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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LISA BELYEW,

Plaintiff,

v.

KIMBERLY MERRIFIELD,

Defendant.

No. 2:18-cv-0648-MCE-EFB P

ORDER GRANTING IFP AND FINDINGS
AND RECOMMENDATIONS TO DISMISS
ACTION PURSUANT TO 28 U.S.C. § 1915A

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. She has filed an application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. Request to Proceed In Forma Pauperis

Plaintiff’s application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

II. Screening Requirement and Standards

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which

1 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such
2 relief.” *Id.* § 1915A(b).

3 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)
4 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and
5 plain statement of the claim showing that the pleader is entitled to relief, in order to give the
6 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*
7 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

8 While the complaint must comply with the “short and plain statement” requirements of Rule 8,
9 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556
10 U.S. 662, 679 (2009).

11 To avoid dismissal for failure to state a claim a complaint must contain more than “naked
12 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of
13 action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of
14 a cause of action, supported by mere conclusory statements do not suffice.” *Iqbal*, 556 U.S. at
15 678.

16 Furthermore, a claim upon which the court can grant relief must have facial plausibility.
17 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual
18 content that allows the court to draw the reasonable inference that the defendant is liable for the
19 misconduct alleged.” *Iqbal*, 556 U.S. at 678. When considering whether a complaint states a
20 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*
21 *Pardus*, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the
22 plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

23 **III. Screening Order**

24 Plaintiff was a defendant in a state court criminal proceeding. She alleges that a Butte
25 County Superior Court Judge deprived her of a fair trial in violation of her right to due process.
26 ECF No. 1 at 2-4. She seeks damages and asks that the judge be “recus[ed] from the bench!” *Id.*
27 at 6. The defendant judge, however, is immune from plaintiff’s suit because the claims against
28 her are based on acts performed in her capacity as a judge. *See Ashelman v. Pope*, 793 F.2d 1072,

1 1078 (1986) (holding that “a conspiracy between judge and prosecutor to predetermine the
2 outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the
3 immunity extended to judges and prosecutors”). Immunity aside, plaintiff’s claim is barred by
4 *Heck v. Humphrey*, 512 U.S. 477, (1994). *Heck* holds that if success in a section 1983 action
5 would implicitly question the validity of confinement or its duration, the plaintiff must first show
6 that the underlying conviction was reversed on direct appeal, expunged by executive order,
7 declared invalid by a state tribunal, or questioned by the grant of a writ of habeas corpus.
8 *Muhammad v. Close*, 540 U.S. 749, 751 (2004). If plaintiff were to succeed on her due process
9 claim, it would call into question the validity of her conviction and confinement. As a general
10 rule, a challenge in federal court to the fact of conviction or the length of confinement must be
11 raised in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See Preiser v.*
12 *Rodriguez*, 411 U.S. 475 (1973).

13 For these reasons, plaintiff’s complaint must be dismissed without leave to amend. *See*
14 *Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009); *Silva v. Di Vittorio*, 658 F.3d 1090, 1105
15 (9th Cir. 2011) (“Dismissal of a pro se complaint without leave to amend is proper only if it is
16 absolutely clear that the deficiencies of the complaint could not be cured by amendment.”
17 (internal quotation marks omitted)); *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) (“[A]
18 district court should grant leave to amend even if no request to amend the pleading was made,
19 unless it determines that the pleading could not be cured by the allegation of other facts.”).

20 Accordingly, IT IS ORDERED that:

- 21 1. Plaintiff’s request to proceed in forma pauperis (ECF No. 4) is granted.
- 22 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected
23 in accordance with the notice to the California Department of Corrections and
24 Rehabilitation filed concurrently herewith.

25 Further, IT IS RECOMMENDED that this action be dismissed pursuant to 28 U.S.C.
26 § 1915A.

27 These findings and recommendations are submitted to the United States District Judge
28 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days

1 after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
4 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*
5 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: June 27, 2018.

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8 EDMUND F. BRENNAN
9 UNITED STATES MAGISTRATE JUDGE
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