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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TIMOTHY DUGGER
Plaintiff,
v.
UNITED STATES OF AMERICA, et al.
Defendants.

No. 2:23-cv-1057 AC P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a former federal inmate proceeding pro se who filed this civil rights action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Federal Tort Claims Act, the Americans with Disabilities Act, the Rehabilitation Act, and state law. He has requested leave to proceed without paying the full filing fee for this action, under 28 U.S.C. § 1915. Plaintiff has submitted a declaration showing that he cannot afford to pay the entire filing fee. See 28 U.S.C. § 1915(a)(2). Accordingly, plaintiff’s motion to proceed in forma pauperis is granted.

I. Statutory Screening of Prisoner Complaints

The court is required to screen complaints brought by prisoners seeking relief against “a governmental entity or officer or employee of a governmental entity.” 28 U.S.C. § 1915A(a). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989). The court may dismiss a claim as frivolous if it is based on

1 an indisputably meritless legal theory or factual contentions that are baseless. Neitzke, 490 U.S.
2 at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an
3 arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989).

4 In order to avoid dismissal for failure to state a claim a complaint must contain more than
5 “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause
6 of action.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other words,
7 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
8 statements do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim upon which the
9 court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. “A claim has facial
10 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
11 inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678. When
12 considering whether a complaint states a claim, the court must accept the allegations as true,
13 Erickson v. Pardus, 551 U.S. 89, 93-94 (2007), and construe the complaint in the light most
14 favorable to the plaintiff, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

15 II. Factual Allegations of the Complaint

16 The complaint alleges that defendants Thompson, Bouleware, Brown, Allred, and the
17 United States violated plaintiff’s rights under the Eighth Amendment, Americans with Disabilities
18 Act (ADA), and Rehabilitation Act (RA) and also committed several state torts against him. ECF
19 No. 1. Specifically, plaintiff alleges that on August 10, 2021, while incarcerated at FCI-Herlong,
20 he was walking past a cell door when the door swung open and hit his left hand. Id. at 8. His left
21 hand, including his wrist and fingers, immediately swelled and he could not move it without
22 feeling extreme pain. Id. Plaintiff told the unit officer about the accident and injury, but the
23 officer refused to call the medical department and told plaintiff to instead put in a sick call slip.
24 Id.

25 From September to November of 2021 the prison was on total lockdown because of an
26 outbreak of COVID cases, resulting in all inmates being locked in their cells twenty-four hours a
27 day except for showers. Id. at 9. During this time plaintiff submitted multiple sick call slips,
28 emails, and in-person requests concerning the injuries and pain in his left hand and requesting that

1 someone see him but none of them were answered and no one from the medical department came
2 to see or examine him. Id. Plaintiff also repeatedly notified Brown, Bouleware, and Thompson,
3 who came to plaintiff's unit regularly during the lockdown, that he needed medical attention, that
4 he was in pain, that he could not use his left hand, and that medical would not respond to his
5 requests. Id. at 9-10. Thompson told plaintiff he would look into it, but nothing was done. Id. at
6 10.

7 On November 25, 2021, plaintiff saw Allred, the prison doctor. Id. Allred acknowledged
8 receiving several of plaintiff's sick call slips about his left hand, but stated he had been too busy
9 to see him. Id. Allred then examined plaintiff's hand and told him it was obviously fractured and
10 dislocated in several areas and that he would immediately schedule plaintiff with an orthopedic
11 surgeon. Id. Plaintiff was seen by an outside doctor on February 9, 2022, and was told that his
12 hand had healed with a fracture and dislocation in his left thumb and wrist area, resulting in
13 deformity and permanent damage. Id. at 10-11. The doctor further explained that plaintiff would
14 need surgery to alleviate the pain and reduce the arthritis that would spread through the wrist and
15 possibly into his arm but that even with surgery he would have significant loss of range and use
16 of his hand due to the extensive delay. Id. at 11.

17 In April 2022, plaintiff's left hand started to swell on a regular basis and he suffered from
18 increased pain and periods of numbness lasting from a couple hours up to three days. Id. at 12.
19 Near the end of April 2022, plaintiff started going to morning sick call to let medical staff know
20 about the pain, numbness and swelling, but as of the date of the complaint, Allred has not seen
21 plaintiff despite the pain and numbness worsening daily. Id.

22 Finally, plaintiff asserts that he is handicapped and defendants have failed to provide him
23 with physical therapy and accommodations such as a brace and an accessible toilet, shower, and
24 sink. Id. at 16.

25 III. Claims for Which a Response Will Be Required

26 After conducting the screening required by 28 U.S.C. § 1915A(a), the court finds that to
27 the extent plaintiff is claiming inadequate medical care in violation of the Eighth Amendment, he
28 has properly stated a claim for relief under Bivens against Thompson, Bouleware, Brown, and

1 Allred. See Carlson v. Green, 446 U.S. 14, (1980) (damages available under the Eighth
2 Amendment for failing to provide adequate medical treatment). He has also stated a claim for
3 relief against the United States under the Federal Tort Claims Act (FTCA) based on Thompson,
4 Bouleware, Brown, and Allred’s conduct.

5 IV. Failure to State a Claim

6 However, the allegations in the complaint do not state any claims for relief under state
7 law, the ADA, or the RA. With respect to the state law claims, “[t]he United States is the only
8 proper defendant in an FTCA action,” Lance v. United States, 70 F.3d 1093, 1095 (9th Cir. 1995)
9 (per curiam) (citation omitted), and an action under the FTCA is the exclusive remedy for
10 plaintiff’s claims other than those based on violations of the United States Constitution, 28 U.S.C.
11 § 2679(b) (remedy against the United States under the FTCA for personal injury based on
12 conduct of government employee acting within the scope of their employment is exclusive
13 remedy for damages except for actions based on violations of the United States Constitution). In
14 other words, the FTCA bars plaintiff’s state law claims against the individual defendants.

15 With respect to plaintiff’s ADA claim, Title II of the ADA does not apply to the federal
16 government, its agencies, and its employees, and plaintiff therefore cannot state a viable ADA
17 claim. Claggett v. Woodring, No. 08-cv-6251 JFW MAN, 2008 WL 11461743, at *4 (C.D. Cal.
18 Oct. 28, 2008) (“[T]he definition of ‘public entity’ set forth in Title II of the ADA does not
19 include the federal government. This statutory language has been held to clearly establish that
20 Title II of the ADA is inapplicable to the federal government, its agencies, and its officers and
21 employees.” (collecting cases)); see also 42 U.S.C. § 12131(1) (defining public entity). He also
22 fails to state a claim under § 504 of the RA because the federal government is immune from
23 monetary damages, see Lane v. Pena, 518 U.S. 187 (1996) (§ 504 of the Rehabilitation Act does
24 not waive the federal government’s sovereign immunity from monetary damages), and any claim
25 for injunctive relief is moot since, as noted above, the record reflects that plaintiff has been
26 released from custody, see Dilley v. Gunn, 64 F.3d 1365, 1368 (9th Cir. 1995) (“An inmate’s
27 release from prison while his claims are pending generally will moot any claims for injunctive
28 relief relating to the prison’s policies unless the suit has been certified as a class action.).

1 c. One completed USM-285 form for each of the following defendants: United States
2 of America, Thompson, Bouleware, Brown, and Allred; and

3 d. Six copies of the endorsed complaint filed June 5, 2023.

4 5. Plaintiff should not attempt service on defendants and need not request waiver of
5 service. Upon receipt of the above-described documents, the court will direct the United States
6 Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure 4
7 without payment of costs.


8 6. Failure to return the documents within the time permitted, will result in a
9 recommendation that this action be dismissed for failure to prosecute based on Rule 41(b) of the
10 Federal Rules of Civil Procedure.

11 7. The Clerk of the Court shall randomly assign a United States District Judge to this
12 action.

13 IT IS FURTHER RECOMMENDED that the Americans with Disabilities Act and
14 Rehabilitation Act claims against all defendants and the state law claims against defendants
15 Thompson, Bouleware, Brown, and Allred be dismissed without leave to amend.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
18 after being served with these findings and recommendations, plaintiff may file written objections
19 with the court. Such a document should be captioned “Objections to Magistrate Judges Findings
20 and Recommendations.” Plaintiff is advised that failure to file objections within the specified
21 time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153
22 (9th Cir. 1991).

23 DATED: January 29, 2025

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25 ALLISON CLAIRE
26 UNITED STATES MAGISTRATE JUDGE
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NOTICE OF SUBMISSION OF
DOCUMENTS

Plaintiff submits the following documents in compliance with the court's order filed

_____:

- 1 completed summons form
- 5 completed forms USM-285
- 6 copies of the complaint

DATED:

Plaintiff