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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

WILLIE HEAROD,
CDCR #T-09568,

Plaintiff,

vs.

GIURBINO, Warden; CHARLES PICKETT,
M.D.; JOHN PARSON, M.D.; JEANNE
WOODFORD, Director of the Department of
Corrections; SYLVIA GARCIA, Warden; P.
CHAN, M.D.; and DOES 1-30,

Defendants.

Civil No. 07-1319 H (JMA)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE AND GARNISHING
\$350 BALANCE FROM
PRISONER'S TRUST ACCOUNT
[Doc. No. 4]; AND**

**(3) DISMISSING FIRST AMENDED
COMPLAINT FOR FAILING TO
STATE A CLAIM PURSUANT TO
28 U.S.C. §§ 1915(e)(2)(b)(ii) &
1915A(b)(1)**

Plaintiff, Willie Hearod, a state inmate currently incarcerated at California Mens Colony located in San Luis Obispo, California and proceeding pro se, initially filed a civil rights action pursuant to 42 U.S.C. § 1983.

Plaintiff did not prepay the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No.

1 4]. Before the Court had the opportunity to screen Plaintiff's Complaint, he filed a First
2 Amended Complaint ("FAC") on August 27, 2007.¹

3 **I. Motion to Proceed IFP [Doc. No. 4]**

4 Effective April 9, 2006, all parties instituting any civil action, suit or proceeding in a
5 district court of the United States, except an application for writ of habeas corpus, must pay a
6 filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure
7 to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C.
8 § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners
9 granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless
10 of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v.*
11 *Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

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

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27 ¹ A review of Plaintiff's First Amended Complaint indicates that Plaintiff has failed to comply
28 with S.D. CAL. CIVLR 15.1. Plaintiff attached several exhibits to his original Complaint which he refers
to in his First Amended Complaint. However, Plaintiff failed to attach these exhibits to his First
Amended Complaint. The Local Rule provides, in part, that "all amended pleadings shall contain
copies of all exhibits referred to in such amended pleadings." *Id.*

1 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
2 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
3 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119. Plaintiff's trust
4 account statement shows that he has no available funds from which to pay filing fees at this time.
5 *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be prohibited from
6 bringing a civil action or appealing a civil action or criminal judgment for the reason that the
7 prisoner has no assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281
8 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal
9 of a prisoner's IFP case based solely on a "failure to pay ... due to the lack of funds available to
10 him when payment is ordered."). Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed
11 IFP [Doc. No. 4] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However,
12 the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk
13 of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

14 **III. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2) and § 1915A**

15 **A. Standard**

16 The PLRA also obligates the Court to review complaints filed by all persons proceeding
17 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused
18 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
19 conditions of parole, probation, pretrial release, or diversionary program," "as soon as
20 practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
21 provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion
22 thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from
23 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203
24 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,
25 446 (9th Cir. 2000) (§ 1915A).

26 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
27 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is
28 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,

1 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing
2 an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of
3 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection
4 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint
5 that fails to state a claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
6 (discussing 28 U.S.C. § 1915A).

7 “[W]hen determining whether a complaint states a claim, a court must accept as true all
8 allegations of material fact and must construe those facts in the light most favorable to the
9 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
10 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
11 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,
12 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
13 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

14 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
15 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
16 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
17 United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 2122
18 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

19 Plaintiff names as Defendants, Giurbino, the Warden for Centinela State Prison, Charles
20 Pickett, Chief Medical Officer (“CMO”), and Jeanne Woodford, former Director of the
21 Department of Corrections, and Sylvia Garcia, former Warden for Calipatria State Prison. There
22 are no factual allegations contained in Plaintiff’s First Amended Complaint pertaining to these
23 Defendants outside their roles as supervisors. However, there is no respondeat superior liability
24 under 42 U.S.C. § 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead,
25 “[t]he inquiry into causation must be individualized and focus on the duties and responsibilities
26 of each individual defendant whose acts or omissions are alleged to have caused a constitutional
27 deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*, 423
28 U.S. 362, 370-71 (1976)). In order to avoid the respondeat superior bar, Plaintiff must allege

1 personal acts by each individual Defendant which have a direct causal connection to the
2 constitutional violation at issue. *See Sanders v. Kennedy*, 794 F.2d 478, 483 (9th Cir. 1986);
3 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). As a supervisor, a Defendant may only be
4 held liable for the allegedly unconstitutional violations of his subordinates if Plaintiff alleges
5 specific facts which show: (1) how or to what extent this supervisor personally participated in
6 or directed Defendants' actions, and (2) in either acting or failing to act, the supervisor was an
7 actual and proximate cause of the deprivation of his constitutional rights. *Johnson v. Duffy*, 588
8 F.2d 740, 743 (9th Cir. 1978). As currently pleaded, however, Plaintiff's First Amended
9 Complaint in no way sets forth facts which might be liberally construed to support an
10 individualized constitutional claim against Giurbino, Pickett, Garcia or Woodford. Accordingly,
11 the claims against these Defendants are dismissed for failing to state a claim upon which § 1983
12 relief can be granted.

13 Thus, the Court finds that Plaintiff's Complaint fails to state a section 1983 claim upon
14 which relief may be granted, and is therefore subject to dismissal pursuant to 28 U.S.C.
15 §§ 1915(e)(2)(b) & 1915A(b). Because it is not altogether certain that Plaintiff would be unable
16 to allege any additional facts, however, the Court will provide Plaintiff with an opportunity to
17 amend his pleading in light of the standards set forth above. *See Lopez*, 203 F.3d at 1130-31.

18 **IV. Conclusion and Order**

19 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

20 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 4] is
21 **GRANTED**.

22 2. The Secretary of California Department of Corrections and Rehabilitation, or his
23 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
24 owed in this case by collecting monthly payments from the account in an amount equal to twenty
25 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
26 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).

27 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
28 **ASSIGNED TO THIS ACTION.**

