

FILED
17 FEB 15 AM 11:36
 CLERK, U.S. DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA
 BY: *MXN* DEPUTY

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

CHASE HAYES,
 Plaintiff,
 v.
 NASSCO,
 Defendant.

Case No.: 3:17-cv-00004-BEN-WVG

ORDER:

- (1) GRANTING SECOND MOTION TO PROCEED IN FORMA PAUPERIS;**
- (2) DENYING SECOND MOTION FOR APPOINTMENT OF COUNSEL;**
- (3) DISMISSING FIRST AMENDED COMPLAINT FOR FAILING TO STATE A CLAIM**

On January 30, 2017, Plaintiff Chase Hayes filed his second Motions to Proceed *In Forma Pauperis* (“IFP”) and for Appointment of Counsel, along with his proposed First Amended Complaint (“FAC”).¹ (Docket No. 7.) For the reasons stated below, the

¹ On January 24, 2017, the Court denied Plaintiff’s motion to proceed IFP for failing to demonstrate an inability to pay the filing fee, denied Plaintiff’s motion for appointment of counsel for failing to demonstrate a likelihood of success on the merits of his claim, and

1 second Motion to Proceed IFP is **GRANTED**, the second Motion for Appointment of
2 Counsel is **DENIED**, and the proposed First Amended Complaint is **DISMISSED**
3 **without prejudice.**

4 **I. Motion to Proceed IFP**

5 All parties instituting any civil action in a district court must pay a filing fee. 28
6 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire
7 fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a).

8 Under 28 U.S.C. § 1915(a)(1),

9 any court of the United States may authorize the
10 commencement, prosecution or defense of any suit, action or
11 proceeding . . . without prepayment of fees or security therefor,
12 by a person who submits an affidavit that includes a statement
13 of all assets such [person] possesses that the person is unable to
14 pay such fees or give security therefor.

14 Plaintiff's second Motion to Proceed IFP indicates he receives \$168.80 per week in
15 disability benefits, and \$170.00 a month in the form of food stamps. (Docket No. 7 at 1.)
16 Plaintiff further indicates his expenses total approximately \$800.00 per month. (*Id.*)
17 The Court finds Plaintiff has sufficiently stated that he cannot afford to pay the filing fee.
18 Therefore, the Motion is **GRANTED**, and Plaintiff's proposed First Amended Complaint
19 (docket no. 7) shall be deemed filed *nunc pro tunc* to the date of this Order.

20 **II. Motion to Appoint Counsel**

21 Plaintiff also filed a second Motion for Appointment of Counsel, in which he
22 asserts he has "no ability to articulate his claim in a legal manner" due to "the complexity
23 of the legal issues involved in Longshore and Harbor Workers Compensation Law, et al."
24 (Docket No. 7 at 2.)

25
26
27
28 dismissed without prejudice his initial Complaint for failing to state a claim upon which
relief may be granted. (Docket No. 6.)

1 As the Court stated in its January 24, 2017 Order (docket no. 6), courts have
2 discretion, pursuant to 28 U.S.C. § 1915(e)(1) (1996), to appoint counsel for indigent
3 civil litigants upon a showing of exceptional circumstances. “A finding of exceptional
4 circumstances requires an evaluation of both the likelihood of success on the merits and
5 the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the
6 legal issues involved.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991) (internal
7 citations omitted). “Neither of these factors is dispositive and both must be viewed
8 together before reaching a decision.” *Id.* (internal citations omitted).

9 The Court cannot say there is any likelihood of success on the merits of Plaintiff’s
10 claims because, as will be explained in further detail below, Plaintiff’s First Amended
11 Complaint fails to state a claim upon which relief may be granted. In addition, Plaintiff
12 does not demonstrate an inability to represent himself beyond the ordinary burdens
13 encountered by plaintiffs representing themselves *pro se*, or that he has even attempted to
14 obtain counsel to represent him. *See Garcia v. Smith*, No. 10-cv-1187, 2012 WL
15 2499003, at *4 (S.D. Cal. June 27, 2012) (“Merely alleging indigence is insufficient to
16 entitle him to appointed counsel; he must also demonstrate that he made a good faith
17 effort, but was unable, to obtain counsel.”). Therefore, the Court finds that the
18 exceptional circumstances required for the appointment of counsel are not present.²
19 Plaintiff’s Motion is **DENIED**.

20 ///

21 ///

22 ///

23
24
25 ² The Court emphasizes that courts are directed to construe *pro se* pleadings liberally, and
26 that use of layman’s language, on its own, will not prevent Plaintiff from proceeding with
27 his claim. *See Hebbe, supra*, 627 F.3d at 342 (*pro se* plaintiff’s complaint “must be held
28 to less stringent standards than formal pleadings drafted by lawyers”) (internal citations
omitted).

1 **III. Section 1915 Screening**

2 A. Legal Standard

3 Under section 1915(e) of title 28 of the United States Code, the Court must *sua*
4 *sponte* dismiss IFP complaints, or any portions thereof, which are frivolous, malicious,
5 fail to state a claim, or which seek damages from defendants who are immune. *See Lopez*
6 *v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing 28 U.S.C. §
7 1915(e)(2)). “[T]he provisions of section 1915(e)(2)(B) are not limited to prisoners.”
8 *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001).

9 Every complaint must contain “a short and plain statement of the claim showing
10 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
11 are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported
12 by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
13 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “When there are
14 well-pleaded factual allegations, a court should assume their veracity, and then determine
15 whether they plausibly give rise to an entitlement to relief.” *Id.* at 679; *see Barren v.*
16 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that section 1915(e)(2)
17 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). “Determining
18 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that
19 requires the reviewing court to draw on its judicial experience and common sense.”
20 *Iqbal*, 556 U.S. at 679. The “mere possibility of misconduct” falls short of meeting this
21 plausibility standard. *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.
22 2009).

23 While a plaintiff’s factual allegations are taken as true, courts “are not required to
24 indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th
25 Cir. 2009) (internal quotation marks and citation omitted). Indeed, while courts “have an
26 obligation where the petitioner is pro se, particularly in civil rights cases, to construe the
27 pleadings liberally and to afford the petitioner the benefit of any doubt,” *Hebbe v. Pliler*,
28 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1

1 (9th Cir. 1985)), it may not “supply essential elements of claims that were not initially
2 pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

3 B. Discussion

4 Plaintiff’s First Amended Complaint (“FAC”) must be dismissed for failing to state
5 a claim upon which relief may be granted. 28 U.S.C. § 1915(e).

6 In his FAC, Plaintiff alleges “NASSCO (Paul Goyette) laid Plaintiff off due to
7 Plaintiff injuries [sic],” even though Paul Goyette had allegedly promised him that “the
8 only way Plaintiff would be laid off is seniority if Plaintiff accept a light duty job [sic].”
9 (Docket No. 7 at 2.) However, Plaintiff does not identify who Paul Goyette is with
10 respect to Defendant NASSCO, Plaintiff’s injuries, the date he became injured, or the
11 date he was laid off. Plaintiff further alleges he felt he was discriminated against under
12 Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Americans with
13 Disabilities Act (“ADA”), but does explain how Defendant discriminated against him.³
14 Plaintiff also asserts Defendant “is well aware of my race and disabilities which I can
15 only try to explain my meeting with them in layman’s terms.” However, Plaintiff does
16 not identify what his disabilities are, when Defendant became aware of those disabilities,
17 or the events that transpired in the referenced meeting.

18 In sum, even after construing the documents liberally, the Court finds Plaintiff has
19 failed to state a claim for discrimination under either the Civil Rights Act or the ADA.
20 Plaintiff’s FAC has not met the requirement to include “a short and plain statement of the
21 claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).

22 Moreover, a plaintiff litigating a Title VII claim in a federal district court is
23 required to exhaust his administrative remedies. *Greenlaw v. Garrett*, 59 F.3d 994, 997
24 (9th Cir. 1995) (citing *Brown v. General Services Administration*, 425 U.S. 820, 832
25 (1976)). This includes regulatory and judicially imposed exhaustion requirements. *Id.*

27
28 ³ Plaintiff refers to, but did not attach, a “Right to Sue letter” which purportedly “show[s]
the statue(s) [sic] which [he] felt [he] was discriminated under.” (Docket No. 7 at 2.)

1 The procedural requirements for Title VII actions are “neither interpreted too technically
2 nor applied too mechanically.” *Id.* (citing *Ong v. Cleland*, 642 F.2d 316, 319 (9th Cir.
3 1981) (internal citations omitted).

4 Generally, a Title VII complainant must file a complaint with the Equal
5 Employment Opportunity Commission (“EEOC”) within one hundred and eight (180)
6 days of the alleged violation. 29 C.F.R. § 1601.13(a)(1). If a complainant’s charges arise
7 in a jurisdiction that has a FEP agency, alternative procedures may apply. 29 C.F.R. §
8 1601.13(a)(3). An FEP agency is “a State or local agency which the Commission has
9 determined satisfies the criteria stated in section 706(c) of title VII.” 29 C.F.R. §
10 1601.3(a).

11 Plaintiff’s FAC indicates Plaintiff is suing his former employer for alleged
12 discriminatory conduct. (Docket No. 7 at 2.) Plaintiff did not state when the
13 discriminatory conduct occurred, or that Plaintiff filed a complaint with the EEOC within
14 one hundred and eighty (180) days of each of the alleged violations. 29 C.F.R. §
15 1601.13(a)(1). As a result, Plaintiff has failed to state a claim because he failed to
16 establish that he exhausted all of her administrative remedies, which is a prerequisite to
17 his title VII claims. *Greenlaw, supra*, 59 F.3d at 997 (9th Cir. 1995) (citations omitted).

18 Accordingly, the FAC is **DISMISSED**. However, the Court grants Plaintiff leave
19 to file a Second Amended Complaint that cures the deficiencies noted above.⁴

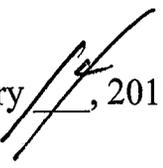
20 CONCLUSION

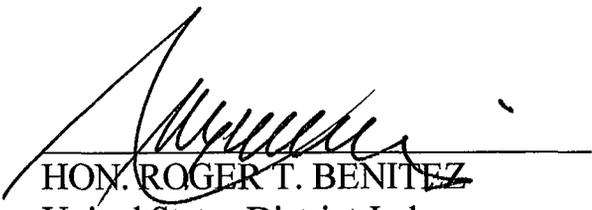
21 Plaintiff’s Motion to Proceed IFP is **GRANTED**. Plaintiff’s Motion for
22 Appointment of Counsel is **DENIED**. Plaintiff’s First Amended Complaint is deemed
23 filed *nunc pro tunc* to the date of this Order, and is concurrently **DISMISSED without**
24

25
26 ⁴ The Court reminds Plaintiff that all that is required is a short and plain statement of
27 facts to establish his claim and an explanation of why he is entitled to relief. Fed. R. Civ.
28 P. 8(a)(2).

1 **prejudice** for failing to state a claim. Plaintiff is granted **thirty (30) days** from the date
2 of this Order to file a second amended complaint that addresses the deficiencies identified
3 above. If Plaintiff does not timely file a second amended complaint, this action shall
4 remain closed without further Order of the Court.

5 **IT IS SO ORDERED.**

6
7 DATED: February , 2017


8 HON. ROGER T. BENITEZ
9 United States District Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28