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

JOHN WESELEYE WALKER,
CDCR #D-44672,

Plaintiff,

vs.

M. BECCERA, Correctional Officer;
M.D. CARYIO, Correctional Lieutenant;
J. HATFIELD, Correctional Lieutenant;
S. ANDERSON, Associate Warden,

Defendants.

CASE NO. 14CV1558 BEN (PCL)

ORDER:

**(1) GRANTING PLAINTIFF’S
MOTION TO PROCEED
IN FORMA PAUPERIS
[Docket No. 2]; and**

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

John Weseleye Walker, (“Plaintiff”), currently incarcerated at Calipatria State Prison located in Calipatria, California, and proceeding pro se, has initiated a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the civil filing fee; instead he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) (Docket No. 2).

I. PLAINTIFF’S MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of

1 \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to
2 prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28
3 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).
4 However, “[u]nlike other indigent litigants, prisoners proceeding IFP must pay the full
5 amount of filing fees in civil actions and appeals pursuant to the PLRA [Prison Litigation
6 Reform Act].” *Agyeman v. INS*, 296 F.3d 871, 886 (9th Cir. 2002). As defined by the
7 PLRA, a “prisoner” is “any person incarcerated or detained in any facility who is
8 accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of
9 criminal law or the terms and conditions of parole, probation, pretrial release, or
10 diversionary program.” 28 U.S.C. § 1915(h). Because Plaintiff is currently incarcerated,
11 he is a prisoner as defined by 28 U.S.C. § 1915(h), and therefore subject to the PLRA’s
12 requirements and limitations. *Agyeman*, 296 F.3d at 886.

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

25 Plaintiff has submitted a certified copy of his trust account statement pursuant to
26 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119. The trust
27 account statement shows that Plaintiff has insufficient funds to pay an initial partial
28 filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be

1 prohibited from bringing a civil action or appealing a civil action or criminal judgment
2 for the reason that the prisoner has no assets and no means by which to pay [an] initial
3 partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as
4 a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure
5 to pay ... due to the lack of funds available.”).

6 Therefore, the Court GRANTS Plaintiff’s Motion to Proceed IFP [Docket No. 2],
7 and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire
8 \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk
9 of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. §
10 1915(b)(1).

11 **II. INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) AND 1915A(b)(1)**

12 **A. Standard of Review**

13 Notwithstanding IFP status or the payment of any partial filing fees, the PLRA
14 also obligates the Court to review complaints filed by all persons proceeding IFP and by
15 those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of,
16 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
17 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
18 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
19 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions
20 thereof, which are frivolous, malicious, fail to state a claim, or which seek damages from
21 defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v.*
22 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v.*
23 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

24 All complaints must contain “a short and plain statement of the claim showing that
25 the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations are
26 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
27 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
28 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining

1 whether a complaint states a plausible claim for relief [is] ... a context-specific task that
2 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*
3 The “mere possibility of misconduct” falls short of meeting this plausibility standard.
4 *Id.*; see also *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

5 “When there are well-pleaded factual allegations, a court should assume their
6 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
7 *Iqbal*, 556 U.S. at 679; see also *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
8 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
9 allegations of material fact and must construe those facts in the light most favorable to
10 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
11 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

12 However, while the court “ha[s] an obligation where the petitioner is pro se,
13 particularly in civil rights cases, to construe the pleadings liberally and to afford the
14 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
15 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not, in
16 so doing, “supply essential elements of claims that were not initially pled.” *Ivey v. Bd.*
17 *of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and
18 conclusory allegations of official participation in civil rights violations are not sufficient
19 to withstand a motion to dismiss.” *Id.*

20 **B. 42 U.S.C. § 1983**

21 “Section 1983 creates a private right of action against individuals who, acting
22 under color of state law, violate federal constitutional or statutory rights.” *Devereaux v.*
23 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of
24 substantive rights, but merely provides a method for vindicating federal rights elsewhere
25 conferred.” *Graham v. Connor*, 490 U.S. 386, 393–94 (1989) (internal quotation marks
26 and citations omitted). “To establish § 1983 liability, a plaintiff must show both (1)
27 deprivation of a right secured by the Constitution and laws of the United States, and (2)
28 that the deprivation was committed by a person acting under color of state law.” *Tsao*

1 v. *Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

2 **C. Due Process**

3 Plaintiff claims that he was denied a “fair and impartial” disciplinary hearing when
4 he was accused of attacking another inmate and the hearing resulted in a “SHU” term.
5 (Compl. at 3.) The Due Process Clause protects Plaintiff against the deprivation of
6 liberty without the procedural protections to which he is entitled. *Wilkinson v. Austin*,
7 545 U.S. 209, 221 (2005). To state a due process claim, Plaintiff must first identify the
8 interest at stake. *Id.* at 221. Liberty interests may arise from the Due Process Clause
9 itself or from state law. *Id.*

10 The Due Process Clause by itself does not confer on inmates a liberty interest in
11 avoiding more adverse conditions of confinement, and under state law, the existence of
12 a liberty interest created by prison regulations is determined by focusing on the nature
13 of the condition of confinement at issue. *Id.* at 221-23 (citing *Sandin v. Conner*, 515
14 U.S. 472, 481-84 (1995)) (quotation marks omitted). Liberty interests created by prison
15 regulations are generally limited to freedom from restraint which imposes “atypical and
16 significant hardship” on the inmate “in relation to the ordinary incidents of prison life.”
17 *Id.* at 221 (citing *Sandin*, 515 U.S. at 484); *Myron v. Terhune*, 476 F.3d 716, 718 (9th
18 Cir. 2007).

19 In this case, Plaintiff has failed to establish a liberty interest protected by the
20 Constitution because he has not alleged, as he must under *Sandin*, sufficient facts related
21 to the conditions in the “SHU” which show “the type of atypical, significant deprivation
22 [that] might conceivably create a liberty interest.” 515 U.S. 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
25 versus discretionary nature of the segregation; (2) the restricted conditions of the
26 prisoner’s confinement and whether they amounted to a “major disruption in his
27 environment” when compared to those shared by prisoners in the general population; and
28 (3) the possibility of whether the prisoner’s sentence was lengthened by his restricted

1 custody. *Id.* at 486-87.

2 Therefore, to allege a due process violation, Plaintiff’s Complaint must contain
3 sufficient “factual content that allows the court to draw the reasonable inference” that his
4 undefined stay in administrative segregation imposed an atypical and significant
5 hardship on him in relation to the ordinary incidents of prison life. *Iqbal*, 556 U.S. at
6 678; *Sandin*, 515 U.S. at 483-84. Plaintiff’s Complaint, however, fails to include any
7 “further factual enhancement” which might suggest any major disruption in his
8 environment, any comparison to the conditions of his previous confinement in the
9 general population, or any mention whatsoever as to its potential effect on the length of
10 his sentence. *See Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556); *Sandin*, 515
11 U.S. at 486-87. Plaintiff must offer more than “naked assertions devoid of further factual
12 enhancement” in order to state a due process claim; and instead must include “sufficient
13 factual matter,” *id.*, which demonstrates “a dramatic departure from the basic conditions”
14 of his confinement that would give rise to a liberty interest before he can claim a
15 violation of due process. *Sandin*, 515 U.S. at 485; *see also Keenan v. Hall*, 83 F.3d
16 1083, 1088-89 (9th Cir. 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998). This he has
17 failed to do; therefore the Court finds that Plaintiff has failed to allege a liberty interest
18 in remaining free of administrative segregation, and thus, has failed to state a due process
19 claim. *See May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997) (concluding that prisoners
20 have no liberty interest in remaining free from administrative segregation or solitary
21 confinement); *Toussaint v. McCarthy*, 801 F.2d 1080, 1091 (9th Cir. 1985) (finding that
22 administrative segregation is the type of confinement that should be reasonably
23 anticipated by inmates at some point in their incarceration), *abrogated in part on other*
24 *grounds by Sandin*, 515 U.S. 472; *see also Myron*, 476 F.3d at 718 (finding no “atypical
25 and significant deprivation” where prisoner failed to allege conditions at level IV prison
26 differed significantly from those at a level III prison).

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1 Accordingly, the Court finds Plaintiff’s Complaint also fails to state a due process
2 claim as to any named Defendant upon which relief can be granted. *See Lopez*, 203 F.3d
3 at 1126-27; *Resnick*, 213 F.3d at 446.

4 **III. CONCLUSION AND ORDER**

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

6 1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF
7 Doc. No. 2) is **GRANTED**.

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

16 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey
17 Beard, Secretary, California Department of Corrections and Rehabilitation, 1515 S
18 Street, Suite 502, Sacramento, California 95814.

19 **IT IS FURTHER ORDERED** that:

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

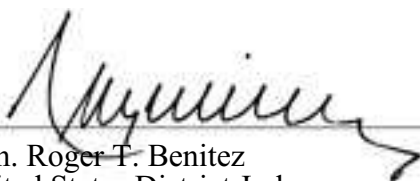
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1 If Plaintiff fails to file an Amended Complaint within the time provided, this civil
2 action shall remain dismissed without prejudice and without further Order of the Court
3 based on Plaintiff's failure to state a claim upon which relief can be granted pursuant to
4 28 U.S.C. § 1915(e)(2) and § 1915A(b).

5 5. The Clerk of Court is directed to mail a court approved civil rights
6 complaint form to Plaintiff.

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DATED: July 21, 2014



Hon. Roger T. Benitez
United States District Judge