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

10 BYRON JACKSON,
11 CDCR #K-61614,

Plaintiff,

13 vs.
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15 O. GUTIERREZ, et al.,
16

17 Defendants.
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Civil No. 07-1755 JM (NLS)

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**

**(2) DISMISSING COMPLAINT FOR
FAILURE TO STATE A CLAIM
PURSUANT TO 28 U.S.C.
§§ 1915(e)(2) AND 1915A(b)**

20
21 Plaintiff, Byron Jackson, an inmate currently incarcerated at Corcoran State Prison
22 in Corcoran, California and proceeding pro se, has filed a civil rights Complaint
23 pursuant to 42 U.S.C. § 1983. In his Complaint, Plaintiff alleges that his Fourteenth
24 Amendment rights were violated during his disciplinary hearing while he was
25 incarcerated at Centinela State Prison.

26 Plaintiff has not prepaid the civil filing fee required by 28 U.S.C. § 1914(a), but
27 has instead submitted a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28
28 U.S.C. § 1915(a) [Doc. No. 4].

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

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

11 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
12 ("PLRA"), a prisoner seeking leave to proceed IFP must submit a "certified copy of the
13 trust fund account statement (or institutional equivalent) for the prisoner for the six-
14 month period immediately preceding the filing of the complaint." 28 U.S.C. §
15 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
16 trust account statement, the Court must assess an initial payment of 20% of (a) the
17 average monthly deposits in the account for the past six months, or (b) the average
18 monthly balance in the account for the past six months, whichever is greater, unless the
19 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
21 20% of the preceding month's income, in any month in which the prisoner's account
22 exceeds \$10, and forward those payments to the Court until the entire filing fee is paid.
23 *See* 28 U.S.C. § 1915(b)(2).

24 The Court finds that Plaintiff has submitted a certified copy of his trust account
25 statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398
26 F.3d at 1119. Plaintiff's trust account statement shows that he has no available funds
27 from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that
28 "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a

1 civil action or criminal judgment for the reason that the prisoner has no assets and no
2 means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding
3 that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s
4 IFP case based solely on a “failure to pay ... due to the lack of funds available to him
5 when payment is ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion to
6 Proceed IFP [Doc. No. 4] and assesses no initial partial filing fee per 28 U.S.C.
7 § 1915(b)(1). However, the entire \$350 balance of the filing fees mandated shall be
8 collected and forwarded to the Clerk of the Court pursuant to the installment payment
9 provisions set forth in 28 U.S.C. § 1915(b)(1).

10 **II. Initial Screening per 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)**

11 Notwithstanding IFP status or the payment of any partial filing fees, the Court must
12 subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory
13 screening and order the sua sponte dismissal of any case it finds “frivolous, malicious,
14 failing to state a claim upon which relief may be granted, or seeking monetary relief from
15 a defendant immune from such relief.” 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254
16 F.3d 845, 845 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not
17 limited to prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
18 (noting that 28 U.S.C. § 1915(e) “not only permits but requires” the court to sua sponte
19 dismiss an *in forma pauperis* complaint that fails to state a claim).

20 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua
21 sponte dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130.
22 However, as amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an
23 action filed pursuant to the IFP provisions of section 1915 make and rule on its own
24 motion to dismiss before directing the U.S. Marshal to effect service pursuant to
25 FED.R.CIV.P. 4(c)(2). See *Calhoun*, 254 F.3d at 845; *Lopez*, 203 F.3d at 1127; see also
26 *McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir. 1997) (stating that sua sponte
27 screening pursuant to § 1915 should occur “before service of process is made on the
28 opposing parties”).

1 “[W]hen determining whether a complaint states a claim, a court must accept as
2 true all allegations of material fact and must construe those facts in the light most
3 favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*,
4 152 F.3d at 1194 (noting that § 1915(e)(2) “parallels the language of Federal Rule of
5 Civil Procedure 12(b)(6)”); *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty
6 to liberally construe a pro se’s pleadings, see *Karim-Panahi v. Los Angeles Police Dep’t*,
7 839 F.2d 621, 623 (9th Cir. 1988), which is “particularly important in civil rights cases.”
8 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). In giving liberal interpretation
9 to a pro se civil rights complaint, however, the court may not “supply essential elements
10 of claims that were not initially pled.” *Ivey v. Board of Regents of the University of*
11 *Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

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

19 **A. Fourteenth Amendment Due Process Claims**

20 Plaintiff alleges that his due process rights were violated during his disciplinary
21 hearing when Centinela prison officials falsified reports in order that Plaintiff would be
22 charged with a felony. (Compl. at 3-5.) “The requirements of procedural due process
23 apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s
24 protection of liberty and property.” *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).

25 State statutes and prison regulations may grant prisoners liberty interests sufficient to
26 invoke due process protections. *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976).
27 However, the Supreme Court has significantly limited the instances in which due process
28 can be invoked. Pursuant to *Sandin v. Conner*, 515 U.S. 472, 483 (1995), a prisoner can

1 show a liberty interest under the Due Process Clause of the Fourteenth Amendment only
2 if he alleges a change in confinement that imposes an “atypical and significant hardship
3 . . . in relation to the ordinary incidents of prison life.” *Id.* at 484 (citations omitted); *Neal*
4 *v. Shimoda*, 131 F.3d 818, 827-28 (9th Cir. 1997).

5 In this case, Plaintiff has failed to establish a liberty interest protected by the
6 Constitution because he has not alleged, as he must under *Sandin*, facts related to the
7 conditions or consequences of a disciplinary hearing which show “the type of atypical,
8 significant deprivation [that] might conceivably create a liberty interest.” *Id.* at 486. In
9 *Sandin*, the Supreme Court considered three factors in determining whether the plaintiff
10 possessed a liberty interest in avoiding disciplinary segregation: (1) the disciplinary
11 versus discretionary nature of the segregation; (2) the restricted conditions of the
12 prisoner’s confinement and whether they amounted to a “major disruption in his
13 environment” when compared to those shared by prisoners in the general population; and
14 (3) the possibility of whether the prisoner’s sentence was lengthened by his restricted
15 custody. *Id.* at 486-87.

16 Here, Plaintiff has failed to allege how his disciplinary hearing created “a major
17 disruption” in his environment, or that the length of his sentence was affected. *See id.*
18 Thus, without more, the Court finds that Plaintiff’s claims fall “within the range of
19 confinement to be normally expected” by prison inmates “in relation to the ordinary
20 incidents of prison life,” and as such, are insufficient to state a due process claim upon
21 which relief can be granted. *Id.* at 486-87.

22 **B. Equal Protection Claims**

23 In addition, Plaintiff claims that prison officials have also violated his right to
24 equal protection under the law. The “Equal Protection Clause of the Fourteenth
25 Amendment commands that no State shall ‘deny to any person within its jurisdiction the
26 equal protection of the laws,’ which is essentially a direction that all persons similarly
27 situated should be treated alike.” *City of Cleburne v. Cleburne Living Center, Inc.* 473
28 U.S. 432, 439 (1985). In order to state a claim under § 1983 alleging violations of the

1 equal protection clause of the Fourteenth Amendment, Plaintiff must allege facts which
2 demonstrate that he is a member of a protected class. *See Harris v. McRae*, 448 U.S. 297,
3 323 (1980) (indigents); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432,
4 440-41 (1985) (listing suspect classes). In this matter, Plaintiff has not sufficiently plead
5 that he is a member of a protected claims nor has he plead any facts to demonstrate that
6 Defendants acted with an intent or purpose to discriminate against him based upon his
7 membership in a protected class. *See Barren v. Harrington*, 152 F.3d 1193, 1194 (9th
8 Cir. 1998), *cert. denied*, 525 U.S. 1154 (1999). Plaintiff has also failed to allege
9 sufficient facts which may prove invidious discriminatory intent. *Village of Arlington*
10 *Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977).
11 Accordingly, the Court dismisses Plaintiff's Fourteenth Amendment equal protection
12 claims for failing to state a claim upon which § 1983 relief can be granted.

13 For all the above reasons, the Court finds that Complaint fails to state a section
14 1983 claim upon which relief may be granted, and is therefore subject to dismissal
15 pursuant to 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). The Court will provide Plaintiff
16 with an opportunity to amend his pleading to cure the defects set forth above.

17 **III. Conclusion and Order**

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

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

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

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1 3. The Clerk of the Court is directed to serve a copy of this Order on James
2 Tilton, Secretary, California Department of Corrections and Rehabilitation, 1515 S Street,
3 Suite 502, Sacramento, California 95814.


4 **IT IS FURTHER ORDERED** that:

5 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28
6 U.S.C. §§ 1915(e)(2)(b)(ii) and (iii) and 1915A(b)(1) and (2). However, Plaintiff is
7 **GRANTED** sixty (60) days leave from the date this Order is stamped "Filed" in which
8 to file a First Amended Complaint which cures all the deficiencies of pleading noted
9 above. Plaintiff's Amended Complaint must be complete in itself without reference to
10 the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants not named and all
11 claims not re-alleged in the Amended Complaint will be deemed to have been waived.
12 *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended
13 Complaint fails to state a claim upon which relief may be granted, it may be dismissed
14 without further leave to amend and may hereafter be counted as a "strike" under 28
15 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

16 5. The Clerk of the Court is directed to mail a form § 1983 complaint to
17 Plaintiff.

18 **IT IS SO ORDERED.**

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20 DATED: January 15, 2008

21 
22 Hon. Jeffrey T. Miller
23 United States District Judge
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