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

ANTHONY ARTHUR BUSH,
CDCR #J-85079,

Plaintiff,

vs.

G. JANDA, Associate Warden;
CALIPATRIA STATE PRISON,

Defendants.

Civil No. 10-1825 BTM (NLS)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE, GARNISHING \$350
FROM PRISONER'S TRUST
ACCOUNT [Doc. No. 5]; and**

**(2) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING TO
STATE A CLAIM AND FOR
SEEKING MONETARY DAMAGES
AGAINST IMMUNE DEFENDANTS
PURSUANT TO
28 U.S.C. §§ 1915(e)(2) and 1915A(b)**

Plaintiff, Anthony Arthur Bush, a state prisoner currently incarcerated at Calipatria State Prison located in Calipatria, California and proceeding pro se, has filed a civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 5].

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1 **I. Motion to Proceed IFP [Doc. No. 5]**

2 All parties instituting any civil action, suit or proceeding in a district court of the United
3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
4 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee
5 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a).

6 Section 1915, as amended by the Prison Litigation Reform Act (“PLRA”), further
7 requires that each prisoner seeking leave to proceed IFP submit a “certified copy of [his] trust
8 fund account statement (or institutional equivalent) ... for the six-month period immediately
9 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2). Using these certified trust
10 account statements, the Court must assess an initial payment of 20% of (a) the average monthly
11 deposit, or (b) the average monthly balance in the account for the past six months, whichever
12 is greater, and collect that amount as the prisoner’s initial partial filing fee, unless he has no
13 current assets with which to pay. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4)..
14 Thereafter, the institution having custody of the prisoner must collect subsequent payments,
15 assessed at 20% of the preceding month’s income, in any month in which his account exceeds
16 \$10, and forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
17 § 1915(b)(2).

18 The Court finds that Plaintiff has submitted an affidavit that complies with 28 U.S.C.
19 § 1915(a)(1) [Doc. No. 5] as well as a certified copy of his prison trust account statement
20 pursuant to 28 U.S.C. § 1915(a)(2) and Civil Local Rule 3.2. Plaintiff’s trust account statement
21 shows he has insufficient funds from which to pay an initial partial filing fee.

22 Accordingly, the Court hereby **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No.
23 5], and assesses no initial partial filing fee at this time. *See* 28 U.S.C. § 1915(b)(1). However,
24 Plaintiff is required to pay the full \$350 filing fee mandated by 28 U.S.C. §§ 1914(a) and
25 1915(b)(1), by subjecting any future funds credited to his prison trust account to the installment
26 payment provisions set forth in 28 U.S.C. § 1915(b)(2).

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

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1 The PLRA also obligates the Court to review complaints filed by all persons proceeding
2 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
3 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
4 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
5 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
6 provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion
7 thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from
8 defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203
9 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,
10 446 (9th Cir. 2000) (§ 1915A).

11 **A. Constitutional Claims**

12 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
13 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
14 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
15 United States. See 42 U.S.C. § 1983.

16 **B. Application to Plaintiff’s Complaint**

17 1. Fourteenth Amendment Due Process claims

18 On February 7, 2007, Plaintiff was placed in Administrative Segregation (“Ad-Seg”) “for
19 writing a letter to his mother making comments about prison officials.” (Compl. at 5.) Plaintiff
20 then appeared before the Institution Classification Committee (“ICC”) which was conducted
21 by Defendant Janda. (*Id.*) Defendant Janda went against the recommendations of the ICC and
22 reduced Plaintiffs’ “A-1-A” status,¹ to A-2-B which resulted in a loss of his job assignment and
23 credit earning ability. (*Id.*)

24 “The requirements of procedural due process apply only to the deprivation of interests
25 encompassed by the Fourteenth Amendment’s protection of liberty and property.” *Board of*

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27 ¹ California prisoners in the A-1-A group are assigned to a full-time credit qualifying work,
28 educational, or vocational training program. As a result, A-1-A inmates earn one-for-one worktime
credit, *i.e.*, for every qualifying day’s work, the inmates earn a day of credit that may be subtracted from
their sentence. 15 CAL. CODE REGS. § 3044(b)(2); CAL. PENAL CODE § 2933(a).

1 *Regents v. Roth*, 408 U.S. 564, 569 (1972). State statutes and prison regulations may grant
2 prisoners liberty interests sufficient to invoke due process protections. *Meachum v. Fano*, 427
3 U.S. 215, 223-27 (1976). However, the Supreme Court has significantly limited the instances
4 in which due process can be invoked. Pursuant to *Sandin v. Conner*, 515 U.S. 472, 483 (1995),
5 a prisoner can show a liberty interest under the Due Process Clause of the Fourteenth
6 Amendment only if he alleges a change in confinement that imposes an “atypical and significant
7 hardship . . . in relation to the ordinary incidents of prison life.” *Id.* at 484 (citations omitted).

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

18 Therefore, to establish a due process violation, Plaintiff must first show the deprivation
19 imposed an atypical and significant hardship on him in relation to the ordinary incidents of
20 prison life. *Id.* at 483-84. Plaintiff has failed to allege any facts from which the Court could
21 find there were atypical and significant hardships imposed upon him as a result of the
22 Defendants’ actions. Plaintiff must allege “a dramatic departure from the basic conditions” of
23 his confinement that would give rise to a liberty interest before he can claim a violation of due
24 process. *Id.* at 485; *see also Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996), *amended*
25 *by* 135 F.3d 1318 (9th Cir. 1998). Plaintiff’s allegations that he lost his paying prison job or that
26 he is earning reduced credits do not rise to the level of a “dramatic departure” from basic prison
27 conditions. Moreover, Plaintiff’s allegation regarding the effect of placement in Ad-Seg on his
28 criminal conviction is unclear. Plaintiff alleges that because he was “forced to turn his attention

1 to his liberty,” he lost his appeal. (Compl. at 6.) If Plaintiff is alleging that he lost his criminal
2 conviction appeal due solely to the time he spent in Ad-Seg, he is going to have to provide
3 clearer factual allegations.

4 It is also not clear from Plaintiff’s Complaint how long he was held in Ad-Seg. Based
5 on the facts currently alleged, the Court finds that Plaintiff has failed to allege a liberty interest
6 in remaining free of ad-seg, and thus, has failed to state a due process claim. *See Sandin*, 515
7 U.S. at 486 (holding that placing an inmate in administrative segregation for thirty days “did not
8 present the type of atypical, significant deprivation in which a state might conceivably create a
9 liberty interest.”).

10 Therefore, the Court dismisses Plaintiff’s Fourteenth Amendment claims for failing to
11 state a claim upon which relief may be granted.

12 2. First Amendment claims

13 In addition, Plaintiff appears to claim that his First Amendment rights were violated
14 because he was punished for “simply venting to his mother about custodial staff’s conduct.”
15 (Compl. at 6.) “[A] prison inmate retains those First Amendment rights that are not inconsistent
16 with his status as a prisoner or with the legitimate penological objectives of the corrections
17 system.” *Pell v. Procunier*, 417 U.S. 817, 822 (1974). A regulation that impinges on First
18 Amendment rights is “valid if it is reasonably related to legitimate penological interests.”
19 *Turner v. Safely* 482 U.S. 78, 89 (1987).

20 Plaintiff does not identify the prison regulation that was the subject of his disciplinary
21 hearing. However, the Ninth Circuit has found that many prison “disrespect” regulations have
22 legitimate penological interests. *See Bradley v. Hall*, 64 F.3d 1276, 1280 (9th Cir. 1995). Here,
23 because the Court must apply the *Turner* standards to Plaintiff’s First Amendment claim but he
24 has failed to supply the necessary factual allegations to review his claim, the Court must dismiss
25 Plaintiff’s First Amendment claims for failing to state a claim upon which relief may be granted.

26 3. Eleventh Amendment

27 Finally, Plaintiff names Calipatria State Prison as a Defendant in this matter. The State
28 of California, the California Department of Corrections and Rehabilitation, as an agency of the

1 State of California and Calipatria State Prison are not “persons” subject to suit and are instead,
2 entitled to absolute immunity from monetary damages actions under the Eleventh Amendment.
3 *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 53-54 (1996); *Pennhurst State School &*
4 *Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *see also Hale v. State of Arizona*, 993 F.2d 1387,
5 1398-99 (9th Cir. 1993) (holding that a state department of corrections is not a “person” within
6 the meaning of § 1983). In order to state a claim under § 1983, Plaintiff must identify a
7 “person” who, acting under color of state law, deprived him of a right guaranteed under the
8 Constitution or a federal statute. *See* 42 U.S.C. § 1983.

9 Therefore, Plaintiff’s claims for monetary damages against Calipatria State Prison are
10 dismissed with prejudice.

11 Thus, Plaintiff’s Complaint must be dismissed for failing to state a claim upon which
12 section 1983 relief may be granted and for seeking monetary damages against an immune
13 defendant. *See* 28 U.S.C. §§ 1915(e)(2)(b); 1915A(b). Because it is not altogether certain that
14 Plaintiff would be unable to allege additional facts which might state a claim against Defendants,
15 however, the Court will provide Plaintiff with an opportunity to amend his pleading in light of
16 the standards 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. 5] is
20 **GRANTED**.

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

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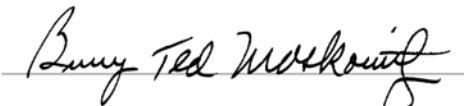
2 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
3 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
4 Sacramento, California 95814.

5 **IT IS FURTHER ORDERED** that:

6 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
7 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave
8 from the date this Order is "Filed" in which to file a First Amended Complaint which cures all
9 the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in
10 itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants
11 not named and all claims not re-alleged in the Amended Complaint will be deemed to have been
12 waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

13 **IT IS SO ORDERED.**

14 DATED: December 13, 2010

15 
16 Honorable Barry Ted Moskowitz
17 United States District Judge

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