

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

Horn v. Delatori

Case No. 25cv2404-BEN (KSC) · No. 25cv2404-BEN (KSC); 3:25-cv-02404 · Decided October 2, 2025

OPINION

Horn v. Delatori

PER CURIAM.

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8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 11 JESSIE RAY-LYNN HORN, Case No.: 25cv2404-BEN (KSC)

CDCR #AX-3772,

12 ORDER: Plaintiff, 13

vs. (1) GRANTING MOTION TO

14 PROCEED IN FORMA PAUPERIS,

and 15 DELATORI, Correctional Officer, 16 Defendant. (2) DISMISSING COMPLAINT WITH
LEAVE TO AMEND PURSUANT TO

17 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b) 18 19 20 21 22 Plaintiff Jessi Ray-Lynn Horn, a state
prisoner proceeding pro se, has filed this civil 23 rights action pursuant to 42 U.S.C. § 1983 along
with a Motion to proceed in forma 24 pauperis (“IFP”). (ECF Nos. 1-2.) 25 I. Motion to Proceed
IFP 26 All parties instituting any civil action, suit or proceeding in a district court of the 27 United
States, except an application for writ of habeas corpus, must pay a filing fee of 28 \$405, consisting
of a \$350 statutory fee plus an additional administrative fee of \$55, 1 although the administrative
fee does not apply to persons granted leave to proceed IFP.

2 See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee

3 Schedule, § 14 (eff. Dec. 1, 2023)). The action may proceed despite a plaintiff’s failure to 4
prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. 5 § 1915(a).
See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007). Section 6 1915(a)(2) requires
prisoners seeking leave to proceed IFP to submit a “certified copy of 7 the trust fund account
statement (or institutional equivalent) for . . . the 6-month period 8 immediately preceding the
filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. 9 King*, 398 F.3d 1113, 1119 (9th Cir.
2005). From the certified trust account statement, the 10 Court assesses an initial payment of 20%
of (a) the average monthly deposits in the account 11 for the past six months, or (b) the average
monthly balance in the account for the past six 12 months, whichever is greater, unless the
prisoner has insufficient assets. See 28 U.S.C. 13 § 1915(b)(1)&(4); *Bruce v. Samuels*, 577 U.S.

82, 84 (2016). Prisoners who proceed IFP 14 must pay any remaining balance in “increments” or “installments,” regardless of whether 15 their action is ultimately dismissed. 28 U.S.C. § 1915(b)(1)&(2); Bruce, 577 U.S. at 84. 16 Plaintiff’s prison certificate shows an average monthly balance of \$290.95 and 17 average monthly deposits of \$212.84 for the 6-months preceding the filing of this action, 18 and an available balance of \$104.88. (ECF No. 3 at 3.) The Court GRANTS Plaintiff’s 19 motion to proceed IFP and assesses an initial partial filing fee of \$58.19. Plaintiff remains 20 obligated to pay the \$291.81 balance of the fee in monthly installments. Bruce, 577 U.S. 21 at 84; 28 U.S.C. § 1915(b)(1)&(2). 22 II. Screening pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b) 23 A. Standard of Review 24 Because Plaintiff is a prisoner proceeding IFP, his Complaint requires a pre-Answer 25 screening pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b). Under these statutes, the Court 26 must sua sponte dismiss a prisoner’s IFP complaint, or any portion of it, which is frivolous, 27 malicious, fails to state a claim, or seeks damages from defendants who are immune. See 28 Lopez v. Smith, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing 28 U.S.C. 1 § 1915(e)(2)); Rhodes v. Robinson, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 2 U.S.C. § 1915A(b)). “The purpose of § 1915A is to ensure that the targets of frivolous or 3 malicious suits need not bear the expense of responding.” Nordstrom v. Ryan, 762 F.3d 4 903, 920 n.1 (9th Cir. 2014) (internal quote marks omitted). 5 “The standard for determining whether a plaintiff has failed to state a claim upon 6 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of 7 Civil Procedure 12(b)(6) standard for failure to state a claim.” Watison v. Carter, 668 F.3d 8 1108, 1112 (9th Cir. 2012); see also Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th Cir. 9 2012) (noting that § 1915A screening “incorporates the familiar standard applied in the 10 context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).”) Rule 11 12(b)(6) requires a complaint to “contain sufficient factual matter, accepted as true, to ‘state 12 a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), 13 quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). Detailed factual 14 allegations are not required, but “[t]hreadbare recitals of the elements of a cause of action, 15 supported by mere conclusory statements, do not suffice.” Id. “Determining whether a 16 complaint states a plausible claim for relief [is] . . . a context-specific task that requires the 17 reviewing court to draw on its judicial experience and common sense.” Id. The “mere 18 possibility of misconduct” or “unadorned, the defendant-unlawfully-harmed me 19 accusation[s]” fall short of meeting this plausibility standard. Id. 20 Title 42 U.S.C. § 1983 “creates a private right of action against individuals who, 21 acting under color of state law, violate federal constitutional or statutory rights.” 22 Devereaux v. Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a 23 source of substantive rights, but merely provides a method for vindicating federal rights 24 elsewhere conferred.” Graham v. Connor, 490 U.S. 386, 393-94 (1989) (internal quotation 25 marks omitted). 26 B. Allegations in the Complaint 27 Plaintiff alleges that on August 20, 2024, he was resting his foot on a railing while 28 tying his boot after having removed it to go through a metal

detector, when Defendant 1 Correctional Officer Delatori instructed him to tie his shoe behind the red out of bounds 2 line. (ECF No. 1 at 3.) “Before I could respond or I guess respond fast enough for c/o 3 Delatori he yelled ‘now’ then very violently, aggressively, and forcefully pushed or slapped 4 my foot off the rail I had it on while tying my boot.” (Id.) Plaintiff walked with a limp all 5 day, and a medical examination the next day revealed slight swelling which was treated 6 with a bandage wrap. (Id.) He states that he has suffered anxiety and depression because 7 “my inmate peers have said and acted as if they can say as well as do anything to me 8 [because] I didn’t respond to c/o Delatori with any violence.” (Id.) 9 C. Analysis 10 The Eighth Amendment forbids prison officials from “the unnecessary and wanton 11 infliction of pain.” *Whitley v. Albers*, 475 U.S. 312, 319 (1986). It “places restraints on 12 prison officials, who may not, for example, use excessive physical force against prisoners.” 13 *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Nevertheless, “prison officials are 14 authorized and indeed required to take appropriate measures to maintain prison order and 15 discipline and protect staff and other prisoners.” *LeMaire v. Maas*, 12 F.3d 1444, 1458 16 (9th Cir. 1993). “The Eighth Amendment’s prohibition of ‘cruel and unusual’ punishments 17 necessarily excludes from constitutional recognition de minimis uses of physical force, 18 provided that the use of force is not of a sort ‘repugnant to the conscience of mankind.’” 19 *Hudson v. McMillian*, 503 U.S. 1, 9 (1992), quoting *Whitley*, 475 U.S. at 327. 20 Plaintiff does not allege he suffered a substantial injury. Although Plaintiff claims 21 there is no need for him to show a serious injury (see ECF No. 1 at 3), the lack of injury is 22 relevant to the inquiry. See *Whitley*, 475 U.S. at 321 (noting that the extent of the injury 23 suffered by an inmate is one factor that may suggest “whether the use of force could 24 plausibly have been thought necessary” in the situation, “or instead evinced such 25 wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing 26 willingness that it occur.”) Plaintiff correctly observes that “[w]hen prison officials 27 maliciously and sadistically use force to cause harm, contemporary standards of decency 28 always are violated . . . whether or not significant injury is evident. Otherwise, the Eighth 1 Amendment would permit any physical punishment, no matter how diabolic or inhuman, 2 inflicting less than some arbitrary quantity of injury.” *Hudson*, 503 U.S. at 9. However, 3 “[n]ot every malevolent touch by a prison guard gives rise to a federal cause of action,” 4 and “[a]n inmate who complains of a ‘push or shove’ that causes no discernible injury 5 almost certainly fails to state a valid excessive force claim.” *Wilkins v. Gaddy*, 559 U.S. 6 34, 38 (2010), quoting *McMillian*, 503 U.S. at 9; see also *Graham v. Connor*, 490 U.S. 7 386, 396 (1989) (“Not every push or shove, even if it may later seem unnecessary in the 8 peace of a judge’s chambers, violates the [federal Constitution].”); *Whitley*, 475 U.S. at 9 321-22 (“Prison officials are entitled to deference whether a prisoner challenges excessive 10 force or conditions of confinement.”); *Simmons v. G. Arnett*, 47 F.4th 927, 933 (9th Cir. 11 2022) (“prison officials should be accorded ‘wide-ranging deference’ when they are 12 exercising their judgment to maintain prison safety,” because “[i]n the specialized context 13 of prison operations, the use of force can be a ‘legitimate means for

preventing small 14 disturbances from becoming dangerous to other inmates or the prison personnel”) 15 (citations omitted). 16 Defendant is alleged to have “forcefully pushed or slapped [Plaintiff’s] foot off the 17 rail I had it on while tying my boot” after telling Plaintiff he was in an unauthorized area, 18 causing slight swelling of his foot. (ECF No. 1 at 3.) These allegations fail to plausibly 19 allege Defendant applied force maliciously and sadistically to cause harm rather than in a 20 good-faith effort to maintain or restore discipline. *Wilkins*, 559 U.S. at 38; *McMillian*, 503 21 U.S. at 9; see also *Iqbal*, 556 U.S. at 678 (noting that a complaint is subject to dismissal 22 for failure to state a claim if it does not “contain sufficient factual matter, accepted as true, 23 to state a claim to relief that is plausible on its face.”) 24 The Complaint is dismissed under 28 U.S.C. §§ 1915(e)(2) & 1915A(b) for failure 25 to state a claim. *Watson*, 668 F.3d at 1112; *Wilhelm*, 680 F.3d at 1121. 26 D. Leave to Amend 27 In light of Plaintiff’s pro se status, the Court grants leave to amend. See *Rosati v. 28 Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) (“A district court should not dismiss a pro 1 se complaint without leave to amend [pursuant to 28 U.S.C. § 1915(e)(2)] unless ‘it is 2 absolutely clear that the deficiencies of the complaint could not be cured by amendment.’”), 3 quoting *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012). 4 III. Conclusion and Orders 5 Good cause appearing, the Court: 6 1. GRANTS Plaintiff’s Motion to Proceed IFP. (ECF No. 5.) 7 2. DIRECTS the Secretary of the CDCR, or his designee, to collect from 8 Plaintiff’s prison trust account the \$58.19 initial partial filing fee and to collect the \$291.81 9 balance of the \$350 filing fee by collecting monthly payments from Plaintiff’s account in 10 an amount equal to twenty percent (20%) of the preceding month’s income and forwarding 11 those payments to the Clerk of the Court each time the amount in the account exceeds \$10 12 pursuant to 28 U.S.C. § 1915(b)(2). 13 3. DIRECTS the Clerk of the Court to serve a copy of this Order on Jeff 14 Macomber, Secretary, California Department of Corrections and Rehabilitation, P.O. Box 15 942883, Sacramento, California 94283-0001. 16 4. DISMISSES the Complaint without prejudice and with leave to amend 17 pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b). 18 5. GRANTS Plaintiff forty-five (45) days leave from the date of this Order in 19 which to file an amended complaint which cures the deficiencies of pleading noted in this 20 Order. Plaintiff’s First Amended Complaint must be complete by itself without reference 21 to his original Complaint. Defendants not named and any claims not re-alleged in the First 22 Amended Complaint will be considered waived. See S.D. Cal. CivLR 15.1; *Hal Roach 23 Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n 24 amended pleading supersedes the original.”); *Lacey v. Maricopa County*, 693 F.3d 896, 25 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are not re- 26 alleged in an amended pleading may be “considered waived if not repled.”) A failure to 27 amend will result in dismissal of this action for failure to state a claim and failure to 28 prosecute. See *Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does 1 not take advantage of the opportunity to fix his complaint, a district court may convert the 2 dismissal of the complaint into dismissal of the entire

action.”) 3 IT IS SO ORDERED. 4 Dated: October 2, 2025 5 Hon. Roger T. Benitez United States
District Court 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

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