

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
27
28

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

LEON HATTEN,

Plaintiff,

v.

ROBARGE, et al.,

Defendants.

No. 2:17-CV-2367-DMC-P

ORDER

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is Plaintiff’s complaint (Doc. 1). Plaintiff alleges defendants violated his rights under the American’s with Disabilities Act and seems to allege defendants retaliated against him in violation of his First Amendment Rights. For the reasons set forth below, Plaintiff’s complaint is dismissed with leave to amend.

I. SCREENING REQUIREMENT AND STANDARD

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if it: (1) is frivolous or malicious; (2) fails to state a claim upon which relief can be granted; or (3) seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1), (2).

1 The Federal Rules of Civil Procedure require complaints contain a “...short and
2 plain statement of the claim showing that the pleader is entitled to relief.” See McHenry v.
3 Renne, 84 F.3d 1172, 1177 (9th Cir. 1996) (quoting Fed. R. Civ. P. 8(a)(1)). Detailed factual
4 allegations are not required, but “[t]hreadbare recitals of the elements of a cause of action,
5 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678
6 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff’s
7 allegations are taken as true, courts “are not required to indulge unwarranted inferences.” Doe I v.
8 Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation
9 omitted).

10 Prisoners proceeding pro se in civil rights actions are entitled to have their
11 pleadings liberally construed and are afforded the benefit of any doubt. Hebbe v. Pliler, 627 F.3d
12 338, 342 (9th Cir. 2010) (citations omitted). To survive screening, Plaintiff’s claims must be
13 facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer
14 that each named defendant is liable for the misconduct alleged, Iqbal, 556 U.S. at 678 (quotation
15 marks omitted); Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The
16 sheer possibility that a defendant acted unlawfully is not sufficient, and mere consistency with
17 liability falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678 (quotation marks
18 omitted); Moss, 572F.3d at 969.

20 II. PLAINTIFF’S ALLEGATIONS

21 Plaintiff’s complaint names two defendants, Committee Correctional Counselor S.
22 Robarge and Chair Person T. Wamble. Plaintiff asserts both defendants failed to accommodate
23 his disability as mandated by the Americans with Disability Act (ADA). Specifically, Plaintiff
24 contends that he is in a leg brace and uses a cane for mobility due to a 2001 injury resulting from
25 a gunshot wound to his back. Plaintiff states that he cannot walk or stand for long periods of time
26 because of nerve damage in and around his spine. Plaintiff alleges that he was assigned to a
27 carpentry class that could not accommodate his disability and was subsequently removed from the
28 carpentry class after a prison review of his disability. Plaintiff contends the prison medical

1 evaluation stated he was to be housed at a level terrain institution and Plaintiff seems to allege
2 that he was then transferred to a non-level terrain institution where he fell down a flight of stairs
3 after exiting the prison library.

4 Plaintiff further seems to assert a claim of retaliation against both defendants for
5 ordering his transfer after Plaintiff consulted with counsel.

7 III. ANALYSIS

8 A. ADA Claim

9 Plaintiff seeks to bring a claim under Title II of the Americans with Disabilities
10 Act (ADA), 42 U.S.C. § 12132. Title II of the ADA “prohibit[s] discrimination on the basis of
11 disability.” Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002). “To establish a violation of
12 Title II of the ADA, a plaintiff must show that (1) [he] is a qualified individual with a disability;
13 (2) [he] was excluded from participation in or otherwise discriminated against with regard to a
14 public entity’s services, programs, or activities; and (3) such exclusion or discrimination was by
15 reason of [his] disability.” Id.

16 Plaintiff may proceed against individual defendants in their official capacities, but only if
17 Plaintiff shows discriminatory intent. See Ferguson v. City of Phoenix, 157 F.3d 668, 674 (9th
18 Cir. 1998). To show discriminatory intent, a plaintiff must establish deliberate indifference by the
19 public entity. Duvall v. County of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001). Deliberate
20 indifference requires: (1) knowledge that a harm to a federally protected right is substantially
21 likely, and (2) a failure to act upon that likelihood. Id. at 1139. The first prong is satisfied when
22 the plaintiff identifies a specific, reasonable and necessary accommodation that the entity has
23 failed to provide, and the plaintiff notifies the public entity of the need for accommodation or the
24 need is obvious or required by statute or regulation. Id. The second prong is satisfied by showing
25 that the entity deliberately failed to fulfill its duty to act in response to a request for
26 accommodation. Id. at 1139-40.

27 ///

28 ///

1 Plaintiff's claim that Committee Correctional Counselor S. Robarge and Chair
2 Person T. Wamble violated his rights under the ADA by transferring him to a different
3 correctional center fails. Plaintiff fails to allege sufficient facts connecting the two named
4 defendants with his transfer to a different correctional facility. Plaintiff also fails to articulate
5 how that transfer to a different prison facility excluded him from participation in a service,
6 program, or activity, as required by law. See Lovell, 303 F.3d at 1052. Additionally, Plaintiff
7 fails to allege facts of discriminatory intent. Plaintiff asserts that both Defendants were aware of
8 his disability but provides no facts related to an accommodation that Defendants failed to provide.
9 Plaintiff must show discriminatory intent by identifying (1) an accommodation that Defendants
10 knew or should have known about, and (2) by showing that the Defendants failed to act upon the
11 request for that accommodation. See Ferguson, 157 F.3d at 674. Because Plaintiff failed to
12 identify any accommodation in his complaint his ADA claim, as currently alleged, fails.

13 **B. Retaliation Claim**

14 In order to state a claim under 42 U.S.C. § 1983 for retaliation, the prisoner must
15 establish that he was retaliated against for exercising a constitutional right, and that the retaliatory
16 action was not related to a legitimate penological purpose, such as preserving institutional
17 security. See Barnett v. Centoni, 31 F.3d 813, 815-16 (9th Cir. 1994) (per curiam). In meeting
18 this standard, the prisoner must demonstrate a specific link between the alleged retaliation and the
19 exercise of a constitutional right. See Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995);
20 Valandingham v. Bojorquez, 866 F.2d 1135, 1138-39 (9th Cir. 1989). The prisoner must also
21 show that the exercise of First Amendment rights was chilled, though not necessarily silenced, by
22 the alleged retaliatory conduct. See Resnick v. Hayes, 213 F.3d 443, 449 (9th Cir. 2000), see also
23 Rhodes v. Robinson, 408 F.3d 559, 569 (9th Cir. 2005). Thus, the prisoner plaintiff must
24 establish the following in order to state a claim for retaliation: (1) prison officials took adverse
25 action against the inmate; (2) the adverse action was taken because the inmate engaged in
26 protected conduct; (3) the adverse action chilled the inmate's First Amendment rights; and (4) the
27 adverse action did not serve a legitimate penological purpose. See Rhodes, 408 F.3d at 568.
28 Generally, prisoners have no liberty interest in avoiding being transferred to another prison. See

1 Olim v. Wakinekona, 461 U.S. 238, 245 (1983). However, prisoners may not be transferred in
2 retaliation for exercising their First Amendment rights. See Pratt v. Rowland, 65 F.3d 802, 806
3 (9th Cir. 1995).

4 Plaintiff seems to allege he was retaliated against because he “involved” an
5 attorney regarding his ADA claims against the Defendants. The facts related to this allegation are
6 sparse. Plaintiff does not provide a real link between his consultations with counsel and his
7 transfer to a different prison facility. See Pratt, 65 F.3d at 807 (holding a prisoner must
8 demonstrate a specific link between the alleged retaliation and the exercise of a constitutional
9 right). Further, Plaintiff does not provide any facts demonstrating that his First Amendment
10 rights were chilled by the transfer. See Rhodes, 408 F.3d at 568 (Plaintiff must show that the
11 exercise of First Amendment rights was chilled, though not necessarily silenced, by the alleged
12 retaliatory conduct.)

13 14 **IV. AMENDING THE COMPLAINT**

15 Because it is possible that the deficiencies identified in this order may be cured by
16 amending the complaint, plaintiff is entitled to leave to amend prior to dismissal of the entire
17 action. See Lopez v. Smith, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc). Plaintiff is
18 informed that, as a general rule, an amended complaint supersedes the original complaint. See
19 Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). Thus, following dismissal with leave to
20 amend, all claims alleged in the original complaint which are not alleged in the amended
21 complaint are waived. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987). Therefore, if
22 plaintiff amends the complaint, the court cannot refer to the prior pleading in order to make
23 plaintiff's amended complaint complete. See Local Rule 220. An amended complaint must be
24 complete in itself without reference to any prior pleading. See id.

25 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
26 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See
27 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The complaint must allege in specific terms how
28 each named defendant is involved, and must set forth some affirmative link or connection

1 between each defendant's actions and the claimed deprivation. See May v. Enomoto, 633 F.2d
2 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

3 Finally, plaintiff is warned that failure to file an amended complaint within the
4 time provided in this order may be grounds for dismissal of this action. See Ferdik, 963 F.2d at
5 1260-61; see also Local Rule 110. Plaintiff is also warned that a complaint which fails to comply
6 with Rule 8 may, in the court's discretion, be dismissed with prejudice pursuant to Rule 41(b).
7 See Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 673 (9th Cir. 1981).

8 9 V. CONCLUSION

10 Accordingly, IT IS HEREBY ORDERED that:

- 11 1. Plaintiff's complaint is dismissed with leave to amend; and
- 12 2. Plaintiff shall file a first amended complaint within 30 days of the date of
13 service of this order.

14
15
16 Dated: November 7, 2018



17 DENNIS M. COTA
18 UNITED STATES MAGISTRATE JUDGE