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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DESHAWN MITCHELL
12 K-70241,

13 Plaintiff,

14 v.

15 LIEUTENANT M. CARPIO,

16 Defendants.
17

Case No.: 3:16-cv-02814-WQH-NLS

ORDER:

1) **GRANTING PLAINTIFF'S
MOTION TO PROCEED *IN FORMA
PAUPERIS* PURSUANT TO 28 U.S.C.
§ 1915(a) (ECF No. 3)**

AND

2) **DIRECTING U.S. MARSHAL TO
EFFECT SERVICE OF SUMMONS
AND COMPLAINT PURSUANT TO
28 U.S.C. § 1915(d)
AND Fed.R.Civ.P. 4(c)(3)**

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23 Deshawn Mitchell ("Plaintiff"), currently incarcerated at California Correctional
24 Institution located in Tehachapi, California, and proceeding pro se, has filed a civil rights
25 complaint ("Compl.") pursuant to 42 U.S.C. § 1983 (ECF No. 1).

26 Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a);
27 instead, he has filed a Motion to Proceed In Forma Pauperis ("IFP") pursuant to 28

1 U.S.C. § 1915(a) (ECF No. 3).

2 **I. Plaintiff’s Motion to Proceed IFP**

3 All parties instituting any civil action, suit or proceeding in a district court of the
4 United States, except an application for writ of habeas corpus, must pay a filing fee of
5 \$400. *See* 28 U.S.C. § 1914(a).¹ An action may proceed despite a plaintiff’s failure to
6 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
7 § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*
8 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if a prisoner, like Plaintiff, is
9 granted leave to proceed IFP, he remains obligated to pay the entire fee in “increments,”
10 *see Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), regardless of whether his
11 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*,
12 281 F.3d 844, 847 (9th Cir. 2002).

13 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
14 (“PLRA”), a prisoner seeking leave to proceed IFP must submit a “certified copy of the
15 trust fund account statement (or institutional equivalent) for the prisoner for the six-
16 month period immediately preceding the filing of the complaint.” 28 U.S.C.
17 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
18 trust account statement, the Court assesses an initial payment of 20% of (a) the average
19 monthly deposits in the account for the past six months, or (b) the average monthly
20 balance in the account for the past six months, whichever is greater, unless the prisoner
21 has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution
22 having custody of the prisoner then collects subsequent payments, assessed at 20% of the
23 preceding month’s income, in any month in which the prisoner’s account exceeds \$10,

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26 ¹ In addition to the \$350 statutory fee, all parties filing civil actions on or after May 1, 2013, must pay
27 an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees,
District Court Misc. Fee Schedule) (eff. May 1, 2013). However, the additional \$50 administrative fee
is waived if the plaintiff is granted leave to proceed IFP. *Id.*

1 and forwards those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
2 § 1915(b)(2).

3 In support of his IFP Motion, Plaintiff has submitted a certified copy of his trust
4 account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. Cal. CivLR 3.2. *Andrews*,
5 398 F.3d at 1119. The Court has reviewed Plaintiff’s trust account statement, but it
6 shows that he has a current available balance of zero. *See* 28 U.S.C. § 1915(b)(4)
7 (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action
8 or appealing a civil action or criminal judgment for the reason that the prisoner has no
9 assets and no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at
10 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of
11 a prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds
12 available to him when payment is ordered.”).

13 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 3) and
14 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
15 balance of the filing fees mandated will be collected by the California Department of
16 Corrections and Rehabilitation (“CDCR”) and forwarded to the Clerk of the Court
17 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

18 **II. Initial Screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A**

19 Notwithstanding Plaintiff’s IFP status or the payment of any partial filing fees, the
20 PLRA also obligates the Court to review complaints filed by all persons proceeding IFP
21 and by those, like Plaintiff, who are “incarcerated or detained in any facility [and]
22 accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the
23 terms or conditions of parole, probation, pretrial release, or diversionary program,” “as
24 soon as practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A. Under
25 these statutes, the Court must sua sponte dismiss complaints, or any portions thereof,
26 which are frivolous, malicious, fail to state a claim, or which seek damages from
27 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v.*

1 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing § 1915(e)(2));
2 *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. §
3 1915A(b)).

4 All complaints must contain “a short and plain statement of the claim showing that
5 the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). Detailed factual allegations are
6 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
7 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
8 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining
9 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that
10 requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at
11 679. The “mere possibility of misconduct” falls short of meeting this plausibility
12 standard. *Id.*; see also *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

13 “When there are well-pleaded factual allegations, a court should assume their
14 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
15 *Iqbal*, 556 U.S. at 679; see also *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
16 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
17 allegations of material fact and must construe those facts in the light most favorable to
18 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that §
19 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

20 However, while the court “ha[s] an obligation where the petitioner is pro se,
21 particularly in civil rights cases, to construe the pleadings liberally and to afford the
22 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
23 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
24 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of*
25 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

26 **A. Plaintiff’s Factual Allegations**

27 Plaintiff was previously housed at Calipatria State Prison (“CAL”) from April 13,

1 2015 to June 28, 2016. (Compl. at 2.) During this time frame, Plaintiff claims he
2 repeatedly applied for job assignments within the prison. (*Id.* at 1- 9.) However, each
3 time he was denied the job assignment by Lieutenant Carpio with the explanation that
4 Plaintiff’s “work group/privilege group” prohibited these work assignments. (*Id.*)
5 Plaintiff, an African American, claims that Mexican American inmates with these same
6 work group/privilege group status were given these job assignments instead. (*Id.* at 5.)
7 Plaintiff claims that he informed Defendant Carpio that he was discriminating against all
8 African American inmates. (*Id.* at 7.)

9 As currently pleaded, the Court finds the Fourteenth Amendment equal protection
10 allegations in Plaintiff’s Complaint are sufficient to survive the sua sponte screening
11 required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Accordingly, the Court will direct
12 the U.S. Marshal to effect service on Plaintiff’s behalf. *See* 28 U.S.C. § 1915(d) (“The
13 officers of the court shall issue and serve all process, and perform all duties in [IFP]
14 cases.”); Fed.R.Civ.P. 4(c)(3) (“[T]he court may order that service be made by a United
15 States marshal or deputy marshal . . . if the plaintiff is authorized to proceed in forma
16 pauperis under 28 U.S.C. § 1915.”).

17 **III. Conclusion and Order**

18 Good cause appearing, **IT IS HEREBY ORDERED** that:

19 1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No.
20 3) is **GRANTED**.

21 2. The Secretary of the CDCR, or his designee, shall collect from Plaintiff’s
22 prison trust account the \$350 filing fee owed in this case by collecting monthly payments
23 from the account in an amount equal to twenty percent (20%) of the preceding month’s
24 income and forward payments to the Clerk of the Court each time the amount in the
25 account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS**
26 **SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED**
27 **TO THIS ACTION.**

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2 3. The Clerk of the Court is directed to serve a copy of this Order on Scott
3 Kernan, Secretary, California Department of Corrections and Rehabilitation, P.O. Box
4 942883, Sacramento, California, 94283-0001.

5 **IT IS FURTHER ORDERED** that:

6 4. The Clerk is **DIRECTED** to issue a summons as to Plaintiff's Complaint
7 (ECF No. 1) upon Defendants and forward it to Plaintiff along with blank U.S. Marshal
8 Form 285s for each named Defendant. In addition, the Clerk is directed to provide
9 Plaintiff with a certified copy of this Order and a certified copy of his Complaint (ECF
10 No. 1) and the summons so that he may serve each named Defendant. Upon receipt of
11 this "IFP Package," Plaintiff is directed to complete the Form 285s as completely and
12 accurately as possible, and to return them to the United States Marshal according to the
13 instructions provided by the Clerk in the letter accompanying his IFP package.

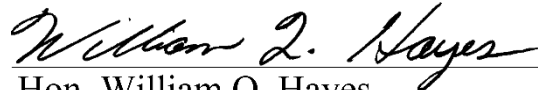
14 5. Upon receipt, the U.S. Marshal is **ORDERED** to serve a copy of the
15 Complaint and summons upon the named Defendants as directed by Plaintiff on the USM
16 Form 285s. All costs of service will be advanced by the United States. *See* 28 U.S.C.
17 § 1915(d); Fed.R.Civ.P. 4(c)(3).

18 6. Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint
19 within the time provided by the applicable provisions of Federal Rule of Civil Procedure
20 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to
21 "waive the right to reply to any action brought by a prisoner confined in any jail, prison,
22 or other correctional facility under section 1983," once the Court has conducted its sua
23 sponte screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made
24 a preliminary determination based on the face on the pleading alone that Plaintiff has a
25 "reasonable opportunity to prevail on the merits," the defendant is required to respond).

26 7. Plaintiff must serve upon the Defendants or, if appearance has been entered
27 by counsel, upon Defendants' counsel, a copy of every further pleading or other

1 document submitted for consideration by the Court. Plaintiff must include with the
2 original paper to be filed with the Clerk of the Court, a certificate stating the manner in
3 which a true and correct copy of the document was served on the Defendants, or counsel
4 for Defendants, and the date of that service. Any paper received by the Court which has
5 not been properly filed with the Clerk, or which fails to include a Certificate of Service,
6 may be disregarded.

7 Dated: December 1, 2016


8 Hon. William Q. Hayes
9 United States District Court

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