

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN L. BERNSTEIN, et al.,
Plaintiffs,
v.
JANET DUNLOP, et al.,
Defendants.

Case No. [13-cv-01563-RS](#) (JCS)

**REPORT AND RECOMMENDATION
RE REVIEW UNDER 28 U.S.C. § 1915**

Dkt. No. 1.

I. INTRODUCTION

Plaintiff Michael A. Leon (hereafter “Leon” or “Plaintiff”) filed this action along with other Plaintiffs¹ alleging Defendants² violated his constitutional rights, inflicted emotional distress upon him, and failed to provide Leon with reasonable accommodations in violation of the Americans with Disabilities Act. Leon filed an application to proceed *in forma pauperis*, which was granted upon finding Leon to be indigent. *See* Dkt. No. 13. Having done so, the next question is whether the Complaint must be dismissed under 28 U.S.C. § 1915(e)(2)(B), which requires dismissal of an *in forma pauperis* complaint that is frivolous or malicious, fails to state a

¹ The other named plaintiffs in this action are: John L. Bernstein; Mary Helen Bernstein; Achilles Leon; Melissa Leon; and John L. Bernstein IV. None of these plaintiffs has filed an application to proceed *in forma pauperis*.

² The following individuals and entities are named as defendants in this action: Janet Dunlop; Department of Labor Administrative Law Judge William Dorsey; the Department of Labor; the Secretary of Labor; United States District Court Judge Cindy K. Jorgenson; Seyfarth Shaw LLP (“Seyfarth Shaw”) and two of its partners, Meagan Noel Newman and James L. Curtis. In the body of his Complaint, Ogletree, Deakins, Nash, Smoak & Stewart P.C. (“Olgetree Deakins P.C.”), the Oro Valley Police Department, and Tigor Naby are referenced as though they are also defendants in this action.

1 claim, or seeks monetary relief from a defendant who is immune to such relief. *See id.* For the
2 reasons explained below, it is recommended that the case be DISMISSED under § 1915 and that
3 Plaintiff Leon be granted leave to amend portions of the Complaint.

4 **II. BACKGROUND**

5 **A. Factual Allegations**

6 Leon alleges that he has “communication disabilities.” Compl. ¶ 20. The Complaint is
7 twenty-six pages long and difficult to comprehend. It appears that Leon was an employee at
8 Securaplane Technologies (“Securaplane”), a company responsible for manufacturing lithium-ion
9 charging systems. Dkt. No. 1 (Complaint) (“Compl.”) ¶ 5. In 2007, Leon made several attempts
10 to warn Securaplane about the possible danger of lithium-ion batteries. According to Leon, the
11 batteries are heat-intolerant, and explode when they take too much heat. After making multiple
12 complaints to Securaplane about the batteries, Leon was fired. While Securaplane maintained that
13 Leon was fired for misconduct, Leon believed he was fired for his comments about the danger of
14 lithium-ion batters. *Id.* On March 20, 2007, Leon filed a whistleblower complaint with the
15 Federal Aviation Administration (“FAA”). *Id.* ¶ 24. A hearing took place sometime in 2012
16 before the Administrative Review Board (“ARB”), presumably with Department of Labor
17 Administrative Law Judge William Dorsey presiding over the case. Leon lost this case. *Id.*

18 Securaplane is not named as a defendant in the instant action. Rather, Leon filed this
19 action against certain individuals and entities *involved* in the previous whistleblower proceedings
20 against Securaplane: (1) Janet Dunlop; (2) Department of Labor Administrative Law Judge
21 William Dorsey; (3) the Department of Labor; (4) the Secretary of Labor; (5) United States
22 District Court Judge Cindy K. Jorgenson from the District of Arizona, Tuscon Division; (6)
23 Seyfarth Shaw LLP, a law firm headquartered in Chicago, Illinois; (7) Megan Noel Newman, a
24 partner at Seyfarth Shaw; and (8) James L. Curtis, a partner at Seyfarth Shaw. The body of the
25 Complaint also references the following individual and entities as defendants in this action: (9)
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1 Ogletree Deakins P.C., another law firm; (10) Tigor Naby, a lawyer; and (11) the Oro Valley
2 Police Department. Leon's allegations against defendants are set forth below.

3 1. Janet Dunlop

4 It appears Ms. Dunlop is an administrative employee of the ARB, though that is not clear
5 from the Complaint. The sole allegation against Ms. Dunlop is that she misrepresented the time in
6 which a decision in Leon's case before the ARB would be decided, informing Leon that the case
7 would be decided by the end of 2012. Compl. ¶ 23. Leon alleges that there was no decision in his
8 case until March of 2013, which was after he contacted the whistleblower organizations. *Id.* Leon
9 also asserts that Ms. Dunlop informed Leon that half of the proceedings before the ARB involve
10 pro se litigants. *Id.* ¶ 24.

12 2. Administrative Law Judge William Dorsey

13 Leon asserts that William Dorsey was the Administrative Law Judge ("ALJ") of the
14 Department of Labor who presided over his ARB proceedings against Securaplane. Leon asserts
15 that ALJ Dorsey instructed him to wait until he testified to present his points and evidence, but
16 then never gave Leon a chance to testify at trial. Compl. ¶ 20. Leon further alleges that ALJ
17 Dorsey also did not allow Leon to present a closing argument at trial. *Id.* Leon alleges that ALJ
18 Dorsey criticized the way Leon presented his safety concerns, and applauds Securaplane for firing
19 Leon. Compl. ¶ 20. Leon alleges that ALJ Dorsey continually interrupted him, enjoyed "toying"
20 with Leon, who is a "Native American Hispanic self-represented claimant with communication
21 disabilities." *Id.* Leon alleges that ALJ Dorsey failed to provide Leon with a reasonable
22 accommodation—in violation of the Americans with Disability Act—by holding Leon to the same
23 standards as experienced attorneys. Leon further alleges that ALJ Dorsey colluded with
24 Securaplane's defense counsel, Seyfarth Shaw LLP, which is evidenced by ALJ Dorsey's failure
25 to credit Leon's corroborating evidence, failure to assist Leon to overcome his disability in court
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1 proceedings, and refusal to sanction Seyfarth Shaw LLP after they presented contradictory
2 evidence.

3 Other than the allegations asserted against ALJ Dorsey, there are no specific allegations in
4 the Complaint against the Department of Labor or the Secretary of Labor.

5 3. United States District Court Judge Cindy Jorgenson

6 It appears that Leon filed five separate lawsuits in the District of Arizona, and Defendant
7 United States District Court Judge Cindy Jorgenson presided over all five actions. Leon alleges
8 that Judge Jorgenson used to work as a Pima County Superior Court judge, and therefore, has a
9 conflict of interest that should prevent her from presiding over Leon's cases which named judges
10 from the Pima County Superior Court as defendants. *Id.* ¶ 29. Leon asserts that it is statistically
11 improbable that all five cases would be randomly assigned to the same judge. Compl. ¶ 26. Leon
12 also alleges that he filed three motions to disqualify Judge Jorgenson in two of his cases, but Judge
13 Jorgenson refused to recuse herself. *Id.* ¶ 27.

14 4. Seyfarth Shaw & Olgetree Deakins P.C.

15 Leon asserts that Seyfarth Shaw LLP was counsel for Boeing and Danaher Corporation in
16 the FAA whistleblower matter, and that Ogletree Deakins P.C. was defense counsel—presumably
17 for Boeing—in all other matters. Compl. ¶ 33. Leon asserts his allegations against “defense
18 counsel” generally, without specifying which law firm and which lawyers undertook which
19 conduct. Leon alleges that defense counsel subjected him to harassment during his video
20 deposition because “[d]efense counsel scheduled terminally ill Leon for deposition on his birthday
21 which lasted a span of two days.” Compl. ¶ 34. Leon asserts that he was so distressed by the
22 video deposition that he filed a motion for protective order to prevent further slander and libel. *Id.*
23 He alleges that defense counsel invited former managers subject to the lawsuit to intimidate Leon,
24 which raised his blood pressure. *Id.* Leon further alleges that defense counsel failed to produce
25 files and deponents, “instructed deponents not to answer, interrogated deponents on Leon's dime,
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1 walked out on depositions, [and] threatened that he would waste the entire deposition if the
2 deposition was not canceled.” *Id.*

3 There are also no specific allegations against Megan N. Newman or James L. Curtis,
4 though the Complaint states they are both partners at SeyFarth Shaw LLP, thus a reasonable
5 inference may be drawn that they are the partners who undertook this alleged conduct.

6 Leon also asserts certain allegations regarding Tigor Naby, which the Court presumes was
7 a lawyer at either Seyfarth Shaw or Olgetree Deakins P.C., although it is unclear. *See* Compl. ¶
8 34. Leon alleges that Nagy threatened Leon with a lawsuit and threatened to take away Leon’s
9 Social Security benefits—Leon’s sole source of income—if Leon did not withdraw his lawsuit
10 against Danaher in Pima County Superior Court. *Id.* Leon also alleges that Nagy refused to
11 accept service for defendants who he represented. Leon further asserts that Nagy interfered with
12 the subpoena process in a federal action in which he was not counsel of record. *Id.*

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15 5. Oro Valley Police Department

16 The Complaint also alleges that Leon “was vilified” by the “Oro Valley Police Department
17 for exercising constitutional rights in connection with voicing safety concerns for the public.”
18 Compl. ¶ 18. Leon accuses the Oro Valley Police Department of conducting “surveillance [of a]
19 terminally ill citizen with no probable cause” and presenting Plaintiff in a false light to the
20 community. *Id.* ¶¶ 39, 45-48.

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23 There are several other plaintiffs in this action who have not yet been mentioned. With the
24 exception of money spent and time lost assisting Leon pursue his legal matters, the Complaint
25 contains no factual allegation of any injury with regard to any of these plaintiffs. One paragraph
26 of the Complaint focuses on such injuries:

27 Leon Michael Leon has suffered unquestionably the most during
28 these proceedings. Plaintiffs Mary Bernstein and John Bernstein III
over the past six years and inception of these matters have assisted

1 Michael Leon during court appearances, countless hours of
 2 preparation of documents, thousands of dollars for deposition
 3 transcripts, traveling hundreds of miles, transcribing documents,
 4 long distance telephone calls, faxes for handicapped family member
 5 Michael Leon in an effort to obtain justice. Likewise, John
 6 Bernstein IV and Achilles Leon have been imposed on economically
 7 to assist family member during legal proceedings. In addition, all
 8 individuals referenced above lives have been consumed by
 9 proceedings in an effort to obtain justice for Michael Leon.
 10 Handicapped individuals are allowed to be assisted by individuals in
 11 court matters. Defendants have contributed to the astronomical
 12 costs incurred and suffering of Plaintiffs by denying justice through
 13 constant delays, suspensions and dismissals.

14 Compl. ¶ 20.

15 **B. Claims**

16 The Complaint contains seven causes of action. No specific claim differentiates between
 17 Defendants. In count one, Leon alleges that Defendants violated his rights under the 5th, 7th and
 18 14th Amendments by preventing Leon from accessing the courts and federal agencies. Leon also
 19 alleges that Defendant Oro Valley Police Department conducted unlawful surveillance of Leon
 20 without probable cause. In count two, Leon asserts that Defendants violated the Americans with
 21 Disabilities Act by holding a pro se litigant with communication disabilities to the same standard
 22 as attorneys, and thereby denying Leon's access to the courts. In counts three and four, Leon
 23 alleges that Defendants intentionally (count three), and negligently (count four), inflicted
 24 emotional distress upon Leon by denying him access to the courts and by failing to provide a
 25 reasonable accommodation. In counts five, six and seven, Leon asserts claims under 42 U.S.C. §
 26 1983 for violations the First Amendment, the Equal Protection Clause, and the State's creation of
 27 danger.

28 **I. LEGAL STANDARD:**

Where a Leon is found to be indigent under 28 U.S.C. § 1915(a)(1), and is granted leave to
 proceed *in forma pauperis*, courts must engage in a preliminary screening and dismiss any claims
 that: (1) are frivolous or malicious; (2) fail to state a claim on which relief may be granted; or (3)
 seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. §
 1915(e)(2)(B).

In determining whether a Leon fails to state a claim, the Court assumes that all factual

1 allegations in the Complaint are true. *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th
2 Cir. 1990). However, “the tenet that a court must accept a complaint’s allegations as true is
3 inapplicable to ... mere conclusory statements.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). The
4 pertinent question is whether the factual allegations, assumed to be true, “state a claim to relief
5 that is plausible on its face.” *Iqbal*, 556 U.S. at 663 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S.
6 544, 547 (2007)). Where the complaint has been filed by a *pro se* plaintiff, as is the case here,
7 courts must “construe the pleadings liberally and to afford the petitioner the benefit of any doubt.”
8 *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (internal quotations omitted).

9 In determining whether a complaint is frivolous, the “initial assessment” of the plaintiff’s
10 factual allegations “must be weighted in favor of the plaintiff.” *Denton v. Hernandez*, 504 U.S.
11 25, 32 (1992) (finding that frivolous determinations “cannot serve as a factfinding process for the
12 resolution of disputed facts”). “[A] complaint, containing as it does both factual allegations and
13 legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact.” *Neitzke v.*
14 *Williams*, 490 U.S. 319, 325 (1989). Dismissal for frivolousness “is only appropriate for a claim
15 based on an indisputably meritless legal theory.” *Milligan v. Archuleta*, 659 F.3d 1294, 1296
16 (10th Cir. 2011). A court may dismiss an *in forma pauperis* claim as factually frivolous “only if
17 facts alleged are ‘clearly baseless,’ a category encompassing allegations that are ‘fanciful,’
18 ‘fantastic,’ and ‘delusional.’ *Denton*, 504 U.S. at 32-33 (internal citations omitted). The
19 determination of “frivolousness” is a decision entrusted to the discretion of the court entertaining
20 the *in forma pauperis* petition. *Id.*

21 **II. DISCUSSION**

22 There are several deficiencies in the Complaint. As a preliminary matter, with the
23 exception of Leon’s alleged injuries, there are no factual allegations of any injury suffered by any
24 other plaintiff beyond the fact they spent money and time assisting Leon pursue his court
25 proceedings. *See* Compl. ¶ 20. Such allegations are insufficient to state a claim under any legal
26 theory, and are also frivolous. Therefore, it is recommended that all claims asserted on behalf of
27 any plaintiff other than Leon be dismissed with prejudice. Although no plaintiff other than Leon
28 has filed an application to proceed *in forma pauperis*, and no plaintiff has paid the court filing fee,

1 the court may still dismiss the claims under its sua sponte power under Rule 12(b)(6). *See Omar*
 2 *v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) (“A trial court may dismiss a claim sua
 3 sponte under Fed.R.Civ.P. 12(b)(6). Such a dismissal may be made without notice where the
 4 claimant cannot possibly win relief.”). It is clear from the Complaint that any Plaintiff save Leon
 5 “cannot possibly win relief” in this action, thus such claims should be dismissed. *Id.*

6 There are several other deficiencies with the Complaint. First, judicial immunity precludes
 7 Leon from asserting any legal claim against ALJ Dorsey and United States District Court Judge
 8 Cindy Jorgenson arising from acts taken in their judicial capacities. Second, Plaintiff fails to plead
 9 facts sufficient to state a claim under the Americans with Disability Act. Third, Plaintiff fails to
 10 state a claim under 42 U.S.C. § 1983 because several defendants were not acting under the color of
 11 state law, and there is an insufficient factual basis to assert any Section 1983 claim against the
 12 defendants who were acting under the color of law.

13 **A. Judicial Immunity**

14 Judges are immune from suit for actions taken in the judge’s judicial capacity. *Mireles v.*
 15 *Waco*, 502 U.S. 9, 11-12 (1991). In *Mireles*, the Supreme Court decided whether a judge’s order
 16 to police officers to carry out a judicial order with excessive force was an act covered by judicial
 17 immunity. Although the act of ordering excessive force was not an act normally performed by a
 18 judge, the Court wrote that “we look to the particular act’s relation to a general function normally
 19 performed by a judge[.]” *Id.* at 12 (“if only the particular act in question were to be scrutinized,
 20 then any mistake of a judge in excess of his authority would become a ‘nonjudicial’ act.”).

21 Leon’s claims against ALJ Dorsey are barred by the doctrine of judicial immunity. *Butz v.*
 22 *Economou*, 438 U.S. 478, 512-13 (1978) (judicial immunity also covers Administrative Law
 23 Judges). Leon alleges that ALJ Dorsey did not allow him to present oral argument, instructed him
 24 to wait until he testified to present his evidence, and ultimately did not allow him to testify.
 25 Determining if and when evidence will be presented, whether sanctions will be imposed, and
 26 whether closing arguments will be permitted, are traditional functions of a judge and therefore
 27 may not form the basis of any claim against ALJ Dorsey. *Mireles*, 502 U.S. at 11-12. Plaintiff
 28 also alleges that ALJ Dorsey “colluded” with defense counsel, but substantiates this claim with

1 further allegations that he failed to credit Leon’s corroborating evidence and failed to sanction
 2 defense counsel, which are also “functions” of a judge. *Id.* Furthermore, other allegations against
 3 ALJ Dorsey, such as the allegation that ALJ Dorsey criticized and “toyed” with Leon and
 4 applauded Securaplane for firing Leon, fail to state a claim for relief.

5 Leon’s claims against Judge Jorgenson are also barred by the doctrine of judicial
 6 immunity. Leon alleges that Judge Jorgenson had a conflict of interest in two of his cases in
 7 which Pima County Superior Court judges were named as defendants due to Judge Jorgenson’s
 8 prior work as a Pima County Superior Court judge. However, Judge Jorgenson’s decisions
 9 whether or not to refuse herself from those cases—decisions allegedly made in response to
 10 motions which Leon filed—were decisions made in Judge Jorgenson’s judicial capacity when
 11 performing the judicial “function” of deciding motions. These allegations are barred by judicial
 12 immunity. *Mireles*, 502 U.S. at 11-12.

13 **B. Americans with Disabilities (“ADA”)**

14 Leon writes the following in his Complaint for his claim under the ADA:

15 Defendants denied Plaintiff access to court system by holding
 16 handicapped pro se litigant with communication disabilities,
 17 physical/mental disabilities to the same standards as attorneys not
 18 providing reasonable accommodation for the disabled in compliance
 19 with ADA. The Courts allowed, encouraged and facilitated the
 mistreatment of a terminally ill citizen in violation of the ADA.
 Defendant William Dorsey deliberately took advantage of pro se
 litigant exhibited bias partiality to defense.

20 Compl. ¶ 20. From this allegation, it may be inferred that Leon asserts his ADA claim against
 21 ALJ Dorsey, the Department of Labor and the Secretary of Labor for failing to provide Leon with
 22 a reasonable accommodation in his legal proceedings. This claim is only considered against ALJ
 23 Dorsey to the extent it is not barred by the doctrine of judicial immunity.

24 Title II of the ADA prohibits discrimination on the basis of disability and applies to public
 25 entities such as the courts. *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). Title II of the
 26 ADA provides:

27 Subject to the provisions of this subchapter, no qualified individual
 28 with a disability shall, by reason of such disability, be excluded from
 participation in or be denied the benefits of the services, programs,
 or activities of a public entity, or be subjected to discrimination by

any such entity.

42 U.S.C. § 12132. To sufficiently allege a violation under Title II of the ADA, Leon must allege that: (1) he is a qualified individual with a disability; (2) he was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities, and (3) such exclusion or discrimination was by reason of his disability. *Lovell*, 303 F.3d at 1052.

Plaintiff meets the first element of this claim. The ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modification to rules, policies, or practice, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131.

However, the factual allegations in the Complaint do not show that Leon "was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities" or that "such exclusion or discrimination was by reason of his disability." *Lovell*, 303 F.3d at 1052. Leon alleges that ALJ Dorsey failed to provide Leon with a reasonable accommodation by holding Leon to the same standards as experienced attorneys. The specific allegations substantiating this claim are unclear. Plaintiff does not allege that he requested an aid to assist with his communication and was denied that request. Rather, the allegations pertain to ALJ Dorsey's alleged favoritism of defense counsel. Such allegations, however, do not show that Leon was excluded from any services or otherwise discriminated against due to his disability. This claim should be dismissed with leave to amend.

C. 42 U.S.C. § 1983

Leon asserts three claims under 42 U.S.C. § 1983 alleging that Defendants—without differentiation among the Defendants—violated his rights under the First Amendment, rights to Equal Protection, rights against State Created Danger, as well as rights protected by the 5th, 7th and 14th Amendments.³ Section 1983 provides a private cause of action against any person who,

³ While the Complaint's first count asserts violations of the 5th, 7th and 14th Amendments, it may be inferred that the first count is intended assert a claim under 42 U.S.C. § 1983. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002).

1 under color of state law, deprives another of any rights, privileges, or immunities secured by the
2 Constitution and laws of the United States. 42 U.S.C. § 1983. “To establish § 1983 liability, a
3 plaintiff must show both (1) deprivation of a right secured by the Constitution and laws of the
4 United States, and (2) that the deprivation was committed by a person acting under color of state
5 law.” *Chudacoff v. Univ. Med. Ctr. of S. Nevada*, 649 F.3d 1143, 1149 (9th Cir. 2011).

6 First, Plaintiff Leon will be unable to maintain a Section 1983 claim against several of the
7 defendants because they were not “acting under the color of state law.” Seyfarth Shaw LLP,
8 Megan Newman, James Curtis, Ogletree Deakins and Tigor Naby are all private individual or
9 entities, and Plaintiff does not allege facts showing they were acting under the color of law. All
10 Section 1983 claims against these defendants should be dismissed with prejudice.

11 The Complaint also does not specify whether Janet Dunlop is government employee or
12 acting under the color of state law. However, the Section 1983 claims against Ms. Dunlop fail
13 because Ms. Dunlop is merely accused of misrepresenting the time in which a decision in Leon’s
14 case would be decided. *See* Compl. ¶ 23. Such an allegation does not show that Ms. Dunlop
15 deprived Leon of any constitutional rights. Therefore, all Section 1983 claims asserted against
16 Ms. Dunlop should also be dismissed with prejudice.

17 It is clear from the Complaint that other Defendants were acting under the color of state
18 law, including ALJ Dorsey, the Department of Labor, the Secretary of Labor, Judge Jorgenson and
19 the Oro Valley Police Department. However, Leon still fails to state a claim under 42 U.S.C. §
20 1983 against these Defendants. As explained above, ALJ Dorsey and Judge Jorgenson are
21 immune under the doctrine of judicial immunity for all acts taken in their judicial capacity.
22 However, even ignoring this doctrine, there are no allegations asserted against ALJ Dorsey or
23 Judge Jorgenson that show they deprived Plaintiff of his constitutional rights. There are also no
24 specific allegations against the Department of Labor or the Secretary of Labor beyond the
25 allegations asserted against ALJ Dorsey. Thus, it is recommended that all Section 1983 claims
26 against these defendants be dismissed with prejudice.

1 Plaintiff Leon also alleges that “Defendant Oro Valley Police Department [conducted]
 2 surveillance [of a] terminally ill citizen with no probable cause.” Compl. ¶ 39. The Oro Valley
 3 Police Department is a public entity which acts under the color of state law, and unlawful
 4 surveillance may constitute a constitutional violation. Nevertheless, the Complaint is void of any
 5 further facts regarding such allegedly unlawful surveillance. While Leon is not required to plead
 6 the specific facts of this claim, he must at least allege “enough facts to state a claim to relief that is
 7 plausible on its face.” *Twombly*, 550 U.S. at 547. Therefore, it is recommended that Plaintiff be
 8 granted leave to amend his claim against the Oro Valley Police Department under Section 1983.

9 **D. Subject Matter Jurisdiction**

10 Federal courts have subject matter jurisdiction over a case only if there is diversity
 11 jurisdiction or federal question jurisdiction. Plaintiffs have not alleged diversity jurisdiction in
 12 this case.⁴ Plaintiffs have only asserted jurisdiction on the basis of federal question. Nevertheless,
 13 as currently pled, the Complaint fails to state a claim based on a federal right, which is required for
 14 subject matter jurisdiction on the basis of a federal question. *See* 28 U.S.C. § 1331. If Plaintiff is
 15 unable to state a claim for a violation of a federal right, or other basis for federal jurisdiction, his
 16 claims for intentional and negligent infliction of emotional distress should be dismissed.

17 **III. CONCLUSION**

18 For the foregoing reasons, it is recommended that the Complaint be DISMISSED and that
 19 Leon be given leave to amend his ADA claim, as well as his Section 1983 claims against the Oro
 20 Valley Police Department only.

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 22 Dated: July 8, 2013

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 JOSEPH C. SPERO
 United States Magistrate Judge

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 27 ⁴ It is not clear from the face of the Complaint whether subject matter jurisdiction may
 28 arise on the basis of diversity. Leon is a citizen of Arizona and the Bernsteins are citizens of
 California. Compl. ¶¶ 6-8. Leon does not allege the citizenship of Defendants or the amount in
 controversy.