

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ROSARIO MARINELLO,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
CTF SOLEDAD,

Defendant.

Case No.: CV12-02564 PSG

**ORDER TO REASSIGN CASE AND
REPORT AND RECOMMENDATION
THAT PLAINTIFF ROSARIO
MARINELLO’S APPLICATION TO
PROCEED *IN FORMA PAUPERIS* BE
DENIED**

On May 31, 2012, Plaintiff Rosario Marinello (“Marinello”) proceeding pro se filed an amended complaint and an application to proceed *in forma pauperis*. Based on the application and the file herein,

IT IS HEREBY ORDERED that this case be reassigned to a District Court Judge with the recommendation that Marinello’s application to proceed *in forma pauperis* be DENIED.¹

Granting or refusing permission to proceed *in forma pauperis* is a matter within the sound discretion of the trial court.² It is the court’s duty to examine any *in forma pauperis* application “to determine whether the proposed proceeding has merit and if it appears that the proceeding is

¹ This court is ordering reassignment to a District Court Judge because, absent consent of all parties, a magistrate judge does not have the authority to make case-dispositive rulings. *See, e.g., Tripathi v. Rison*, 847 F.2d 548, 549 (9th Cir. 1988).

² *See Shobe v. People of State of California*, 362 F.2d 545, 546 (9th Cir. 1966).

1 without merit, the court is bound to deny a motion seeking leave proceed *in forma pauperis*.”³ A
2 federal court must dismiss an *in forma pauperis* complaint if the complaint is: (1) frivolous; (2)
3 fails to state a claim on which relief may be granted; or (3) seeks monetary relief against a
4 defendant who is immune from such relief.⁴

5 Marinello brings a claim for employment discrimination under Title VII of the Civil Rights
6 Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and a claim for retaliation against the California
7 Department of Corrections and Rehabilitation CTF Soledad (“DOCR”).⁵ These claims have
8 already been adjudicated in favor of DOCR and affirmed by the Ninth Circuit.⁶ Although
9 Marinello alleges that material facts were overlooked in the previous decision by the District Court
10 as well as in the denial of appeal by the Ninth Circuit,⁷ Marinello ultimately is attempting to raise
11 the same claims against the same defendant, as he has done several times previously.⁸ His claims
12 therefore appear barred by the doctrine of res judicata and lack merit. The case shall be reassigned
13 to a U.S. District Judge and the undersigned recommends that the application to proceed *in forma*
14 *pauperis* be DENIED.
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17 **IT IS SO ORDERED**

18 Dated: 6/15/2012

19 
20 PAUL S. GREWAL
21 United States Magistrate Judge

22 ³ *Smart v. Heinze*, 247 F.2d 114, 116 (9th Cir. 1965).

23 ⁴ *See* 28 U.S.C. § 1915(e)(2); *see also Neitzke v. Williams*, 190 U.S. 319, 324 (1989).

24 ⁵ *See* Docket Item No. 6 (Amended Employment Discrimination Complaint Brief and Statement of Facts)

25 ⁶ *See Marinello v. California Dep’t of Corrections and Rehabilitation*, 430 Fed.Appx. 583, 583
26 (9th Cir. 2011)

27 ⁷ *See* Docket Item No. 6 (Amended Employment Discrimination Complaint Brief and Statement of Facts)

28 ⁸ *See Marinello v. California Dep’t of Corrections and Rehabilitation*, No. 5:11-cv-05186-PSG;
Marinello v. California Dep’t of Corrections and Rehabilitation, No. 5:11-cv-06682-RMW.