

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CAROL ADRIANNE SMITH,  
Plaintiff,  
v.  
ANDY COOK,  
Defendant.

Case No.: 17cv00961-AJB-WVG

**AMENDED ORDER:**

**(1) GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS;  
(Doc. No. 2)**

**(2) SUA SPONTE DISMISSING FOR  
FAILURE TO STATE A CLAIM;  
AND  
(Doc. No. 1)**

**(3) DENYING AS MOOT MOTION  
TO APPOINT COUNSEL  
(Doc. No. 3)**

On May 9, 2017, Plaintiff Carol Smith ("Plaintiff"), a non-prisoner proceeding pro se, commenced this action against Defendant Andy Cook ("Defendant"). (Doc. No. 1.) On the same day, Plaintiff also moved to proceed in forma pauperis ("IFP") pursuant to 28 U.S.C. § 1915(a), and filed a motion to appoint counsel. (Doc. Nos. 2, 3.) For the following reasons, the Court **GRANTS** Plaintiff's motion to proceed IFP, sua sponte **DISMISSES**

1 Plaintiff's Complaint for failure to state a claim, and **DENIES AS MOOT** Plaintiff's  
2 motion to appoint counsel.

3 **I. Motion to Proceed In Forma Pauperis**

4 All parties instituting any civil action, suit, or proceeding in a district court of the  
5 United States, except an application for writ of habeas corpus, must pay a filing fee of  
6 \$350. See 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay  
7 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). All actions sought  
9 to be filed IFP pursuant to § 1915 must be accompanied by an affidavit, signed by the  
10 applicant under penalty of perjury, that includes a statement of all assets which show  
11 inability to pay initial fees or give security. S.D. CivLR 3.2.a. Here, Plaintiff states that she  
12 has two children ages twenty-one and thirteen that depend on her for support. (Doc. No. 2  
13 at 3.) The affidavit submitted by Plaintiff also indicates that she is employed, she receives  
14 approximately \$900 per month in salary and \$1732 in child support, and has two checking  
15 accounts with a total amount of \$1000. (Id. at 1-2.) However, Plaintiff has monthly  
16 expenses amounting to \$3733, falling short of her monthly income by over a thousand  
17 dollars. Accordingly, the Court finds that Plaintiff meets the § 1915(a) requirements and  
18 **GRANTS** Plaintiff's motion to proceed IFP.

19 **II. Sua Sponte Dismissal for Failure to State a Claim**

20 Pursuant to 28 U.S.C. § 1915(e)(2), a court may dismiss a case at any time if it  
21 determines the plaintiff has failed to state a claim on which relief may be granted. 28 U.S.C.  
22 § 1915(e)(2)(B)(ii). Here, Plaintiff's fifty-four page Complaint alleges a variety of causes  
23 of action including but not limited to: (1) irrelevant evidence; (2) willful suppression of  
24 evidence; (3) failure to explain or deny; (4) conclusive presumption; (5) statute of frauds;  
25 (6) breach of fiduciary duty; and (7) racial discrimination. (Doc. No. 1 at 27-34.) Though  
26 the Court believes that Plaintiff's underlying complaint stems from Defendant's alleged  
27 failure to successfully represent Plaintiff in a family court case, Plaintiff's vague and  
28 unclear pleading fails to state facts to support a cognizable constitutional or statutory cause

1 of action. Moreover, the majority of Plaintiff's causes of action depend on the California  
2 Evidence Code, which are inapplicable to Plaintiff's instant federal case.

3 As a result, Plaintiff has not presented a sufficient basis for a cognizable claim on  
4 which relief may be granted. Pursuant to § 1915(e)(2), the Court **DISMISSES** the  
5 Complaint **WITHOUT PREJUDICE** for failure to state a claim.

### 6 **III. Motion to Appoint Counsel**

7 Under 28 U.S.C. § 1915(e)(1), courts are granted discretion to appoint counsel for  
8 indigent persons under "exceptional circumstances." *Agyeman v. Corr. Corp. of Am.*, 390  
9 F.3d 1101, 1103 (9th Cir. 2004). As Plaintiff has yet to pay the filing fee, and her Complaint  
10 has been dismissed without prejudice, the motion for counsel is **DENIED AS MOOT**. The  
11 Court notes, however, that the Constitution provides no right of appointment of counsel in  
12 a civil case unless an indigent litigant may lose his physical liberty if he loses the litigation.  
13 *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981).

### 14 **IV. Conclusion**

15 For the reasons set forth above, the Court:

16 (1) **GRANTS** Plaintiff's motion to proceed IFP;


17 (2) sua sponte **DISMISSES** Plaintiff's Complaint **WITHOUT PREJUDICE** for  
18 failure to state a claim; and

19 (3) **DENIES AS MOOT** Plaintiff's motion to appoint counsel.

20 Pursuant to this Order, Plaintiff is granted **thirty (30) days** from the date of this Amended  
21 Order to file a new motion to proceed IFP. If Plaintiff chooses to file a new motion to  
22 proceed IFP, she must also file her proposed first amended complaint with said motion. If  
23 Plaintiff does not file a new motion to proceed IFP and proposed first amended complaint,  
24 this action will be dismissed.

25 **IT IS SO ORDERED.**

26 Dated: May 16, 2017

27   
28 Hon. Anthony J. Battaglia  
United States District Judge

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