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6 **UNITED STATES DISTRICT COURT**
7 **NORTHERN DISTRICT OF CALIFORNIA**
8 **SAN FRANCISCO DIVISION**

9
10 ANDRE PATTERSON,
11 Plaintiff,

12 v.

13 RACHIALLE FRANKLIN,
14 Defendant.

Case Number 11-cv-06137 NC

**REFERRAL FOR REASSIGNMENT
WITH RECOMMENDATION TO
DISMISS WITHOUT PREJUDICE**

Re: Docket No. 3

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17 Plaintiff Andre Patterson moves to proceed in forma pauperis (“IFP”) under 28 U.S.C. §
18 1915. Dkt. No. 3. Patterson has not consented to the jurisdiction of a magistrate judge. As this
19 Court does not have authority to make a dispositive ruling in this case because the parties have
20 not consented to its jurisdiction under 28 U.S.C. § 636(c), the Court orders that this case be
21 REASSIGNED to a District Judge. The Court RECOMMENDS that Patterson’s complaint be
22 dismissed without prejudice in accordance with 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state
23 a claim upon which relief may be granted.

24 **I. STANDARD OF REVIEW**

25 Any person seeking to commence a civil suit in district court must pay a filing fee of
26 \$350. 28 U.S.C. § 1914(a). A district court has the authority to waive this fee for any person
27 who shows in an affidavit that he or she is unable to pay it. 28 U.S.C. § 1915(a)(1). A district
28 court may dismiss the complaint of an IFP applicant at any time if it determines that the

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1 complaint fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2)(B)(ii).
2 Dismissal under the IFP statute “does not prejudice the filing of a paid complaint making the
3 same allegations.” *Denton v. Hernandez*, 504 U.S. 25, 34 (1992).

4 II. DISCUSSION

5 Patterson has shown in his IFP application that he is unable to pay the filing fee required
6 to file a complaint. *See* Dkt. No. 3, IFP Application. Patterson’s complaint, however, fails to
7 state a claim upon which relief may be granted. In his complaint, Patterson claims that
8 Defendant Franklin violated his rights under the First and Fifth Amendments of the United States
9 Constitution. Dkt. No. 1, Complaint, at 2. He alleges that after he was threatened by an “unruly”
10 and “violent” co-tenant, he attempted to report the incident to Defendant Franklin, who is his
11 landlord and “an advocate for Catholic charities.” *Id.* at 1. Franklin allegedly told Patterson to
12 leave her office and “banned” him “from services.” *Id.* at 2. Patterson claims that Franklin’s
13 actions violated his “right to a fair hearing” under the Fifth Amendment. *Id.* The rest of the
14 complaint contains excerpts of the text of the First and Fifth Amendments. *Id.*

15 The First Amendment prohibits Congress from making laws “respecting an establishment
16 of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the
17 press; or the right of the people peaceably to assemble, and to petition the Government for a
18 redress of grievances.” U.S. CONST. amend. I. The Due Process Clause of the Fifth Amendment
19 forbids the federal government from depriving persons of “life, liberty, or property, without due
20 process of law.” U.S. CONST. amend. V. The First and Fifth Amendments “apply to and restrict
21 only the Federal Government and not private persons.” *Public Utils. Comm’n of Dist. of*
22 *Columbia v. Pollak*, 343 U.S. 451, 461 (1952). Federal government officials may be sued in
23 their capacity as individuals. *See Bivens v. Six Unknown Named Agents of Federal Bureau of*
24 *Narcotics*, 403 U.S. 388 (1971).

25 Here, Patterson’s complaint fails to state a claim for relief under the First or Fifth
26 Amendments because he fails to allege that Franklin is a person acting on behalf of the federal
27 government. Patterson’s complaint also fails to state a claim for relief under 42 U.S.C. § 1983,
28 which provides a cause of action for constitutional violations committed by persons acting under
the color of state law, as Patterson does not allege that Franklin acted under the authority of state

1 law when she purportedly violated his rights. *See West v. Adkins*, 487 U.S. 42, 48-49 (1988).
2 Accordingly, the Court recommends that Patterson's complaint be dismissed with leave to
3 amend.

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5 IT IS SO ORDERED.

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7 DATED: December 12, 2011



NATHANAEL M. COUSINS
United States Magistrate Judge