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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PATRICK KELLY, CDCR #AM-6145,	Plaintiff,
vs.	
W.L. MONTGOMERY; B. HEDRICK; R, BUCKEL; S. KERNAN; M. VOONG; K.J. ALLEN	Defendants.

Case No.: 3:17-cv-1998-LAB-NLS

ORDER:

- 1) GRANTING MOTION TO PROCEED IN FORMA PAUPERIS [ECF No. 2]; AND**
- 2) DIRECTING U.S. MARSHAL TO EFFECT SERVICE UPON DEFENDANTS PURSUANT TO 28 U.S.C. § 1915(d) AND Fed. R. Civ. P. 4(c)(3)**

Patrick Kelly (“Plaintiff”) incarcerated at Calipatria State Prison (“CAL”) located in Calipatria, California, is proceeding pro se in this case with a civil rights Complaint filed pursuant to 42 U.S.C. § 1983 (ECF No. 1).

Plaintiff has not prepaid the \$400 civil filing fee required 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) (ECF No. 2).

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1 **I. 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). The 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, a prisoner who is granted leave to
8 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”
9 *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185
10 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed. *See* 28
11 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).
12 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a “certified
13 copy of the trust fund account statement (or institutional equivalent) for ... the 6-month
14 period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2);
15 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account
16 statement, the Court assesses an initial payment of 20% of (a) the average monthly
17 deposits in the account for the past six months, or (b) the average monthly balance in the
18 account for the past six months, whichever is greater, unless the prisoner has no assets. 28
19 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the
20 prisoner then collects subsequent payments, assessed at 20% of the preceding month’s
21 income, in any month in which his account exceeds \$10, and forwards those payments to
22 the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

23 In support of his Motion to Proceed IFP, Plaintiff has submitted a copy of his
24 prison certificate completed by an accounting official at CAL attesting as to his trust
25 account activity. (ECF No. 2 at 4.); *see* 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2;
26 *Andrews*, 398 F.3d at 1119. This certificate shows that Plaintiff had an average monthly
27 balance of \$127.15, and average monthly deposits of \$131.67 to his account over the 6-
28 month period immediately preceding the filing of his Complaint. (*Id.*)

1 Based on this financial information, the Court GRANTS Plaintiff's Motion to
2 Proceed IFP (ECF No. 2), and assesses his initial partial filing fee to be \$26.33 pursuant
3 to 28 U.S.C. § 1915(b)(1). However, the Court will direct the Secretary of the California
4 Department of Corrections and Rehabilitation ("CDCR"), or his designee, to collect this
5 initial fee only if sufficient funds are available in Plaintiff's account at the time this Order
6 is executed. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be
7 prohibited from bringing a civil action or appealing a civil action or criminal judgment
8 for the reason that the prisoner has no assets and no means by which to pay the initial
9 partial filing fee."); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28
10 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's IFP case
11 based solely on a "failure to pay ... due to the lack of funds available to him when
12 payment is ordered."). The remaining balance of the \$350 total fee owed in this case must
13 be collected and forwarded to the Clerk of the Court pursuant to 28 U.S.C. § 1915(b)(1).

14 **II. Screening Pursuant to 28 U.S.C. § 1915(e)(2)(B) & 1915A**

15 **A. Standard of Review**

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

26 "The standard for determining whether a plaintiff has failed to state a claim upon
27 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
28 Civil Procedure 12(b)(6) standard for failure to state a claim." *Watison v. Carter*, 668

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

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

15 Here, the Court finds Plaintiff’s Complaint contains First Amendment claims, as
16 well as claims brought pursuant to the Religious Land Use and Institutionalized Persons
17 Act (“RLUIPA”), sufficient to survive the “low threshold” for proceeding past the sua
18 sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). *See Wilhelm* 680
19 F.3d at 1123.

20 Accordingly, the Court will direct the U.S. Marshal to effect service upon
21 Defendants on Plaintiff’s behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court
22 shall issue and serve all process, and perform all duties in [IFP] cases.”); FED. R. CIV. P.
23 4(c)(3) (“[T]he court may order that service be made by a United States marshal or
24 deputy marshal . . . if the plaintiff is authorized to proceed in forma pauperis under 28
25 U.S.C. § 1915.”).

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1 **III. Conclusion and Order**

2 For the reasons discussed, the Court:

3 1) **GRANTS** Plaintiff's Motion to Proceed In Forma Pauperis (ECF No. 2).

4 2) **ORDERS** the Secretary of the CDCR, or his designee, to collect from
5 Plaintiff's trust account the \$26.33 initial filing fee assessed, if those funds are available
6 at the time this Order is executed, and forward whatever balance remains of the full \$350
7 owed in monthly payments in an amount equal to twenty percent (20%) of the preceding
8 month's income to the Clerk of the Court each time the amount in Plaintiff's account
9 exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL PAYMENTS MUST BE
10 CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS
11 ACTION.

12 3) **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott
13 Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

14 4) **DIRECTS** the Clerk to issue a summons as to Plaintiff's Complaint (ECF
15 No. 1) and forward it to Plaintiff along with blank U.S. Marshal Form 285 for each
16 Defendant. In addition, the Clerk will provide Plaintiff with a certified copy of this Order,
17 a certified copy of his Complaint and the summons so that he may serve Defendants.
18 Upon receipt of this "IFP Package," Plaintiff must complete the Form 285 as completely
19 and accurately as possible, *include an address where Defendants may be found and/or*
20 *subject to service* pursuant to S.D. CAL. CIVLR 4.1c, and return it to the United States
21 Marshal according to the instructions the Clerk provides in the letter accompanying his
22 IFP package;

23 5) **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons
24 upon Defendants as directed by Plaintiff on the USM Form 285 provided to him. All
25 costs of that service will be advanced by the United States. *See* 28 U.S.C. § 1915(d); FED.
26 R. Civ. P. 4(c)(3);

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