

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KEVIN NESBIT,

Plaintiff,

No. 3:17-cv-01009-HZ

v.

OPINION & ORDER

OREGON EMPLOYMENT DEPT
COLLECTIONS UNIT,

Defendant.

Kevin Nesbit
11303 SE 56th Ave.
Milwaukie, OR 97222

Plaintiff Pro Se

HERNÁNDEZ, District Judge:

Pro se Plaintiff Kevin Nesbit brings this action against the Oregon Employment Department Collections Unit (OED). Plaintiff moves to proceed in forma pauperis (IFP) and he moves for appointment of counsel. While Plaintiff's IFP application lacks the requisite detail for

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this Court to determine whether Plaintiff qualifies, the Court grants the motion for the limited purpose of this initial review of Plaintiff's complaint. The Court dismisses the complaint and denies Plaintiff's motion for appointment of counsel.

STANDARDS

A complaint filed in forma pauperis may be dismissed at any time, including before service of process, if the court determines that:

- (B) the action or appeal–
 - (i) is frivolous or malicious;
 - (ii) fails to state a claim on which relief may be granted; or
 - (iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915(e)(2); see also *Neitzke v. Williams*, 490 U.S. 319, 324 (1989) (sua sponte dismissals under section 1915 “spare prospective defendants the inconvenience and expense of answering” complaints which are “frivolous, malicious, or repetitive”); *Lopez v. Smith*, 203 F.3d 1122, 1126 n.7 (9th Cir. 2000) (section 1915(e) applies to all in forma pauperis complaints, not just those filed by inmates). A complaint is frivolous “where it lacks an arguable basis in law or in fact.” *Neitzke*, 490 U.S. at 325; *Jackson v. State of Ariz.*, 885 F.2d 639, 640 (9th Cir. 1989).

As the Ninth Circuit has instructed, however, courts must “continue to construe pro se filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). A pro se complaint “must be held to less stringent standards than formal pleadings drafted by lawyers.” Id. (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)). A pro se litigant will be given leave to amend his or her complaint unless it is clear that the deficiencies of the complaint cannot be cured by amendment. *Lopez*, 203 F.3d at 1130–31.

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DISCUSSION

I. Allegations

To the best of this Court's understanding, Plaintiff's claim is that employees of the OED have slandered and defamed him with their "actions and unprofessional misconduct." Compl., ECF 1. The complaint suggests that OED employees accused Plaintiff of improperly collecting unemployment benefits and OED has attempted to collect the alleged overpayment from Plaintiff. Id.; Suppl. to Compl., ECF 5.

Plaintiff does not provide any basis for jurisdiction. Compl. As for the relief sought, Plaintiff asks for "economic damages in the amount of \$8,424.80 and non-economic general damages including but not limited to deliberate infliction of emotional distress in the sum of \$84,240.84." Id.

II. Pleading Standard

The Federal Rules of Civil Procedure describe "a liberal system of 'notice pleading.'" *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168, (1993). This notice pleading system "requires a complaint to contain (1) a statement of jurisdiction, (2) 'a short and plain statement of the claim showing that the pleader is entitled to relief,' and (3) 'a demand for judgment for the relief the pleader seeks.'" *Walsh v. Nevada Dep't of Human Res.*, 471 F.3d 1033, 1036 (9th Cir. 2006) (quoting Rule 8(a)).

"[T]he pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (internal quotation omitted). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. . . . Nor

does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.” Id. (internal quotation omitted).

The complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face[,]” meaning “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. (internal quotation and citation omitted). The complaint must contain “well-pleaded facts” which “permit the court to infer more than the mere possibility of misconduct.” Id.

Here, Plaintiff fails to assert a “plain statement” of his claims. Plaintiff’s statements and the relief sought are so lacking in specific factual content that the Court cannot draw a reasonable inference that Defendant is liable for misconduct. The complaint is confusing and the Court cannot confidently determine what this case is about. Thus, the complaint fails to state a claim under Iqbal.

III. Jurisdiction

Rule 8 requires a pleading to contain “a short and plain statement of the grounds for the court’s jurisdiction[.]” Fed. R. Civ. P. 8(a)(1). Federal courts are courts of limited jurisdiction. *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 998 (9th Cir. 2007). Federal jurisdiction may be based on the presence of a federal question or on diversity of citizenship. 28 U.S.C. §§ 1331, 1332. To invoke federal question jurisdiction, a plaintiff must plead that the defendant has violated some constitutional or statutory provision. Diversity jurisdiction requires that all plaintiffs be of different state citizenship than all defendants. *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939). To establish diversity jurisdiction, plaintiffs must allege that they are citizens of one state, that all of the defendants are citizens of other states, and that the damages are more than \$75,000.

In his complaint, Plaintiff does not indicate any basis for jurisdiction. He cites no federal constitutional, statutory, or treaty right at issue in the case. Plaintiff appears to reside in Oregon. He brings Oregon tort claims against an Oregon state agency. Thus, this Court lacks jurisdiction to hear those claims because complete diversity among all parties is not present. See *Exxon Mobile Corp.*, 545 U.S. 546, 552 (2005).

Because Plaintiff fails to identify a basis for federal jurisdiction, this Court lacks subject matter jurisdiction and must dismiss the complaint. See Fed.R.Civ.P. 12(h)(3) (court is required to dismiss an action if the court determines that it lacks subject matter jurisdiction); *Scholastic Entm't, Inc. v. Fox Entm't Group, Inc.*, 336 F.3d 982, 985 (9th Cir. 2003).

IV. Motion to Appoint Counsel

Plaintiff moves for a court-appointed attorney. There is no constitutional right to counsel in a civil case. *United States v. 30.64 Acres of Land*, 795 F.2d 796, 801 (9th Cir. 1986). However, pursuant to 28 U.S.C. § 1915(e), this Court has discretion to request volunteer counsel for indigent parties in exceptional circumstances. *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). While this Court may request volunteer counsel in exceptional cases, it has no power to make a mandatory appointment. *Mallard v. United States Dist. Ct. of Iowa*, 490 U.S. 296, 301-08 (1989).

In order to determine whether exceptional circumstances exist, this Court evaluates the party's likelihood of success on the merits and the ability of the party to articulate his or her claim pro se in light of the complexity of the legal issues involved. *Wood*, 900 F.2d at 1335-36. However, “[n]either of these factors is dispositive and both must be viewed together before reaching a decision on request of counsel under section 1915(d).” *Wilborn*, 789 F.2d at 1331; *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).

Here, it is inappropriate to consider Plaintiff's request when the Court is dismissing the case. The Court denies the motion for appointment of counsel.

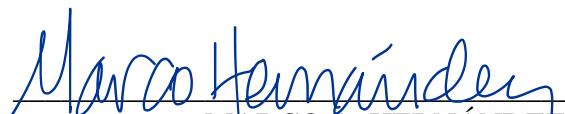
CONCLUSION

Plaintiff's motion to proceed in forma pauperis [2] is granted for the limited purpose of reviewing Plaintiff's complaint. Plaintiff's complaint [1] is dismissed. Plaintiff's motion for appointment of counsel [3] is denied.

Plaintiff may file an amended complaint, curing the deficiencies noted above, within 30 days of the date of this order. Plaintiff is advised that failure to file an amended complaint which cures the deficiencies noted shall result in the dismissal of this proceeding, with prejudice.

IT IS SO ORDERED.

Dated this 25 day of JULY, 2017



MARCO A. HERNÁNDEZ
United States District Judge