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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JAMES LEROYE JEFFERSON,
12 CDCR #P-34202,

13 Plaintiff,

14 vs.

15 MRS. GREY; MRS. BIRD; DIAZ;
16 B. NAVARRO; J. NEIL; M. NEIL, et al.,

17 Defendants.
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Case No.: 3:17-cv-01754-DMS-RBB

ORDER:

**1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
[ECF No. 2]; and**

**2) DISMISSING COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C. §§
1915(e)(2)(B)(ii) AND 1915A(b)(1)**

23 James Leroye Jefferson, (“Plaintiff”), a state inmate currently incarcerated at the
24 Richard J. Donovan Correctional Facility (“RJD”) located in San Diego, California, and
25 proceeding pro se, has filed a civil rights complaint (“Compl.”) pursuant to 42 U.S.C.
26 § 1983 (ECF No. 1). Plaintiff did not prepay the civil filing fee required by 28 U.S.C.
27 § 1914(a) when he filed his Complaint; instead, he filed a Motion to Proceed In Forma
28 Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

1 **II. Motion to Proceed IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the
3 United States, except an application for writ of habeas corpus, must pay a filing fee of
4 \$400. *See* 28 U.S.C. § 1914(a).¹ An action may proceed despite a plaintiff’s failure to
5 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
6 § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*
7 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if a prisoner, like Plaintiff, is
8 granted leave to proceed IFP, he remains obligated to pay the entire fee in “increments,”
9 *see Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), regardless of whether his
10 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*,
11 281 F.3d 844, 847 (9th Cir. 2002).

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

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27 ¹ In addition to the \$350 statutory fee, all parties filing civil actions on or after May 1, 2013, must pay
28 an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees,
District Court Misc. Fee Schedule) (eff. May 1, 2013). However, the additional \$50 administrative fee
is waived if the plaintiff is granted leave to proceed IFP. *Id.*

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2 In support of his IFP Motion, Plaintiff has submitted a certified copy of his trust
3 account certificate pursuant to 28 U.S.C. § 1915(a)(2) and S.D. Cal. CivLR 3.2.
4 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff’s trust account certificate,
5 but it shows that he has a current available balance of only \$4.64. *See* 28 U.S.C.
6 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a
7 civil action or appealing a civil action or criminal judgment for the reason that the
8 prisoner has no assets and no means by which to pay the initial partial filing fee.”);
9 *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve”
10 preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay . . . due to
11 the lack of funds available to him when payment is ordered.”).

12 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (**ECF No. 2**) and
13 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
14 balance of the filing fees mandated will be collected by the California Department of
15 Corrections and Rehabilitation (“CDCR”) and forwarded to the Clerk of the Court
16 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

17 **III. Screening Pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

18 **A. Standard of Review**

19 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint also requires a
20 pre-answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these
21 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of
22 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants
23 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
24 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.
25 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that
26 the targets of frivolous or malicious suits need not bear the expense of responding.’”
27 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*
28 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

1 “The standard for determining whether a plaintiff has failed to state a claim upon
2 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
3 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
4 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
5 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
6 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
7 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted
8 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
9 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

10 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
11 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
12 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for
13 relief [is] ... a context-specific task that requires the reviewing court to draw on its
14 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or
15 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting
16 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969
17 (9th Cir. 2009).

18 Finally, in deciding whether Plaintiff has stated a plausible claim for relief, the
19 Court may consider exhibits attached to his Complaint. *See* FED. R. CIV. P. 10(c) (“A
20 copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all
21 purposes.”); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555
22 n.19 (9th Cir. 1990) (citing *Amfac Mortg. Corp. v. Ariz. Mall of Tempe, Inc.*, 583 F.2d
23 426 (9th Cir. 1978) (“[M]aterial which is properly submitted as part of the complaint may
24 be considered” in ruling on a Rule 12(b)(6) motion to dismiss.)).

25 **B. Plaintiff’s factual allegations**

26 Plaintiff’s factual allegations are disjointed and difficult to discern. It appears that
27 Plaintiff claims he is being discriminated against because he is HIV positive. (*See*
28 Compl. at 4.) Plaintiff claims that he has worked in the RJD prison kitchen for more than

1 a year but Defendant Diaz will not allow him to serve food. (*Id.* at 5.) He further claims
2 Diaz told other inmates about his HIV status which caused the kitchen to become a
3 “hostile work” environment. (*Id.* at 4-5.) On July 7, Plaintiff alleges “Mrs. Grey”
4 allowed him to serve food even though Diaz had told her “never put [Plaintiff] on the
5 line.” (*Id.* at 5.)

6 **C. Plaintiff’s claims**

7 1. Verbal Harassment

8 Plaintiff claims that other inmate workers in the kitchen “harass and bully” him.
9 (Compl. at 4.) Allegations of verbal harassment and abuse by themselves fail to state a
10 claim cognizable under 42 U.S.C. § 1983. *Freeman v. Arpaio*, 125 F.3d 732, 738 (9th
11 Cir. 1997); *see also, e.g., Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), *as*
12 *amended*, 135 F.3d 1318 (9th Cir. 1998) (disrespectful and assaultive comments by
13 prison guard not enough to implicate Eighth Amendment).

14 Thus, the Court finds that Plaintiff’s claims of verbal harassment must be
15 DISMISSED for failing to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2) &
16 1915A(b)(1).

17 2. Discrimination

18 Plaintiff claims that he “has a right to serve food” regardless of whether he is “HIV
19 positive.” (Compl. at 5.) The Court construes this claim as arising under section 504 of
20 the Rehabilitation Act of 1973. The Rehabilitation Act provides, in part, that “[n]o
21 otherwise qualified individual with a disability ... shall, solely by reason of her or his
22 disability, be excluded from the participation in, be denied the benefits of, or be subjected
23 to discrimination under any program or activity receiving Federal financial assistance.”
24 29 U.S.C. § 794(a). The Ninth Circuit has held that the Rehabilitation Act applies to state
25 prisons. *See Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988).

26 In order to state a claim under the Rehabilitation Act, Plaintiff must demonstrate
27 that: (1) he is a disabled person under the Act; (2) that he otherwise qualified for the
28 benefit; (3) was denied the benefit due to discrimination based on his disability; and (4)

1 the place where the discrimination occurred receives federal assistance. *Id.* at 562-63.
2 The Ninth Circuit has held that “a person infected with the HIV virus is an individual
3 with a disability within the meaning of the [Rehabilitation] Act.” *Gates v. Rowland*, 39
4 F.3d 1439, 1446 (9th Cir. 1994).

5 In *Gates*, the Ninth Circuit held that the standard of review of the Rehabilitation
6 Act’s “statutory rights in a prison setting to be equivalent to the review of constitutional
7 rights in a prison setting, as outlined by the Supreme Court” in *Turner v. Safely*, 482 U.S.
8 78 (1987). *Id.* at 1447. In *Turner*, the Court held “when a prison regulation impinges on
9 inmates’ constitutional rights, the regulation is valid if it is reasonably related to
10 legitimate penological interests.” *Turner*, 482 U.S. at 89. In *Gates*, it was ultimately
11 held that, using the *Turner* standard of review, “deference is due to prison authorities’
12 policy not to open food service jobs to HIV-infected inmates.” *Gates*, 39 F.3d at 1448.
13 Based on this holding, the Court finds that Plaintiff cannot state a discrimination claim
14 arising from Defendants’ alleged refusal to allow him to retain a food serving job based
15 on his HIV status.

16 3. Eighth Amendment claim

17 Plaintiff also claims that his Eighth Amendment rights have been violated but his
18 Complaint is far from clear. (*See* Compl. at 7.) Plaintiff appears to claim that Defendant
19 Grey “raise[s] issue against transgender.” (*Id.*) Plaintiff claims that as a result, he
20 “continued to suffer abuse physically, mentally and emotionally.” (*Id.*) Plaintiff
21 provides no specific factual allegations regarding this claim.

22 The Eighth Amendment’s prohibition against cruel and unusual punishment
23 protects prisoners not only from inhumane methods of punishment but also from
24 inhumane conditions of confinement. *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th
25 Cir. 2006) (citing *Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *Rhodes v. Chapman*,
26 452 U.S. 337, 347 (1981)) (quotation marks omitted). While conditions of confinement
27 may be, and often are, restrictive and harsh, they must not involve the wanton and
28 unnecessary infliction of pain. *Morgan*, 465 F.3d at 1045 (citing *Rhodes*, 452 U.S. at

1 347). Thus, conditions which are devoid of legitimate penological purpose or contrary to
2 evolving standards of decency that mark the progress of a maturing society violate the
3 Eighth Amendment. *Id.* (quotation marks and citations omitted); *Hope v. Pelzer*, 536 U.S.
4 730, 737 (2002); *Rhodes*, 452 U.S. at 346.

5 In addition, prison officials have a duty to ensure prisoners are provided adequate
6 shelter, food, clothing, sanitation, medical care, and personal safety, *Johnson v. Lewis*,
7 217 F.3d 726, 731 (9th Cir. 2000) (quotation marks and citations omitted). To plead an
8 Eighth Amendment claim, prisoners must allege facts sufficient to plausibly show that
9 officials acted with deliberate indifference to a substantial risk of harm to their health or
10 safety. *Farmer*, 511 U.S. at 847.

11 Here, Plaintiff has failed to state an Eighth Amendment claim because he has
12 failed to allege facts sufficient to plausibly show that any of the persons he has named as
13 Defendants in this case acted with deliberate indifference to any known, specific, or
14 individualized substantial risk to *his* health or safety. *Id.*; *see also Paine v. City of*
15 *Lompoc*, 265 F.3d 975, 984 (9th Cir. 2001) (whether or not each defendant “is a
16 participant in the incidents that could give rise to liability” is a necessary element of the
17 § 1983 claim). In order to establish a claim for damages against an individual prison
18 official under § 1983, Plaintiff must allege facts to plausibly show that each official’s
19 deliberate indifference actually and proximately caused a deprivation of his Eighth
20 Amendment rights. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988).

21 Thus, because Plaintiff fails to allege facts sufficient to satisfy the subjective
22 component of an Eighth Amendment violation—that any Defendant caused him to be
23 deprived of “life’s necessities” with deliberate indifference to his health or safety—his
24 Complaint fails to state an Eighth Amendment claim upon which relief can be granted.
25 *Farmer*, 511 U.S. 837; *Iqbal*, 556 U.S. at 679.

26 **D. Leave to Amend**

27 Because Plaintiff is proceeding without counsel, and he has now been provided
28 with notice of his Complaint’s deficiencies, the Court will grant him leave to amend. *See*

1 *Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) (“A district court should not
2 dismiss a pro se complaint without leave to amend [pursuant to 28 U.S.C.
3 § 1915(e)(2)(B)(ii)] unless ‘it is absolutely clear that the deficiencies of the complaint
4 could not be cured by amendment.’”) (quoting *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th
5 Cir. 2012)).

6 **III. Conclusion and Order**

7 Good cause appearing, the Court:

8 1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)
9 (ECF No. 2).

10 2. **ORDERS** the Secretary of the CDCR, or his designee, to collect from
11 Plaintiff’s trust account the \$350 owed in monthly payments in an amount equal to
12 twenty percent (20%) of the preceding month’s income to the Clerk of the Court each
13 time the amount in Plaintiff’s account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2).
14 **ALL PAYMENTS MUST BE CLEARLY IDENTIFIED BY THE NAME AND**
15 **NUMBER ASSIGNED TO THIS ACTION.**

16 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott
17 Kernan, Secretary, California Department of Corrections and Rehabilitation, P.O. Box
18 942883, Sacramento, California, 94283-0001.

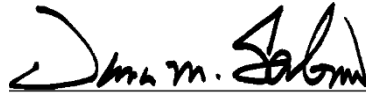
19 4. **DISMISSES** Plaintiff’s Complaint in its entirety for failing to state a claim
20 upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and
21 § 1915A(b)(1), and **GRANTS** him forty-five (45) days leave from the date of this Order
22 in which to file an Amended Complaint which cures all the deficiencies of pleading
23 noted. Plaintiff’s Amended Complaint must be complete by itself without reference to his
24 original pleading, and must comply with S.D. CAL. CIVLR 8.2(a). Defendants not named
25 and any claim not re-alleged in his Amended Complaint will be considered waived. *See*
26 S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d
27 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the original.”); *Lacey v.*
28 *Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with

1 leave to amend which are not re-alleged in an amended pleading may be “considered
2 waived if not repled.”).

3 5. The Clerk of Court is directed to mail Plaintiff a copy of a court approved
4 form § 1983 complaint.

5 **IT IS SO ORDERED.**

6 Dated: October 12, 2017



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8 Hon. Dana M. Sabraw
9 United States District Judge
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