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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE HAROLD HOUSE; LORILEE L. HOUSE,

Plaintiffs-Appellants,

v.

EILEEN EGLAND, in her individual capacity; et al.,

Defendants-Appellees.

No. 18-55105

D.C. No. 5:17-cv-01085-DSF-SK
Central District of California,
Riverside

ORDER

Before: LEAVY, HAWKINS, and TALLMAN, Circuit Judges.

Appellants' motion for reconsideration (Docket Entry No. 14) is denied.

No further filings will be entertained in this closed case.

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ORDER

Before: LEAVY, HAWKINS, and TALLMAN, Circuit Judges.

The district court certified that this appeal is not taken in good faith and revoked appellants' in forma pauperis status. *See* 28 U.S.C. § 1915(a). On March 21, 2018, the court ordered appellants to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record and response to the court's order to show cause, we conclude this appeal is frivolous. We therefore deny appellants' motion to proceed in forma pauperis (Docket Entry No. 11) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

All other pending motions are denied as moot.

DISMISSED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIE H. HOUSE, et al.,

Plaintiffs,

v.

JESSICA DAGNAN, et al.,

Defendants.

CASE NO. 5:17-cv-01085-DSF (SK)

JUDGMENT

IT IS ADJUDGED that the Second Amended Complaint is dismissed without leave to amend, and this action is dismissed with prejudice.

DATED: 12/27/17

Dale S. Fischer

HON. DALE S. FISCHER
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIE H. HOUSE, et al.,

Plaintiffs,

v.

JESSICA DAGNAN, et al.,

Defendants.

CASE NO. 5:17-cv-01085-DSF (SK)

ORDER DISMISSING ACTION

I.

INTRODUCTION

Plaintiffs, a married couple both 64 years of age, proceed in forma pauperis with a Second Amended Complaint ("SAC") alleging civil rights violations under 42 U.S.C. §§ 1981, 1983, 1985(3), and 12132. (SAC 10–22). Plaintiffs allege that a San Bernardino County employee and 10 Does discriminated against them based on their age and Mr. House's hearing disability when Defendants threatened to arrest Mr. House, instructed him to visit the San Bernardino County Sheriff's Department twice, made him wait in the foyer more than three hours the first time, and then kicked him out on the second visit without explanation. (SAC 7–9). Plaintiffs also allege that Mr. House was wrongfully convicted of a sex offense sometime in

1992 based on perjured testimony and forced to register as a sex offender against his will. (SAC 22–33). They seek $3,500,000 in damages. (SAC 35).

If Plaintiffs' action is "frivolous" or "fails to state a claim on which relief may be granted," the Court may "dismiss the case at any time." 28 U.S.C. § 1915(e)(2)(B)(i), (ii). A claim is frivolous if it is based on an indisputably meritless legal theory or if the factual contentions are clearly baseless. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989). To state a claim on which relief may be granted, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive dismissal, a plaintiff 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).

II.

DISCUSSION

A. The SAC Fails to State a Civil Rights Claim under § 1983

To state a claim under 42 U.S.C. § 1983, Plaintiffs must allege that a state official deprived them of a right secured by the U.S. Constitution or federal law. *See Martinez v. California*, 444 U.S. 277, 284 (1980). Plaintiffs allege that Defendants violated their Fourth, Eighth, and Fourteenth Amendment rights, but none of those provisions is applicable. The SAC alleges, at most, that Defendants were insensitive to Mr. House's hearing disability, treated him inconsiderately, made an elderly man sit in a waiting area for more than three hours, and arbitrarily forced a hearing-disabled person to make unexplained visits to a county office with no apparent purpose. But no matter how indecent those actions were in Plaintiffs' eyes, they do not amount to "cruel and unusual punishment" proscribed by the Eighth Amendment. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). Nor do

they entail the "unnecessary and wanton infliction of pain" repugnant to the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976). The Fourth Amendment does not provide a basis for relief either, because no matter how long Mr. House may have had to wait in the public foyer, no reasonable person would have believed that he was not free to leave. *See Brendlin v. California*, 551 U.S. 249, 255 (2007). And being kicked out of a location is the antithesis of a seizure. Finally, Plaintiffs fail to identify—nor can the Court glean—what due process right could have been violated. *See Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). There is no constitutionally-protected interest in short waits or politeness from officials.

Plaintiffs' § 1983 claim fares no better to the extent it is based on the ADA or California law. Because the ADA contains a "comprehensive remedial scheme," Plaintiffs cannot bring a separate action under § 1983 that is predicated on a violation of the ADA. *Okwu v. McKim*, 682 F.3d 841, 844 (9th Cir. 2012). Similarly, any allegations of false imprisonment or challenges to California's sex-offender registration laws are not actionable under § 1983 since they arise under state, not federal, law.

B. The SAC Fails to State a Civil Rights Claim under § 1985(3)

To state a claim under 42 U.S.C. § 1985(3), a complaint must allege: "(1) a conspiracy, (2) to deprive any person or a class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury, property damage or a deprivation of any right or privilege of a citizen of the United States." *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980). The SAC does not meet at least two of these elements.

First, there is no allegation to support the existence of a conspiracy. To prove a conspiracy, Plaintiffs must allege facts plausibly showing an "agreement or meeting of the minds to violate constitutional rights." *United*

Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1540–41 (9th Cir. 1989) (en banc) (internal quotation marks omitted). "A mere allegation of conspiracy without factual specificity is insufficient." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988). Plaintiffs assert that Defendants conspired to mistreat them, but cannot supply even basic details. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 937 (9th Cir. 2012) (conspiracy allegations insufficient when plaintiff did not plead scope of conspiracy, defendants' roles, or when and how conspiracy operated). At best, Plaintiffs allege similar untoward conduct by Defendants, but "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly*, 550 U.S. at 556–57.

Second, even if Plaintiffs could allege facts to support the existence of an agreement, the SAC fails to allege that the purpose of the conspiracy was "aimed at" preventing the exercise of their rights, as opposed to simply having the "incidental effect" of impairing their rights. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275–76 (1993). "[I]t does not suffice for application of § 1985(3) that a protected right be incidentally affected" because a "conspiracy is not 'for the purpose' of denying [a right] simply because it has an effect upon [that] protected right." *Id.* "The right must be *aimed at*," such that its impairment is "a conscious objective of the enterprise." *Id.* (internal quotation marks and citations omitted). The "intent to deprive of a right" means more than mere awareness or acceptance of a deprivation; the defendants must act, at least in part, for the express purpose of producing it. *Id.* at 276. That is not alleged to be the case here and is implausible on the face of the SAC. At most, Defendants' alleged mistreatment of Plaintiffs had the "incidental effect" of denying their alleged rights, but that is insufficient to state a § 1985(3) claim.

C. The SAC Fails to State a Discrimination Claim under § 1981

Plaintiffs allege that they were discriminated against because of their age and disability in violation of 42 U.S.C. § 1981. But § 1981 does not prohibit discrimination based on those classifications. It only prohibits private *racial* discrimination in the making and performance of contracts. *See Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). To state a § 1981 claim, therefore, Plaintiffs must show that Defendants acted with an intent to discriminate based on race, ethnicity, or the like. *See Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982). Section 1981 "does not protect against discrimination on the basis of gender or religion, [] disability, [] age, [] or political affiliation[.]" *Sagana v. Tenorio*, 384 F.3d 731, 738 (9th Cir. 2004) (internal citations omitted).

D. The SAC Fails to State an ADA Claim

The ADA prohibits disability-based discrimination by public entities in the provision of public services. *See* 42 U.S.C. § 12132. But even if Mr. House's hearing disability qualifies for protection under the ADA, the SAC fails to allege what public benefit he was denied or that it was his disability—and not some other factor—that was the cause of the alleged discrimination. *See Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002). To be sure, Plaintiffs allege that Mr. House was treated inconsiderately, but nothing indicates that he was "either excluded from participation in" or "denied the benefits of" any public "services, programs, or activities." *Id.* Being improperly hailed to a police station, inexplicably forced to wait several hours in a public foyer, and forcibly ejected from the premises may be worthy of opprobrium and deserve recourse of some kind, but none of those facts amounts to the denial of public services within the ambit of the ADA.

Nor do they indicate that Mr. House's disability was the "motivating factor" behind the alleged mistreatment. *Head v. Glacier Nw. Inc.*, 413 F.3d

1053, 1065 (9th Cir. 2005), *abrogated on other grounds by Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013). Plaintiffs identify no facts to plausibly suggest that Defendants were motivated to mistreat him because of—and not merely in spite of—his disability. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint fails to state a claim upon which relief may be granted. *Iqbal*, 556 U.S. at 679. "When faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation." *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (quoting *In re Century Aluminum Co. Secs. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013)). "Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true," to render Plaintiffs' allegations "plausible." *Id.* at 996–97. Their conclusory assertions of motive, "because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679.

E. Plaintiffs' Challenge to a Prior Conviction Is Not Cognizable

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that if a judgment in favor of a plaintiff on a civil rights claim would necessarily imply the invalidity of a final, undisturbed conviction, the civil rights claim must be dismissed. *Id.* at 486–87; *see also Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (clarifying that *Heck* bar applies regardless of form of remedy sought). Here, Plaintiffs raise several claims that challenge the validity of Mr. House's apparent prior sex-offense conviction and, by extension, his requirement to register as a sex offender. But because no facts are alleged to suggest that this prior conviction has been overturned, all claims in the SAC that attack the validity of that conviction are barred by

Heck. It does not matter, as Plaintiffs contend, that the conviction was allegedly obtained through perjury and fabricated evidence. *See, e.g., Young v. Bruett*, 68 Fed. App'x 126, 127 (9th Cir. 2003).

III.

CONCLUSION

The SAC is based on demonstrably meritless legal theories and fails to state a claim on which relief may be granted. Plaintiffs received two chances to amend their initial and first amended complaints with detailed explanations of why the previous pleadings were factually and legally deficient. (ECF Nos. 14, 18).[1] But the first amended complaint was materially no different than the initial complaint, and the same is true of the SAC. While the Court has construed Plaintiffs' pleadings liberally, it is "absolutely clear" that the deficiencies of Plaintiffs' claims cannot be cured by a third amendment. *Karim-Panahi*, 839 F.2d at 623. The SAC is therefore ordered dismissed without leave to amend, and judgment dismissing this action with prejudice shall be entered accordingly.

IT IS SO ORDERED.

DATED: 12/27/17

HON. DALE S. FISCHER
U.S. DISTRICT JUDGE

PRESENTED BY:

STEVE KIM
U.S. MAGISTRATE JUDGE

[1] The two previous orders by the Magistrate Judge dismissing Plaintiff's earlier claims with leave to amend were, as explained in those orders, non-dispositive. But if they could be construed as dispositive of any claims or parties, the Court accepts and adopts the findings and conclusions in those orders as its own. *See Mitchell v. Valenzuela*, 791 F.3d 1166, 1174 (9th Cir. 2015); *Bastidas v. Chappell*, 791 F.3d 1155, 1162 (9th Cir. 2015).