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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MONRELL D. MURPHY,
Plaintiff,
v.
RALPH DIAZ,
Defendant.

No. 2:19-cv-1422 MCE AC P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983 and state law and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. Application to Proceed In Forma Pauperis

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). ECF Nos. 2, 6. 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). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff’s trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the preceding month’s income credited to plaintiff’s prison trust account. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time

1 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.
2 § 1915(b)(2).

3 II. Statutory Screening of Prisoner Complaints

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

9 A claim "is [legally] frivolous where it lacks an arguable basis either in law or in fact."
10 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
11 Cir. 1984). "[A] judge may dismiss . . . claims which are 'based on indisputably meritless legal
12 theories' or whose 'factual contentions are clearly baseless.'" Jackson v. Arizona, 885 F.2d 639,
13 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as
14 stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). The critical inquiry is whether a
15 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis.
16 Franklin, 745 F.2d at 1227-28 (citations omitted).

17 "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the
18 claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of
19 what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550
20 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
21 "Failure to state a claim under § 1915A incorporates the familiar standard applied in the context
22 of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." Wilhelm v. Rotman,
23 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). In order to survive dismissal for failure
24 to state a claim, a complaint must contain more than "a formulaic recitation of the elements of a
25 cause of action;" it must contain factual allegations sufficient "to raise a right to relief above the
26 speculative level." Twombly, 550 U.S. at 555 (citations omitted). "[T]he pleading must contain
27 something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally
28 cognizable right of action." Id. (alteration in original) (quoting 5 Charles Alan Wright & Arthur

1 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

2 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
3 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting
4 Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
5 content that allows the court to draw the reasonable inference that the defendant is liable for the
6 misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). In reviewing a complaint under this
7 standard, the court must accept as true the allegations of the complaint in question, Hosp. Bldg.
8 Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 740 (1976) (citation omitted), as well as construe the
9 pleading in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor,
10 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citations omitted).

11 III. Complaint

12 The complaint alleges that defendant Diaz, Secretary of the California Department of
13 Corrections and Rehabilitation (CDCR), violated plaintiff’s rights to freedom of association and
14 due process by denying plaintiff visitation with his wife as a penalty for a rules violation and
15 further violated plaintiff’s rights under state law by committing fraudulent misrepresentation and
16 negligent infliction of emotional distress. ECF No. 1. Specifically, plaintiff alleges that he was
17 charged with a rules violation for “sexual activity with an adult in a visiting room” during a visit
18 with his wife. Id. at 9. The violation report stated that plaintiff had “grabed (sic) his visitor
19 Kandace Murphy [his wife] on her buttocks, rubbed and squeezed her buttocks, and at one point
20 also reached his hand into her pants through the waistline of the paints (sic) where his hand was
21 inside her pants with skin to skin contact.” Id. (alteration in original). Upon being found guilty
22 of the violation, plaintiff was assessed penalties that included a ninety-day loss of good-time
23 credits, which have been restored, and a ninety-day loss of visitation followed by a ninety-day
24 loss of contact visits. Plaintiff appealed the disciplinary and defendant denied the appeal. Id. He
25 further claims that title 15, section 3007 of the California Code of Regulations, which he was
26 found guilty of violating, is unconstitutionally vague because it does not define “illegal sexual
27 acts.” Id. at 11.

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1 IV. Failure to State a Claim

2 A. Personal Involvement

3 Plaintiff's allegations against defendant Diaz appear to be based upon his denial of
4 plaintiff's appeal and his position as Secretary of the CDCR. To the extent the allegations are
5 based upon Diaz's position as Secretary, plaintiff fails to state a claim because "[t]here is no
6 respondeat superior liability under section 1983," Taylor v List, 880 F.2d 1040, 1045 (9th Cir.
7 1989) (citation omitted), and plaintiff has not alleged facts showing either Diaz's personal
8 involvement in the violation or a casual connection between Diaz's conduct and the violation,
9 Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting Hansen v. Black, 885 F.2d 642, 646
10 (9th Cir. 1989)). The allegation that Diaz denied plaintiff's appeal is insufficient to establish the
11 necessary personal involvement because there is no claim for the "loss of a liberty interest in the
12 processing of his appeals . . . because inmates lack a separate constitutional entitlement to a
13 specific prison grievance procedure." Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003)
14 (citing Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988)). Furthermore, as the Seventh Circuit
15 has observed, "[r]uling against a prisoner on an administrative complaint does not cause or
16 contribute to the [constitutional] violation. A guard who stands and watches while another guard
17 beats a prisoner violates the Constitution; a guard who rejects an administrative complaint about a
18 completed act of misconduct does not." George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007).

19 B. Visitation

20 "[F]reedom of association is among the rights least compatible with incarceration. Some
21 curtailment of that freedom must be expected in the prison context." Overton v. Bazzetta, 539
22 U.S. 126, 131 (2003) (citations omitted). Plaintiff's allegations that he was denied visitation for
23 ninety days and contact visits for an additional ninety days fail to state a claim for relief because
24 there is no constitutional right to "unfettered visitation." Kentucky Dep't of Corr. v. Thompson,
25 490 U.S. 454, 460-61 (1989); Overton v. Bazzetta, 539 U.S. 126, 136-37 (2003) (regulations
26 banning visitation privileges entirely for a two-year period for inmates with two substance abuse
27 violations and regulating the conditions of visitation upheld as not affecting constitutional rights
28 that survive incarceration); Gerber v. Hickman, 291 F.3d 617, 621 (9th Cir. 2002) (en banc) ("it is

1 well-settled that prisoners have no constitutional right while incarcerated to contact visits”
2 (citations omitted)). Furthermore, although plaintiff alleges that the restrictions on his visitation
3 were arbitrary and capricious, the facts clearly show that the temporary restrictions were imposed
4 as a penalty for a disciplinary violation.

5 C. Due Process

6 “[D]ue process requires fair notice of what conduct is prohibited before a sanction can be
7 imposed,” Newell v. Sauser, 79 F.3d 115, 117 (9th Cir. 1996), and plaintiff alleges that § 3007 is
8 unconstitutionally vague because it does not define “illegal sexual acts.”

9 Section 3007 provides that “[i]nmates may not participate in illegal sexual acts. Inmates
10 are specifically excluded in laws which remove legal restraints from acts between consenting
11 adults. Inmates must avoid deliberately placing themselves in situations and behaving in a
12 manner which is designed to encourage illegal sexual acts.” Cal. Code Regs. tit. 15, § 3007.
13 However, while § 3007 does not contain a definition of “illegal sexual acts,” there is a separate
14 regulation that defines various terms used within the regulations. That regulation defines “Sexual
15 Activity” as “any behavior of a sexual nature between an inmate and a visitor including, but not
16 limited to . . . [t]he rubbing or touching of . . . buttock(s) . . . for the purpose of arousing,
17 appealing to, or gratifying lust, passions, or sexual desires.” Cal. Code Regs. tit. 15, § 3000. The
18 regulations therefore provided plaintiff with fair notice that his conduct was prohibited as it fell
19 squarely within the type of conduct prohibited by § 3007.

20 D. State Law Claims

21 With respect to plaintiff’s state law claims for fraudulent misrepresentation and negligent
22 infliction of emotional distress, he has failed to state a claim for relief because he has not alleged
23 compliance with the Government Claims Act. See State v. Superior Court (Bodde), 32 Cal. 4th
24 1234, 1240, 1237 (2004) (for claims against the state, timely presentation of a claim under the
25 Government Claims Act is an element of the cause of action and must be pled in the complaint).
26 While amendment may be able to cure this defect, leave to amend should not be granted because
27 plaintiff has failed to state a cognizable claim for relief under federal law, and this court should

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1 therefore decline to exercise supplemental jurisdiction over plaintiff's state law claims.¹

2 Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 & n.7 (1988) (when federal claims are
3 eliminated before trial, district courts should usually decline to exercise supplemental
4 jurisdiction).

5 V. No Leave to Amend

6 Leave to amend should be granted if it appears possible that the defects in the complaint
7 could be corrected, especially if a plaintiff is pro se. Lopez v. Smith, 203 F.3d 1122, 1130-31
8 (9th Cir. 2000) (en banc); Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995) ("A pro se
9 litigant must be given leave to amend his or her complaint, and some notice of its deficiencies,
10 unless it is absolutely clear that the deficiencies of the complaint could not be cured by
11 amendment." (citing Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987))). However, if, after
12 careful consideration, it is clear that a complaint cannot be cured by amendment, the court may
13 dismiss without leave to amend. Cato, 70 F.3d at 1005-06.

14 The undersigned finds that, as set forth above, the complaint fails to state a claim upon
15 which relief may be granted, amendment of the federal claims would be futile, and the court
16 should decline to take jurisdiction over the state law claims. The complaint should therefore be
17 dismissed without leave to amend.

18 VI. Plain Language Summary of this Order for a Pro Se Litigant

19 Your request to proceed in forma pauperis is granted and you are not required to pay the
20 entire filing fee immediately.

21 It is being recommended that your complaint be dismissed without leave to amend
22 because there is no constitutional right to visitation, the regulation was not vague, and the court
23 should not take jurisdiction over your state law claims.

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

- 25 1. Plaintiff's request for leave to proceed in forma pauperis, ECF No. 2, is GRANTED.
26 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff

27 _____
28 ¹ The court takes no position on whether plaintiff would be able to successfully pursue his claims
in state court.

1 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.
2 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the
3 Director of the California Department of Corrections and Rehabilitation filed concurrently
4 herewith.

5 IT IS FURTHER RECOMMENDED that the complaint be dismissed without leave to
6 amend.

7 These findings and recommendations are submitted to the United States District Judge
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
9 after being served with these findings and recommendations, plaintiff may file written objections
10 with the court. Such a document should be captioned "Objections to Magistrate Judges Findings
11 and Recommendations." Plaintiff is advised that failure to file objections within the specified
12 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
13 (9th Cir. 1991).

14 DATED: April 15, 2021

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16 ALLISON CLAIRE
17 UNITED STATES MAGISTRATE JUDGE
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