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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FRITZ GERALD TOUSSAINT,
Plaintiff,
v.
LINDA BENHOELFER,
Defendant.

Case No.: 3:22-cv-00634-WQH-AGS

ORDER

HAYES, Judge:

The matter before the Court is the Motion for Leave to Proceed In Forma Pauperis (ECF No. 4) filed by Plaintiff Fritz Gerald Toussaint.

I. PROCEDURAL BACKGROUND

On March 4, 2022, Plaintiff initiated this action by filing a Complaint against Defendant Linda Benhoelfer in the Eastern District of New York. (ECF No. 1). On April 26, 2022, Plaintiff filed the Motion for Leave to Proceed In Forma Pauperis. (ECF No. 4). On May 6, 2022, the case was transferred to this Court. (ECF No. 5).

II. MOTION FOR LEAVE TO PROCEED IFP

All parties instituting a civil action in a district court of the United States, other than a petition for writ of habeas corpus, must pay a filing fee of \$400.00. *See* 28 U.S.C. § 1914(a); CivLR 4.5. An action may proceed despite a party’s failure to pay only if the party is granted leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a). *See*

1 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). “To proceed in forma pauperis is
2 a privilege not a right.” *Smart v. Heinze*, 347 F.2d 114, 116 (9th Cir. 1965).

3 Plaintiff states in his application to proceed in forma pauperis that he receives about
4 \$377.00 in gross pay or wages per month. (ECF No. 4 at 1). Plaintiff states that he has
5 about \$23.00 in cash or in a checking or savings account. (*Id.* at 2). After considering
6 Plaintiff’s application, the Court determines that Plaintiff cannot afford to pay the filing
7 fee in this case and is eligible to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a).

8 **III. INITIAL SCREENING OF THE COMPLAINT**

9 The court is required to screen cases filed by parties proceeding in forma pauperis.
10 28 U.S.C. § 1915(e)(2) states that

11 (2) Notwithstanding any filing fee, or any portion thereof, that may have been
12 paid, the court shall dismiss the case at any time if the court determines that—

13 (A) the allegation of poverty is untrue; or

14 (B) the action or appeal—

15 (i) is frivolous or malicious;

16 (ii) fails to state a claim on which relief may be granted; or

17 (iii) seeks monetary relief against a defendant who is immune
18 from such relief.

19 28 U.S.C. § 1915(e)(2). “The purpose of [screening] is to ensure that the targets of frivolous
20 or malicious suits need not bear the expense of responding.” *Nordstrom v. Ryan*, 762 F.3d
21 903, 907 n.1 (9th Cir. 2014). The standard used to evaluate whether a complaint states a
22 claim is a liberal one, particularly when the action has been filed pro se. *See Estelle v.*
23 *Gamble*, 429 U.S. 97, 106 (1976). “However, a liberal interpretation . . . may not supply
24 elements of the claim that were not initially pled.” *Ivey v. Bd. of Regents of Univ. of Alaska*,
25 673 F.2d 266, 268 (9th Cir. 1982).

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 F.3d
1108, 1112 (9th Cir. 2012). Rule 12(b)(6) requires a complaint to “contain sufficient factual
matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*

1 *Iqbal*, 556 U.S. 662, 678 (2009). Detailed factual allegations are not required but
2 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
3 statements, do not suffice.” *Id.* “[T]he mere possibility of misconduct” or “an unadorned,
4 the defendant-unlawfully-harmed me accusation” falls short of meeting this plausibility
5 standard. *Id.* at 678-79. “Determining whether a complaint states a plausible claim for relief
6 [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
7 experience and common sense.” *Id.* at 679.

8 “Section 1983 creates a private right of action against individuals who, acting under
9 color of state law, violate federal constitutional or statutory rights.” *Devereaux v. Abbey*,
10 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of substantive
11 rights, but merely provides a method for vindicating federal rights elsewhere conferred.”
12 *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (quotations and citations omitted). “To
13 establish § 1983 liability, a plaintiff must show both (1) deprivation of a right secured by
14 the Constitution and laws of the United States, and (2) that the deprivation was committed
15 by a person acting under color of state law.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128,
16 1138 (9th Cir. 2012).

17 The Complaint alleges that Defendant violated Plaintiff’s constitutional rights
18 between November 2021 and January 2022, while acting as Plaintiff’s lawyer in a criminal
19 matter. The Complaint alleges that Defendant “was a prospective lawyer the Hudson
20 County public defender selected” who “revealed protected facts that [Plaintiff] hadn’t
21 authorized.” (ECF No. 1 at 4). The Complaint alleges that “when meeting [] Plaintiff for
22 the first time . . . [Defendant] was rude and couldn’t answer the Plaintiff’s questions though
23 Plaintiff had been asking for a long time.” (*Id.*). The Complaint alleges that Defendant
24 “was fired that day and was told ‘tell the judge that I am representing myself.’” (*Id.*). The
25 Complaint alleges that “Plaintiff has been on pretrial release and . . . is forced [to] attend[]
26 meetings with a probation officer though he was never told [Defendant] decided for him
27 [sic].” (*Id.* at 5). Plaintiff seeks compensatory and punitive damages, as well as the
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1 “establishment of safeguards from the type of abuses I suffered while being a client of
2 Defendant.” (*Id.*).


3 “A person acts under color of state law only when exercising power ‘possessed by
4 virtue of state law and made possible only because the wrongdoer is clothed with the
5 authority of state law.’” *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting
6 *United States v. Classic*, 313 U.S. 299, 326 (1941)). “Within the context of our legal
7 system, the duties of a defense lawyer are those of a personal counselor and advocate,”
8 which “is essentially a private function . . . for which state office and authority are not
9 needed.” (*Id.* at 318-19). The fact that a defense lawyer is appointed or paid by the state is
10 “insufficient to establish that [the attorney] acts under color of state law within the meaning
11 of § 1983.” (*Id.* at 321). As a result, a defense lawyer “does not act under color of state law
12 when performing a lawyer’s traditional functions as counsel to a defendant in a criminal
13 proceeding.” (*Id.* at 325). Plaintiff’s Complaint is dismissed pursuant to 28 U.S.C. §
14 1915(e)(2) for failure to state a claim upon which relief can be granted.¹

15 **IV. CONCLUSION**

16 IT IS HEREBY ORDERED that the Motion for Leave to Proceed in Forma Pauperis
17 filed by Plaintiff Fritz Gerald Toussaint (ECF No. 4) is granted.

18 IT IS FURTHER ORDERED that the Complaint (ECF No. 1) is dismissed without
19 prejudice for failure to state a claim upon which relief can be granted. Plaintiff Fritz Gerald
20 Toussaint may file a motion to file an amended complaint within sixty (60) days of the date
21 of this Order. If no motion is filed, the Clerk of the Court shall close this case. The Clerk
22 of the Court is directed to mail a copy of this Order to Plaintiff.

23 Dated: May 10, 2022

24 
25 Hon. William Q. Hayes
26 United States District Court

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28 ¹ This Order does not bar Plaintiff from bringing an action for malpractice under state tort law or initiating habeas corpus proceedings.