UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

BENJAMIN BARBER,

Plaintiff,

v.

MEAGAN VANCE in her personal capacity and ELLEN ROSENBLUM, BRAD AVAKIAN, KATE BROWN, BEN CANNON, LYNNE SAXTON in their official capacity,

Defendants.

Case No. 3:16-cv-2105-AC

FINDINGS AND RECOMMENDATION

ACOSTA, Magistrate Judge:

Introduction

Plaintiff Benjamin Barber ("Barber"), who is appearing *pro se* in this action, filed an amended complaint in this lawsuit on February 21, 2017 (the "Complaint"), alleging, in part,

defendants Ellen Rosenblum, Brad Avakian, Kate Brown, Ben Cannon, and Lynne Saxton (collectively the "Defendants")[1] engaged in various discriminatory actions based on Barber's race, gender, and religious beliefs. (Compl. ECF No. 38.) Barber's First Claim for Relief, in which he requested the court stay his state criminal proceedings and overturn his criminal conviction as an unconstitutional restriction of his free speech and an infringement of his copyrights, was dismissed on September 26, 2017. In this Findings and Recommendation, the court addresses the pending motion to dismiss Barber's remaining claims.

The court finds Barber's claims for money damages are barred by Eleventh Amendment immunity, he has failed to allege affirmative actions by Defendants, or Defendants' knowledge of subordinates' actionable conduct, and has failed to allege the requisite causal connection between the actions and a resulting injury. Accordingly, the court recommends Defendants' motion to dismiss Barber's Second through Sixth Claims for Relief be granted.[2]

Background

Barber alleges he is a "white male Jewish American and a resident of Oregon, and sufferers from a gunshot wound to the eye and Crohns disease, as a minor Barber's family name was changed to 'Cortez' by his step father to be eligible for affirmative action programs." (Compl. ¶ 9.) Barber identifies defendant Kate Brown ("Brown") as the Governor of Oregon "responsible for appointments to most agencies"; defendant Ellen Rosenblum ("Rosenblum") as the Attorney General

[1]Barber also named his ex-wife, Meagan Alyssa Vance, as a defendant. In a previous Findings and Recommendation, the court granted Vance's special motion to strike the allegations against her under OR. REV. STAT. 31.150 and dismissed the claims against Vance without prejudice.

[2]No party requested oral argument in their pleadings and the court finds this motion appropriate for disposition without oral argument pursuant to LR 7-1(d)(1).

of Oregon, head of the "largest law firm in Oregon" and "chief policy maker for the Department of Justice"; defendant Brad Avakian ("Avakian") as the Director of the Bureau of Labor and Industries ("BOLI"), whose mission is to "protect employment rights, advance employment opportunities, and protect access to housing and public accommodations free from discrimination"; defendant Ben Cannon ("Cannon") as the executive Director of the Higher Education Coordinating Commission and the "states top higher education official" responsible for "Providing one strategic vision for Oregon higher education planning, funding, and policy; Authorizing postsecondary programs and degrees; Administering key Oregon financial aid, workforce, and other programs; Evaluating and reporting success of higher education efforts"; and defendant Lynne Saxton ("Saxton") "as the executive director of the Oregon Health Authority . . . responsible for overseeing the work of medical schools and practicing boards for licensed professionals, including the Implementation of the cultural competency program requirements." (Compl. ¶¶ 11-15.) Barber alleges his claims against Defendants are based on actions taken in their official capacities, each defendant is "responsible for the acts of [their] subordinates," and they all "authorized, approved or knowingly acquiesced in their [subordinate's] conduct." (Compl. ¶¶ 11-15.)

Barber divides his Complaint into two 'bases" for action, with each supported by separate factual allegations. In support of his Second Claim for Relief, which falls in his "First Basis of Action," Barber offers the following relevant factual allegations. Barber married Vance on December 23, 2011. (Compl. ¶ 16.) Vance had a history of mental health problems and physical disabilities which required Barber to complete class work for Vance's undergraduate and graduate degree programs and perform most of the domestic dutes. (Compl. ¶¶ 16, 20, 21.) Vance sought mental health treatment from Lewis and Clark, during which discussions regarding "'a wheel of

power and control' that mention 'white privilege' 'male privilege' and other forms of discrimination of suspect classes" occurred. (Compl. ¶¶ 22-24.) Barber claims the mental health treatment provided by Lewis and Clark is "inherently suspect under the establishment clause of the first amendment, because they originate from religious doctrines of 'liberation theology' from where the training regiment 'liberation based healing' is derived, and from 'critical pedagogy' which was formed by a liberation theologian named Paulo Fiere." (Compl. ¶ 28.) Barber asserts the treatment is also "inherently suspect under the 14th amendment for discrimination based on a suspect classification, claiming that some classes of people 'white' or 'male' are inherently endowed with privilege, and that 'women' are inherently oppressed by a 'patriarchy' and 'rape culture'[.]" (Compl. ¶ 29.)

Barber appears to allege the Oregon Health Authority requires counselors and therapists licensed in the state of Oregon (the "State") to train in and provide this form of mental health treatment to its patients, the Lewis and Clark therapist provided this treatment to Vance, the treatment contributed to a gender-based animus in Vance, and such treatment, coupled with Vance's medication and unabated use of alcohol, caused Vance to become violent toward Barber. (Compl. ¶¶ 25, 28-31.) Barber obtained a restraining order against Vance which the Portland Police and the district attorney did not enforce, allegedly violating the violence against women act. (Compl. ¶ 34.) Vance eventually filed for divorce and was represented by an attorney paid by the State. (Compl. ¶ 37.) Vance and her attorney conspired to use OR. REV. STAT. 163.472, the yet-to-be enacted statute prohibiting the unlawful dissemination of an intimate image, against Barber. (Compl. ¶ 42.)

In April of 2016, Barber was homeless and unable to pay for online computer services. (Compl. ¶ 42.) In an attempt to preserve his creative product, he uploaded everything on his

computer, including his intimate images and videos, to the Internet. (Compl. ¶¶ 42-43.) Vance reported Barber's publication of still pictures and videos containing intimate images of her to the Oregon Crimes Victims Law Center and the Washington County District Attorney. (Compl. ¶¶ 44, 46.) The Washington County District Attorney subsequently charged Barber with nine criminal counts of Unlawful Dissemination of an Intimate Image under OR. REV. STAT. 163.472. (Davis Decl. ECF No. 62, Ex. 2 at 1.) Barber was tried and found guilty of five counts of Unlawful Dissemination of an Intimate Image under OR. REV. STAT. 163.472 and is currently in custody.

In his Second Claim for Relief, Barber seeks an injunction against all State programs that "favor or disfavor the establishment of any policy any unfalsifiable theory pertaining to the state of human nature, human destiny, social transformation" or "target or classify individuals for benefits or lack thereof or discrimination based on any suspect classification [that] is without a bona fide state interest based on biological basis" and an order requiring the Community Relations Service of the Department of Justice to negotiate a consent degree requiring the State to bring "their federally funded programs into compliance with federal law." (Compl. ¶ 50.) He also seeks damages for loss of consortium, alleging government mandated discrimination and medical malpractice resulted in the dissolution of his marriage, and compensatory damages resulting from the State's failure to protect him from gender-motivated domestic violence under the violence against women act or enforce a valid restraining order against Vance. It appears the defendants allegedly liable in the Second Claim for Relief are Rosenblum, Cannon, and Saxton.[3] (Compl. ¶ at 4.)

Barber's "Second Basis of Action," which includes the Third through Sixth Claims for relief,

[3]Barber also identified Vance as liable under the "First Basis of Action." However, because the court struck the allegations against Vance and dismissed the claims against her in the prior Findings and Recommendation, she is not relevant to this analysis.

are brought against all Defendants. In support of these claims, Barber alleges on July 16, 2015, he attended an "event called WITCH 'Women in tech, coding, hacking' Summer Soiree which was sponsored by Worksystems and Jaguar Land Rover, Worksystems is a recipient of federal Worksource Investment Act funds, and Jaguar Land Rover received a tax abatement from Portland in exchange for hiring quotas." (Compl. ¶ 53.) Barber attempted to report the discriminatory purpose of the WITCH event – to provide employment opportunities to women – to police officers and was arrested. (Compl. ¶ 53.) The organizers of the WITCH event previously hosted other "women only" events to which Barber was denied entrance. (Compl. ¶ 54.) On at least one occasion, Barber reported the discriminatory tactics of the organizers to BOLI and was awarded $20 in a Multnomah County judgment for the civil rights violation. (Compl. ¶ 54.)

The City of Portland created a "Tech Town Diversity Pledge" apparently intended to encourage the hiring of women (the "Pledge"). (Compl. ¶ 55.) Jaguar Land Rover received its tax abatement as the result of its acceptance of the Pledge. (Compl. ¶ 55.) Other participants in the Pledge were a women-only employment agency known as "Scout Savvy," and Intel Corporation ("Intel"), Barber's prior employer. (Compl. ¶¶ 55, 57.) Barber complained to BOLI when his application submitted to Scout Savvy in February 2016 was not accepted but did not obtain a favorable result. (Compl. ¶ 56.) Barber alleges: "The bureau did not enforce the laws it had, nor did it declare the reason for its lack of enforcement, despite a robust collection of evidence and case law." (Compl. ¶ 56.) Additionally, Barber's attempts in July 2016 to convince Intel it should remove identifying information on job applications in the hopes of avoiding active discrimination were unsuccessful. (Compl. ¶ 57.)

Barber, who enrolled in Portland Community College (the "College") in September 2016,

alleges the College celebrates "'whiteness history month' whose sole purpose appears to be [to] disparage 'whiteness'." (Compl. ¶ 58.) Barber complained to the office of equity and inclusion, asserting recognition of the month violates the College's discriminatory harassment provisions. (Compl. ¶ 58.) He also complained the College's scholarship program for female students qualified as disparate treatment in violation of the law. (Compl. ¶ 59.) The College explained its intent was to encourage women, who were "underrepresented" in the student body, to attend the College and that some of the funds would be available to men. (Compl. ¶ 60.) Barber also objected to the College's lack of a "men's studies" department in gender studies. (Compl. ¶ 60.)

Based on these factual allegations, Barber asserts a claim for discrimination in educational and federally assisted programs in his Third Claim for Relief, and claims for unlawful employment practices and discrimination in federally assisted programs in his Fourth, Fifth, and Sixth Claims for Relief. As a remedy for the violations alleged in his Third and Fourth Claims for Relief, Barber requests a court order prohibiting the State, both generally and with regard to federally assisted programs under the direction of the State "from favoring or disfavoring the establishment of any policy any unfalsifiable theory pertaining to the state of human nature, human destiny, social transformation, or discriminate based on protect[ed] class" and directing the Community Relations Service of the Department of Justice to negotiate a consent decree between the State and plaintiff to bring their education programs, under the Third Claim for Relief, or their federally assisted programs, under the Fourth Claim for Relief, into compliance with federal law. (Compl. ¶¶ 61, 63.)

As a further remedy for the discrimination alleged in the Third Claim for Relief, he asks the court to require the College to transform the women studies program into a gender studies program, rename "whiteness history month" to "white history month," and create "as many history months as

required to adequately represent all students." (Compl. ¶¶ 62.) With regard to his Fourth Claim for Relief, Barber additionally asks the court to stay statutes "that create employment, education, or contracting opportunities on the basis of any suspect classification, and find a neutral way to achieve a compelling government interest in producing the diversity, inclusion, and equity that is required." (Compl. ¶ 64.) Similarly, Barber requests a court order requiring BOLI to "prohibit discrimination based on protected class and, including affirmative action policies and in places of public accommodation" and directing the Equal Employment Opportunity Commission (the "EEOC") to negotiate a consent decree between the State and Barber to bring their federally assisted programs into compliance with federal law as a remedy for his Fifth Claim for Relief. (Compl. ¶ 65.) Finally, Barber seeks compensatory damages under his Sixth Claim for Relief for the time spent litigating this lawsuit and assisting the Community Relations Service and EEOC in enforcing civil rights, and for damage to his reputation and career. (Compl. ¶ 66.)

Legal Standards

A well-pleaded complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2) (2017). A federal claimant is not required to detail all factual allegations; however, the complaint must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id*. While the court must assume that all facts alleged in a complaint are true and view them in a light most favorable to the nonmoving party, it need not accept as true any legal conclusion set forth in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Additionally, a plaintiff must set forth a plausible claim for relief – a

possible claim for relief will not do. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678); *Sheppard v. David Evans and Assoc.*, No. 11-35164, 2012 WL 3983909 at *4 (9th Cir. Sept. 12, 2012) ("The Supreme Court has emphasized that analyzing the sufficiency of a complaint's allegations is a 'context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" (quoting *Iqbal*, 556 U.S. at 679)).

In cases involving a plaintiff proceeding *pro se*, the court construes the pleadings liberally and affords the plaintiff the benefits of any doubt. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988); *see also Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992)("[F]ederal courts liberally to construe the 'inartful pleadings' of pro se litigants."). In other words, courts hold *pro se* pleadings to a less stringent standard than those drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). In addition, a *pro se* litigant is entitled to notice of the deficiencies in the complaint and an opportunity to amend, unless the complaint's deficiencies cannot be cured by amendment. *Karim-Panahi*, 839 F.2d at 623-624.

Discussion

Defendants move to dismiss the remainder of Barber's claims based on Eleventh Amendment immunity and failure to plead facts showing direct involvement by Defendants or any resulting harm. Alternatively, Defendants ask the court to order Barber to make the allegations in the Complaint more definite and certain.

I. Eleventh Amendment

"The Eleventh Amendment creates an important limitation on federal court jurisdiction, generally prohibiting federal courts from hearing suits brought by private citizens against state governments without the state's consent." *Sofamor Danek Group v. Brown*, 124 F.3d 1179, 1183 (9th Cir. 1997) (citing *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)). The United States Supreme Court has construed the Eleventh Amendment to bar suits against state officers who are sued in their official capacity for damages or other retroactive relief, but allows suits for prospective declaratory or injunctive relief against state officials acting in their official capacity. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Moreover, the Court has expressly found that Congress did not abrogate the states' Eleventh Amendment immunity when it enacted 42 U.S.C. § 1983, the vehicle through which Barber asserts his claims against Defendants. *Quern v. Jordan*, 440 U.S. 332, 350 (1979).[4]

Barber expressly alleged he is suing Defendants in their official capacities. Consequently, the Eleventh Amendment bars any claim seeking money damages from Defendants. Barber seeks money damages in addition to injunctive relief in his Second Claim for Relief. To this extent, Barber's Second Claim for Relief is barred by the immunity afforded Defendants through the Eleventh Amendment. Barber's Sixth Claim for Relief, in which he seeks solely money damages, is similarly barred. Defendants' motion to dismiss should be granted accordingly.

In his opposition briefing, Barber contends Eleventh Amendment immunity does not protect

[4]Barber appears to assert constitutional violations by state actors under 42 U.S.C. § 1983. However, to the extent Barber intends to assert clams under 42 U.S.C. §§ 1981 or 1985, the Ninth Circuit has held states, and state officers sued in their official capacity, possess Eleventh Amendment immunity under these provisions as well. *See Pittman v. Oregon, Emp't Dept.*, 509 F.3d 1065, 1071-72 (9th Cir. 2007); *Cerrato v. San Francisco Comm. College Dist.*, 26 F.3d 968, 976 (9th Cir. 1994).

actions against States for violations of 29 U.S.C. § 794, 20 U.S.C. § 1681, and 42 U.S.C. §§ 6101 and 2000(d). (Pl.'s Resp. to States Mot. to Dismiss, ECF No. 68 ("Resp."), at 10.) Each of these statutory provisions prohibit discrimination by a program or activity receiving federal financial assistance. While Barber alleges Worksystems is a recipient of federal Worksource Investment Act funds, the Complaint contains no allegation Defendants, or any state agency, program, or activity allegedly discriminating against Barber, receives federal financial assistance.

Similarly, Barber asserts jurisdiction exists under 42 U.S.C. § 12361 (formerly 42 U.S.C. §13981) which "establish[es] a Federal civil rights cause of action for victims of crimes of violence motivated by gender." 42 U.S.C. § 12361(a) (2017). "Crime" is defined as "an act or series of acts that would constitute a felony against the person . . . ." 42 U.S.C. §12361(d)(2)(A) (2017). Barber has not alleged Vance engaged in any acts which would constitute a felony. Furthermore, the United States Supreme Court has held Congress did not have the authority to enact 42 U.S.C. § 13981 under the Congress Clause or the Fourteenth Amendment, putting the enforceability of the statue at issue. *See United States v. Morrison*, 529 U.S. 598 (2000).

Finally, Barber claims the Oregon Tort Claims Act is a waiver of Eleventh Amendment immunity. While the Oregon Tort Claims Act waives sovereign immunity with regard to the torts of state officials acting in the scope of their employment, "[i]t does not waive the State of Oregon's Eleventh Amendment immunity to suit in federal court." *Webber v. First Student, Inc.*, 928 F. Supp. 2d 1244, 1269 (D. Or. 2013). Consequently, the provisions identified by Barber either do not apply to this action or serve to defeat Defendants' Eleventh Amendment immunity with regard to claims for money damages.

II. Failure to Plead Sufficient Facts

To state a claim under 42 U.S.C. § 1983, "a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law." *Long v. Cnty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir.2006). Under § 1983, a defendant violates the rights of a plaintiff if the defendant "'does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made.'" *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 915 (9th Cir.2012) (*en banc*) (quoting *Johnson v. Duffy,* 588 F.2d 740, 743 (9th Cir.1978)).[5] Even where a plaintiff is proceeding *pro se*, "[v]ague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." *Ivey v. Bd. of Regents of Univ. of Alaska,* 673 F.2d 266, 268 (9th Cir.1982).

In addition, in a § 1983 action "the plaintiff must also demonstrate that the defendant's conduct was the actionable cause of the claimed injury. To meet this causation requirement, the plaintiff must establish both causation-in-fact and proximate causation." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir.2008) (citation omitted).[6] Proximate cause "refers to the

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[5]§ 1981 requires an act of intentional discrimination in the making or enforcing of contracts governed by the same test for discrimination under § 1983, while §1985 similarly requires an act in furtherance of a conspiracy to deprive a plaintiff of equal protection under the law. *See Ramirez v. Kroonen*, 44 Fed. Appx. 212, 219 (9th Cir. 2002), *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1141 (9th Cir. 2000).

[6]To establish a claim under § 1981, a plaintiff must show a nexus between the alleged discriminatory conduct and the adverse action which caused plaintiff's injury. *Mustafa v. Clark Cty. School Dist.*, 157 F.3d 1169, 1180 (9th Cir. 1998). Causation is also an implicit requirement in a § 1985 action. *See Arnold v. Int'l Business Machines Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981)

basic requirement that before recovery is allowed in tort, there must be 'some direct relation between the injury asserted and the injurious conduct alleged[.]' It excludes from the scope of liability injuries that are 'too remote,' 'purely contingent,' or 'indirect[ ].'" *CSX Transp., Inc. v. McBride,* 131 S.Ct. 2630, 2645 (2011) (quoting *Holmes v. Securities Investor Prot. Corp.,* 503 U.S. 258, 268 (1992)) (alterations in original).

A. Direct Involvement

Barber does not allege any direct involvement by Defendants in the violation of Barber's civil rights.[7] Rather, Barber generally alleges Defendants are liable for the actions of their subordinates. Liability under § 1983 must be based on a defendant's personal participation in the deprivation of the plaintiff's constitutional rights. *Barron v. Harrington,* 152 F.3d 1193, 1194 (9th Cir.1998). "A supervisor is only liable for the constitutional violations of . . . subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir.1989); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."). Likewise, there is no *respondeat superior* liability under § 1983. *Taylor,* 880 F.2d at 1045.[8] Thus, a supervisor may be held liable under § 1983 only if: (1) he was personally involved in the constitutional deprivation; or (2) a sufficient causal connection exists between the supervisor's

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[7]In his opposition brief, Barber asserts Rosenblum submitted OR. REV. STAT. 163.472 to the legislature, and is responsible for its passage and enforcement. These allegations relate solely to the First Claim for Relief, which has been dismissed.

[8]Similarly, there is no *respondeat superior* liability for state actors sued under § 1981. *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1214-15 (9th Cir. 1996).

wrongful conduct and the constitutional violation. *Jeffers v. Gomez,* 267 F.3d 895, 915 (9th Cir.2001).

Barber has failed to allege any affirmative conduct of, or directions from, Defendants resulting in constitutional violations. Moreover, the Complaint is absent of allegations Defendants knew their subordinates were violating Barber's civil rights and failed to stop them. Barber has failed to state viable claims against Defendants.

Barber similarly fails to identify specific actions of State employees which resulted in constitutional violations. For example, in support of his Second Claim for Relief, Barber alleges the Oregon Health Authority requires licensed therapists to engage in training that enforces gender-based animus, Vance received counseling from a licensed therapist at Lewis and Clark, and such therapy, coupled with alcohol and drug abuse, caused Vance to be aggressive toward Barber and eventually file for divorce. Barber asserts this conduct violated his First Amendment rights and resulted in gender-motivated violence. Barber does not identify a State employee who engaged in conduct that violated Barber's civil rights or describe objectionable conduct in which they engaged. The factual allegations supporting Barber's Third through Sixth Claims for Relief are equally inadequate. Barber alleges a recipient of federal funds and a recipient of a city tax abatement sponsored an event, or events, which he was not allowed to attend because of his gender. Barber's complaints to BOLI about these events achieved mixed results. Barber's private employer did not agree to remove identifying information on applications, and a community college celebrated "whiteness history month," offered women's studies, and managed a scholarship available to female students only. Barber does not identify a single State employee who directly participated in these events or how any State employee's actions violated his constitutional rights.

Barber fails to allege any facts that establish Defendants, or any State employee, was directly involved in the violation of his civil rights. Barber's allegations of Defendants' participation in the violation of his civil rights are, at best, vague and conclusory. These allegations are insufficient to withstand a motion to dismiss. Barber has failed to allege viable claims against Defendants and their motion to dismiss should be granted.

B. Causal Connection

Barber also fails to allege a causal relationship between Defendants' actions and his injuries. In the absence of allegations identifying Defendants' actionable conduct, or the conduct of their subordinates, Barber is unable to allege the requisite causal relationship between Defendants and Barber's alleged injury. Defendants' motion to dismiss should be granted on this ground as well.

C. Leave to Amend

Generally, if a court dismisses a complaint, it should "grant leave to amend . . . unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)(citation omitted). When dismissing a *pro se* complaint, the court must provide a *pro se* plaintiff "notice of the deficiencies of his or her complaint and an opportunity to amend the complaint" before dismissing a complaint without leave to amend. *McGuckin v, Smith*, 974 F.2d 1050, 1055 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997).

Here, the court is not convinced Barber is unable to cure the deficiencies in the Complaint by alleging additional facts. Accordingly, the court recommends dismissing Barber's Second through Fifth Claims for Relief without prejudice. Barber should be advised that any amended complaint must identify the statute under which the claim is asserted, the constitutional right

allegedly violated, the specific actions taken by Defendants or their subordinates, knowledge of their subordinates' actions, the specific injuries suffered by Barber as a results of these actions, and the relationship between the actions and Barber's injuries.

Conclusion

The Defendants' motion to dismiss (ECF No. 56) Barber's Second through Sixth Claims for Relief should be GRANTED. Barber's Second Claim for Relief, to the extent it seeks money damages, and his Sixth Claim for Relief should be dismissed with prejudice as barred by Eleventh Amendment immunity. Barber's Second Claim for Relief, to the extent it seeks prospective relief, and his Third through Fifth Claims for Relief should be dismissed without prejudice.

Scheduling Order

The Findings and Recommendation will be referred to a district judge for review. Objections, if any, are due **October 27, 2017**. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 6th day of October, 2017.

/s/ John V. Acosta
JOHN V. ACOSTA
United States Magistrate Judge