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

DAMON MARTIN,
CDCR #V-86685,

Plaintiff,

vs.

M. ESCALANTE, et al.;

Defendants.

Civil No. 10cv2387 MMA (RBB)

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

I. Procedural History

On November 18, 2010, Damon Martin (“Plaintiff”), a state prisoner currently incarcerated at Richard J. Donovan Correctional Facility located in San Diego, California, and proceeding pro se, submitted a civil action pursuant to 42 U.S.C. § 1983. Additionally, Plaintiff filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]. The Court granted Plaintiff’s Motion to Proceed IFP but sua sponte dismissed his Complaint for failing to state a claim. *See* Nov. 23, 2010 Order at 4. Plaintiff was granted leave to file an Amended Complaint in order to correct the deficiencies of pleading. *Id.* On December 21, 2010, Plaintiff filed his First Amended Complaint (“FAC”).

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

2 As the Court stated in its previous Order, notwithstanding IFP status or the payment of
3 any partial filing fees, the Court must subject each civil action commenced pursuant to 28 U.S.C.
4 § 1915(a) to mandatory screening and order the sua sponte dismissal of any case it finds
5 “frivolous, malicious, failing to state a claim upon which relief may be granted, or seeking
6 monetary relief from a defendant immune from such relief.” 28 U.S.C. § 1915(e)(2)(B);
7 *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C.
8 § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir.
9 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not only permits but requires” the court to
10 sua sponte dismiss an *in forma pauperis* complaint that fails to state a claim).

11 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua sponte
12 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130. However, as
13 amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an action filed pursuant to
14 the IFP provisions of section 1915 make and rule on its own motion to dismiss before directing
15 the U.S. Marshal to effect service pursuant to FED.R.CIV.P. 4(c)(3). See *Calhoun*, 254 F.3d at
16 845; *Lopez*, 203 F.3d at 1127; see also *McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir.
17 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service of
18 process is made on the opposing parties”).

19 “[W]hen determining whether a complaint states a claim, a court must accept as true all
20 allegations of material fact and must construe those facts in the light most favorable to the
21 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194
22 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”);
23 *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe a pro se’s
24 pleadings, see *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988),
25 which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261
26 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the
27 court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board*
28 *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

1 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
2 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
3 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
4 United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 2122
5 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

6 In his First Amended Complaint, Plaintiff alleges that his due process rights were violated
7 during his disciplinary hearing because he was denied access to evidence which he claims would
8 prove him innocent of the charges against him. (*See* FAC at 4.) “The requirements of
9 procedural due process apply only to the deprivation of interests encompassed by the Fourteenth
10 Amendment’s protection of liberty and property.” *Board of Regents v. Roth*, 408 U.S. 564, 569
11 (1972). State statutes and prison regulations may grant prisoners liberty interests sufficient to
12 invoke due process protections. *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). However,
13 the Supreme Court has significantly limited the instances in which due process can be invoked.
14 Pursuant to *Sandin v. Conner*, 515 U.S. 472, 483 (1995), a prisoner can show a liberty interest
15 under the Due Process Clause of the Fourteenth Amendment only if he alleges a change in
16 confinement that imposes an “atypical and significant hardship . . . in relation to the ordinary
17 incidents of prison life.” *Id.* at 484 (citations omitted); *Neal v. Shimoda*, 131 F.3d 818, 827-28
18 (9th Cir. 1997).

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

1 Therefore, to establish a due process violation, Plaintiff must first show the deprivation
2 imposed an atypical and significant hardship on him in relation to the ordinary incidents of
3 prison life. *Sandin*, 515 U.S. at 483-84. Plaintiff has failed to allege any facts from which the
4 Court could find there were atypical and significant hardships imposed upon him as a result of
5 the Defendants' actions. Plaintiff must allege "a dramatic departure from the basic conditions"
6 of his confinement that would give rise to a liberty interest before he can claim a violation of due
7 process. *Id.* at 485; *see also Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996), *amended*
8 *by* 135 F.3d 1318 (9th Cir. 1998). He has not; therefore the Court finds that Plaintiff has failed
9 to allege a liberty interest in remaining free of Ad-seg, and thus, has failed to state a due process
10 claim. *See May*, 109 F.3d at 565; *Hewitt*, 459 U.S. at 466; *Sandin*, 515 U.S. at 486 (holding that
11 placing an inmate in administrative segregation for thirty days "did not present the type of
12 atypical, significant deprivation in which a state might conceivably create a liberty interest.").

13 Accordingly, the Court finds that Plaintiff's First Amended Complaint fails to state a
14 section 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 with an
16 opportunity to amend his pleading to cure the defects set forth above. Plaintiff is warned that
17 if his amended complaint fails to address the deficiencies of pleading noted above, it may be
18 dismissed with prejudice and without leave to amend.

19 **III. Conclusion and Order**

20 Good cause appearing, **IT IS HEREBY ORDERED** that:

21 Plaintiff's First Amended Complaint is **DISMISSED** without prejudice pursuant to 28
22 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days
23 leave from the date this Order is "Filed" in which to file a Second Amended Complaint which
24 cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be
25 complete in itself without reference to the superseded pleading. *See S.D. Cal. Civ. L. R. 15.1.*
26 Defendants not named and all claims not re-alleged in the Amended Complaint will be deemed
27 to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if
28 Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted, it may

1 be dismissed without further leave to amend and may hereafter be counted as a “strike” under
2 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

3 The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

4 **IT IS SO ORDERED.**

5 DATED: December 29, 2010



6 Hon. Michael M. Anello
7 United States District Judge
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