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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CLIFFORD JOHNSON,

Plaintiff,

No. CIV S-10-0296 KJM P

vs.

KATHLEEN L. DICKINSON, et al.,

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding pro se; he has consented to magistrate judge jurisdiction. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). Plaintiff has been without funds for six months and is currently without funds. Accordingly, the court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1). Plaintiff is obligated to make monthly payments of twenty percent of the preceding month's income credited to plaintiff's prison trust account. These payments shall be

1 collected and forwarded by the appropriate agency to the Clerk of the Court each time the
2 amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.
3 § 1915(b)(2).

4 The court is required to screen complaints brought by prisoners seeking relief
5 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
6 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised
7 claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may
8 be granted, or that seek monetary relief from a defendant who is immune from such relief. 28
9 U.S.C. § 1915A(b)(1),(2).

10 A claim is legally frivolous when it lacks an arguable basis either in law or in
11 fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-
12 28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
13 indisputably meritless legal theory or where the factual contentions are clearly baseless.
14 Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however
15 inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d
16 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

17 In order to avoid dismissal for failure to state a claim a complaint must contain
18 more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements
19 of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other
20 words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
21 statements do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, a
22 claim upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570.
23 "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
24 draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129
25 S. Ct. at 1949. When considering whether a complaint states a claim upon which relief can be
26 granted, the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200

1 (2007), and construe the complaint in the light most favorable to the plaintiff, see Scheuer v.
2 Rhodes, 416 U.S. 232, 236 (1974).

3 Plaintiff alleges he overheard one of the defendants say she was raised as a racist
4 and when plaintiff remonstrated, the defendant told him to “shut the f*** up. . . .” He alleges
5 that this caused him mental anguish. However, a guard’s verbal harassment or insults do not
6 state a claim: to find that harassment, without physical injury, states a claim would trivialize the
7 Constitution. See Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987); Spicer v. Collins, 9 F. Supp.
8 2d 673, 683 (E.D. Tex. 1998) (citing cases). Plaintiff may not proceed on this claim under the
9 Civil Rights Act.

10 Plaintiff has also requested the appointment of counsel. The United States
11 Supreme Court has ruled that district courts lack authority to require counsel to represent
12 indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298
13 (1989). In certain exceptional circumstances, the court may request the voluntary assistance of
14 counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir.
15 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). In the present case, the
16 court does not find the required exceptional circumstances. Plaintiff’s request for the
17 appointment of counsel will therefore be denied.

18 In accordance with the above, IT IS HEREBY ORDERED that:

19 1. Plaintiff’s request for leave to proceed in forma pauperis (docket no. 2) is
20 granted.

21 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.
22 The fee shall be collected and paid in accordance with this court’s order to the Director of the
23 California Department of Corrections and Rehabilitation filed concurrently herewith.

24 3. Plaintiff’s complaint is dismissed.

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- 4. The Clerk of the Court is directed to close this case.
- 5. Plaintiff's request for the appointment of counsel (docket no. 3) is denied.

DATED: April 5, 2010.



U.S. MAGISTRATE JUDGE

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