, (2) allege a
25 “case or controversy” within the meaning of Article III, § 2 of the U. S. Constitution, or (3) be
26 authorized by a federal statute that both regulates a specific subject matter and confers federal
27 jurisdiction. *Baker v. Carr*, 369 U.S. 186, 198 (1962). To invoke the court’s diversity
28 jurisdiction, a plaintiff must specifically allege the diverse citizenship of all parties, and that the

1 matter in controversy exceeds \$75,000. 28 U.S.C. § 1332(a); *Bautista v. Pan American World*
2 *Airlines, Inc.*, 828 F.2d 546, 552 (9th Cir. 1987). A case presumably lies outside the jurisdiction
3 of the federal courts unless demonstrated otherwise. *Kokkonen*, 511 U.S. at 376-78. Lack of
4 subject matter jurisdiction may be raised at any time by either party or by the court. *Attorneys*
5 *Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 594-95 (9th Cir. 1996).

6 Liberally construed, plaintiff alleges that he was hired as an employee at a Wal-Mart store
7 in Suisun, California. ECF No. 1 at 3. He claims that prior to receiving the position, he disclosed
8 to Mike Phillips, the store manager, that he has a criminal record. *Id.* Notwithstanding this
9 disclosure, plaintiff was offered a position and commenced employment with Wal-Mart on
10 January 24, 2017. However, two days later he was “suspended pending investigation into [his]
11 hiring.” *Id.* Shortly thereafter, his employment was terminated based on his criminal record. *Id.*
12 He claims that his termination was discriminatory. *Id.*

13 Plaintiff’s reference to employment termination based on discriminatory motives suggests
14 an attempt to allege a claim under Title VII of the Civil Rights Act. However, plaintiff fails to
15 allege facts necessary to state a claim under Title VII.

16 Title VII prohibits an employer to “discriminate against any individual with respect to
17 his compensation, terms, conditions, or privileges of employment, because of such individual’s
18 race, color religion, sex, or national origin.” 42 U.S.C. § 2000e-2. To state a discrimination
19 claim under Title VII, a plaintiff must allege “that (1) he belongs to some protected class; (2) he
20 was qualified for the position; (3) he was subjected to an adverse employment action; and (4)
21 similarly situated individuals outside his protected class were treated more favorably.” *Chuang v.*
22 *Univ. of Cal Davis, Bd. of Tr.*, 225 F.3d 1115, 1123 (9th Cir. 2000).

23 To the extent plaintiff intended to allege a Title VII claim, the claim fails because plaintiff
24 does not allege that he was terminated based on his being a member of a protected class. Plaintiff
25 claims that he was subjected to discrimination based on his criminal record, but having a criminal
26 record is not a protected class under Title VII. *See* 42 U.S.C. § 2000e-2 (prohibiting employment
27 discrimination based on an “individual's race, color, religion, sex, or national origin”); *see also*,
28 *e.g.*, *Manley v. Invesco*, 555 Fed. Appx. 344, 348 (5th Cir. 2014) (“Persons with criminal records

1 are not a protected class under Title VII”); *Levy v. Primerica, Inc.*, 2016 WL 1698028, at *2
2 (N.D. Cal. Apr. 26, 2016) (“having a criminal record is not a protected class under” Title XII.”).
3 Thus, the complaint does not state a Title VII claim.

4 Accordingly, the complaint must be dismissed for failure to state a claim. Plaintiff is
5 granted leave to file an amended complaint, if he can allege a cognizable legal theory against a
6 proper defendant and sufficient facts in support of that cognizable legal theory. *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.

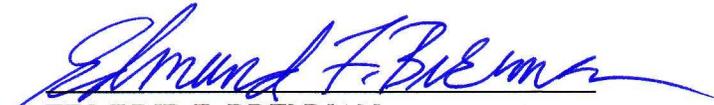
18 Additionally, plaintiff is informed that the court cannot refer to prior pleadings in order to
19 make an amended complaint complete. Local Rule 220 requires that an amended complaint be
20 complete in itself. This is because, as a general rule, an amended complaint supersedes the
21 original complaint. *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 E.D. Cal. L.R. 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 “First Amended Complaint.” Failure to timely file an amended complaint in accordance with this order will result in a recommendation this action be dismissed.

DATED: January 9, 2018.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE