

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

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CEZAR CARVAJAL,

vs.

PRIDE INDUSTRIES,

Plaintiff,

Defendant.

CASE NO. 10CV2319 DMS (AJB)

**ORDER DISMISSING FIRST
AMENDED COMPLAINT
WITHOUT PREJUDICE FOR
FAILING TO STATE A CLAIM
UPON WHICH RELIEF MAY BE
GRANTED PURSUANT TO 28
U.S.C. § 1915(e)(2)(B)(ii)**

Plaintiff, a non-prisoner proceeding *pro se*, has submitted a First Amended Complaint (“FAC”) and an amended request for appointment of counsel. (Docs. 5, 7.) On November 18, 2010, the Court issued an Order granting Plaintiff’s motion to proceed in *forma pauperis* (“IFP”), but dismissing Plaintiff’s Complaint without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). (Doc. 4.) The Court granted Plaintiff leave to file an amended complaint on or before December 10, 2010, and Plaintiff filed his FAC on December 3, 2010.

Because Plaintiff is proceeding IFP, his FAC is subject to a mandatory and *sua sponte* review and dismissal by the Court to the extent it is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000)(*en banc*). Section 1915(e)(2) mandates that the court reviewing a complaint filed pursuant to the IFP provisions of § 1915 make and rule on its own motion to dismiss

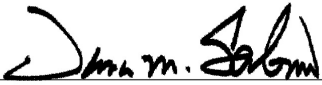
1 before directing that the complaint be served by the U.S. Marshal pursuant to Fed. R. Civ. P. 4(c)(3).
2 *Lopez*, 203 F.3d at 1127; *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

3 As currently pleaded, Plaintiff's FAC is subject to *sua sponte* dismissal under 28 U.S.C. §
4 1915(e)(2)(B)(ii) because it fails to state a claim upon which relief may be granted. Although Plaintiff
5 attaches to his FAC a copy of a charge of discrimination filed by him with the U.S. Equal Employment
6 Opportunity Commission, the FAC itself contains no facts in support of Plaintiff's allegations of
7 violations of the Americans with Disabilities Act and Title VII. The FAC merely alleges "[d]isability-
8 based discrimination, failure to accommodate, failure to engage in interactive process, interference,
9 and retaliation in violation of the ADA; national origin and sex discrimination, and retaliation in
10 violation of Title VII." Such a pleading, without additional factual allegations, is insufficient to state
11 a claim upon which relief may be granted. Accordingly, the Court hereby finds that Plaintiff's FAC
12 must be dismissed.

13 The Complaint is **DISMISSED** without prejudice for failure to state a claim upon which relief
14 may be granted. Plaintiff may file a second amended complaint on or before January 31, 2011.
15 Plaintiff's amended request for appointment of counsel is denied as moot.

16 **IT IS SO ORDERED.**

17 DATED: January 11, 2011

18 
19 _____
20 HON. DANA M. SABRAW
21 United States District Judge
22
23
24
25
26
27
28