

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

Hairston v. Juarez

No. 22-cv-01801-BAS-WVG (S.D. Cal. Mar. 10, 2023) · No. 22-cv-01801-BAS-WVG · Decided March 10,
2023

SUMMARY

The United States District Court for the Southern District of California granted Kevin Tyrone Izal Hairston leave to proceed in forma pauperis and assessed an initial partial filing fee. The court found a plausible Eighth Amendment excessive-force claim against Correctional Officer Juarez, dismissed the First Amendment retaliation claim for failure to state a claim, and granted leave to proceed on the excessive-force claim or amend the complaint.

OPINION

1 2 3 4 5 6 7 UNITED STATES DISTRICT COURT 8 SOUTHERN DISTRICT OF
CALIFORNIA 9 10 KEVIN TYRONE IZAL HAIRSTON, Case No. 22-cv-01801-BAS-WVG
CDCR No. BF-2040, 11 ORDER: Plaintiff, 12 vs. (1) GRANTING MOTION TO 13 PROCEED
IN FORMA PAUPERIS 14 [ECF No. 3] K. JUAREZ, Correctional Officer, 15 Defendant.

(2) SCREENING COMPLAINT 16 PURSUANT TO 28 U.S.C. § 1915(e)(2)(B) AND 28 U.S.C.
17 § 1915A(b) 18 19 20 21 Plaintiff Kevin Tyrone Izal Hairston, proceeding pro se and currently
housed at 22 California State Prison, Sacramento (SAC), filed a civil rights action pursuant to 42
U.S.C. 23 § 1983 on November 14, 2022. (Compl., ECF No. 1.) Initially, Plaintiff failed to prepay
24 the civil filing fee or file a Motion to Proceed in Forma Pauperis (“IFP”), and so the Court 25
dismissed this case without prejudice.

(ECF No. 2.) Plaintiff subsequently filed the IFP 26 Motion now before the Court. (Mot., ECF No.
3.) In addition, the Court screens the 27 Complaint pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28
U.S.C. § 1915A(b). 28 / / / 1 II. Motion for Leave 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 \$400.1 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 regardless of whether his action is ultimately dismissed. See

28 U.S.C. § 1915(b); *Bruce v. 10 Samuels*, 577 U.S. 82, 84 (2016). 11 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a 12 “certified copy of the trust fund account statement (or institutional equivalent) for... the 13 6-month period immediately preceding the filing of the complaint.” 28 U.S.C. 14 § 1915(a)(2).

From the certified trust account statement, the Court assesses an initial 15 payment of 20% of (a) the average monthly deposits in the account for the past six months 16 or (b) the average monthly balance in the account for the past six months, whichever is 17 greater, unless the prisoner has no assets. 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). 18 The institution having custody of the prisoner then collects subsequent payments, assessed 19 at 20% of the preceding month’s income, in any month in which his account exceeds \$10, 20 and forwards those payments to the Court until the entire filing fee is paid.

See 28 U.S.C. 21 § 1915(b)(2); *Bruce*, 577 U.S. at 84. 22 In support of his IFP Motion, Plaintiff has submitted a copy of his CDCR Inmate 23 Statement Report as well as a Prison Certificate completed by an accounting officer at 24 SAC. (See Mot. 4–6) These statements show Plaintiff has carried an average monthly 25 balance of \$219.34, had an average monthly deposit of \$109.67 over the 6-month period 26 27 1 In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50.

See 28 U.S.C. § 1914(a). The additional \$50 administrative fee does not apply to persons granted 28 1 immediately preceding the filing of his Complaint, and had an available balance on the 2 books of \$274.58 at the time of filing. (*Id.* at 4–6.) 3 Accordingly, the Court GRANTS Plaintiff’s Motion for Leave to Proceed IFP (ECF 4 No. 3) and assesses an initial partial filing fee of \$43.87 pursuant to 28 U.S.C. § 1915(b)(1).

5 However, this initial fee shall not be collected if insufficient funds are available in 6 Plaintiff’s account at the time this Order is executed. See 28 U.S.C. § 1915(b)(4) (“In no 7 event shall a prisoner be prohibited from bringing a civil action or appealing a civil action 8 or criminal judgment for the reason that the prisoner has no assets and no means by which 9 to pay the initial partial filing fee.”).

The remaining balance of the \$350 total fee owed in 10 this case must be collected by the Secretary of the California Department of Corrections 11 and Rehabilitation (“CDCR”), or any subsequent agency having custody of Plaintiff, and 12 forwarded to the Clerk of the Court pursuant to the installment payment provisions set out 13 in 28 U.S.C. § 1915(b)(2). 14 II.

Screening Pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b) 15 The Prison Litigation Reform Act requires the Court to review complaints filed by 16 all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained 17 in any facility [and] accused of, convicted of, sentenced for, or adjudicated delinquent for, 18 violations of criminal law or the terms or

conditions of parole, probation, pretrial release, 19 or diversionary program,” at the time of filing or “as soon as practicable after docketing.” 20 See 28 U.S.C. §§ 1915(e)(2), 1915A.

21 Screening requires the Court to dismiss sua sponte a complaint, or any portion of a 22 complaint, which is frivolous, malicious, fails to state a claim, or seeks damages from 23 defendants who are immune. See *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) 24 (en banc) (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 25 (9th Cir.

2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to 26 ensure that the targets of frivolous or malicious suits need not bear the expense of 27 responding.’” *Nordstrom v. Ryan*, 762 F.3d 903, 907 n.1 (9th Cir. 2014) (quoting *Wheeler 28 v. Wexford 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 F.3d 4 1108, 1112 (9th Cir.

2012); see also *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 5 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)”). 8 Rule 12(b)(6) requires a complaint to “contain sufficient factual matter, accepted as 9 true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 10 678 (2009) (cleaned up).

A court must accept all factual allegations pleaded in the 11 complaint as true and must construe them and draw all reasonable inferences in favor of 12 the nonmoving party. See *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 13 1996). Detailed factual allegations are not required, but “[t]hreadbare recitals of the 14 elements of a cause of action, supported by mere conclusory statements, do not suffice.” 15 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for relief 16 [is]... a context-specific task that requires the reviewing court to draw on its judicial 17 experience and common sense.” *Id.* at 679.

18 Here, Plaintiff alleges that he was involved in an “incident” while he was 19 incarcerated at SAC.2 (Compl. 2, ECF No. 1.) After the incident was over and Plaintiff was 20 in waist restraints on the ground, Defendant hit Plaintiff in the head and face five to six 21 times and pepper sprayed him. (*Id.* at 2–5.) Plaintiff was then left in a cell for forty to forty- 22 five minutes during which time he was unable to breathe and suffering the effects of the 23 pepper spray.

(*Id.* at 3.) Plaintiff yelled to the corrections officers that he could not breathe 24 and asked to be put in the shower. (*Id.* at 3–4.) Eventually, he was taken to a 25 decontamination area. (*Id.*) When Plaintiff told Defendant he was going to file a grievance 26 27 2 The facts are all taken from the Complaint (Compl., ECF No. 1).

For the purposes of screening, the Court accepts all of Plaintiff's factual allegations as true. See *Ashcroft v. Iqbal*, 556 U.S. 28 1 regarding the unnecessary use of force, Defendant "threatened future retaliation." (Id. at 3, 2 5.) 3 The Court finds Plaintiff's Complaint alleges a plausible excessive force claim 4 against Defendant sufficient to survive the "low threshold" set for screening as required by 5 28 U.S.C. § 1915(e)(2) and § 1915A(b).

See *Wilhelm*, 680 F.3d at 1123. "[U]nnecessary 6 and wanton infliction of pain" violates the Cruel and Unusual Punishments Clause of the 7 Eighth Amendment. *Hudson v. McMillian*, 503 U.S. 1, 5 (1992). In the context of prison 8 officials who are alleged to have used excessive physical force in violation of the Eighth 9 Amendment, "the core judicial inquiry is... whether force was applied in a good-faith 10 effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Id. 11 at 6–7.

Courts have found that beating a prisoner who is incapacitated by restraints belies 12 good faith. See *Carrasco v. Cababe*, No. 1:19-cv-00724-LJO-JDP, 2019 WL 6170118, at 13 *2 (E.D. Cal. Nov. 20, 2019) (finding allegations that defendants beat plaintiff without 14 justification while he was restrained sufficient to state an excessive force claim); *Lees v. 15 Singsong*, No. 19-cv-01603-HSG, 2021 WL 1925728, at *2 (N.D.

Cal. 2021) (same). Here, 16 Plaintiff alleges that while he was in waist chain restraints, Defendant hit him in the head 17 and face and pepper sprayed him. Thus, making reasonable inferences in Plaintiff's favor, 18 the Court finds the Complaint sufficiently alleges Defendant did not act in good faith to 19 maintain discipline, but rather acted "maliciously and sadistically to cause harm." See 20 *Hudson*, 503 U.S. at 5.

21 Plaintiff's First Amendment retaliation claim, however, does not survive screening. 22 "Prisoners have a First Amendment right to file grievances against prison officials and to 23 be free from retaliation for doing so." *Watson*, 668 F.3d at 1114 (citing *Brodheim v. Cry*, 24 584 F.3d 1262, 1269 (9th Cir. 2009)). "Within the prison context, a viable claim of First 25 Amendment retaliation entails five basic elements: (1) An assertion that a state actor took 26 some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, 27 and that such action (4) chilled the inmate's exercise of his First Amendment rights, and 28 (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes*, 408 F.3d 1 at 567–68.

Plaintiff alleges Defendant "threaten[ed] future retaliation after Plaintiff 2 informed him that he will pursue a prison grievance complaining about the unnecessary 3 use of force." (Compl. at 5.) A mere threat can constitute an adverse action. See *Brodheim*, 4 584 F.3d at 1269–70. But Plaintiff's allegations are conclusory and not specific enough to 5 plausibly allege a retaliation claim.

Stating Defendant “threaten[ed] Plaintiff with future 6 retaliation” merely parrots the wording of the claim. The Complaint lacks factual 7 allegations as to (1) what actions Defendant threatened to undertake or what words 8 Defendant used and (2) how those threats chilled Plaintiff’s First Amendment rights. (See 9 generally Compl.)

Accordingly, the Complaint fails to state a First Amendment retaliation 10 claim and cannot survive screening under 28 U.S.C. § 1915(e) and 28 U.S.C. § 1915A. 11 IV. CONCLUSION 12 Based on the foregoing, the Court: 13 1) GRANTS Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) 14 (ECF No. 3). 15 2) DIRECTS the Secretary of the CDCR, or their designee, to collect from 16 Plaintiff’s trust account the \$350 filing fee owed in this case by garnishing monthly 17 payments from his account in an amount equal to twenty percent (20%) of the preceding 18 month’s income and forwarding those payments to the Clerk of the Court each time the 19 amount in Plaintiff’s account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2).

ALL 20 PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER 21 ASSIGNED TO THIS ACTION. 22 3) DIRECTS the Clerk of the Court to serve a copy of this Order on Jeff 23 Macomber, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001. 24 4) DISMISSES Plaintiff’s First Amendment retaliation claim sua sponte for 25 failing to state a claim upon which relief may be granted pursuant to 28 U.S.C. 26 § 1915(e)(2)(B)(ii) and § 1915A(b)(1).

27 5) GRANTS Plaintiff forty-five (45) days leave from the date of this Order in 28 which to either: (1) file a Notice of Intent to Proceed with only his Eighth Amendment 1 ||claim against Defendant Juarez only; or (2) file an Amended Complaint correcting the 2 || deficiencies of pleading identified in this Order. 3 If Plaintiff chooses to proceed with only his Eighth Amendment claim against 4 || Defendant Juarez, the Court will issue an Order directing the U.S. Marshal to effect service 5 his Complaint on Defendant Juarez and dismissing the remaining First Amendment 6 || retaliation claim.

7 If Plaintiff chooses to file an amended pleading correcting the deficiencies outlined 8 this Order, his Amended Complaint must be complete in itself without reference to his 9 || original pleading. Defendants not named and any claims not re-alleged in the Amended 10 || Complaint will be considered waived. See CivLR 15.1; Hal Roach Studios, Inc. v. Richard 11 || Feiner and Co., Inc., 896 F.2d 1542, 1546 (9th Cir.

1989) (“[A]n amended pleading 12 supersedes the original.”); Lacey v. Maricopa Cnty., 693 F.3d 896, 928 (9th Cir. 2012) 13 ||(noting that claims dismissed with leave to amend which are not re-alleged in an amended 14 || pleading may be considered “waived if not repled”). Plaintiff’s Amended Complaint must 15 entitled “First Amended Complaint,” contain “S.D.

Cal. Civil Case No. 22-cv-01801- 16 || BAS-WVG” in its caption, and comply both with Fed. R. Civ. P. 8 and with S.D. Cal. 17 || CivLR 8.2(a). 18 6) In order to assist Plaintiff in complying with these requirements, the Court 19 || further DIRECTS the Clerk of the Court to provide Plaintiff with (1) a blank copy of its 20 Complaint under the Civil Rights Act, 42 U.S.C. § 1983 and (2) a copy of his 21 ||Complaint (ECF No. 1) for his use and convenience should he choose to amend.

22 IT IS SO ORDERED. 23 |} DATED: March 10, 2023 /) y ☐☐ (yitlig (Byyhan 6 How. Cynthia Bashant 5 United States District Judge 26 27 28 7 ☐☐