

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Kakowski v. Macomber

No. 3:25-cv-00282-RBM-VET (S.D. Cal. Apr. 8, 2025) · No. 3:25-cv-00282-RBM-VET · Decided April 8,
2025

OPINION

Kakowski v. Macomber

PER CURIAM.

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8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 11 BRIAN KAKOWSKI, Case No.: 3:25-cv-00282-RBM-VET

CDCR #BF-3315,

12 Plaintiff, ORDER: 13 vs.

(1) GRANTING PLAINTIFF’S IFP

14 MOTION [Doc. 2] 15 JEFF MACOMBER, Secretary of the California Department of
Corrections and (2) SCREENING PLAINTIFF’S 16 Rehabilitation, et al., COMPLAINT
PURSUANT TO 28 17 Defendants. U.S.C. §§ 1915(e)(2)(B), 1915A(b) 18

(3) DENYING PLAINTIFF’S

19 REMAINING MOTIONS AS MOOT

[Docs. 3, 4] 20 21 22 Plaintiff Brian Kakowski (“Plaintiff”), a state prisoner incarcerated at the
Richard J. 23 Donovan Correctional Facility (“RJD”) in San Diego, California, is proceeding pro
se in 24 this civil rights action. (Doc. 1 ([Complaint].) Plaintiff brings claims pursuant to 42
U.S.C. 25 § 1983 against Defendants California Department of Corrections and Rehabilitation 26
(“CDCR”) Secretary Jeff Macomber, RJD Warden James Hill, RJD Food Manager Victor 27
Acosta, RJD Correctional Food Cook Ward, RJD Correctional Food Officer J. Goff, and 28 RJD
Correctional Lieutenant G. Hernandez (collectively, “Defendants”). (Id. at 2–3.) In 1 his
Complaint, Plaintiff alleges that improper training and supervision of RJD’s kitchen 2 employees
caused unsanitary conditions at RJD, presenting a risk to his health in violation 3 of the Eighth
Amendment. (See id. at 10–21.) Plaintiff also filed a Motion and Declaration 4 Under Penalty of
Perjury in Support of Motion to Proceed in Forma Pauperis (“IFP 5 Motion”) (Doc. 2), a Motion
to File and Accept Excess Pages (“Excess Pages Motion”) 6 (Doc. 3), and a Motion for
Substitution (“Substitution Motion”) (Doc. 4). For the reasons 7 discussed below, Plaintiff’s IFP
Motion is GRANTED, Plaintiff’s Complaint is 8 DISMISSED, and Plaintiff’s Excess Pages
Motion and Substitution Motion are DENIED 9 AS MOOT.

10 I. IFP MOTION

11 All parties instituting any civil action, suit, or proceeding in a district court of the 12 United States, except an application for writ of habeas corpus, must pay a filing fee of 13 \$405, consisting of a \$350 statutory fee plus an additional administrative fee of \$55, 14 although the administrative fee does not apply to persons granted leave to proceed In Forma 15 Pauperis (“IFP”). See 28 U.S.C. § 1914(a); Judicial Conference Schedule of Fees, District 16 Court Misc. Fee Schedule, § 14 (eff. Dec. 1, 2023). Generally, an action may proceed 17 despite a plaintiff’s failure to prepay the entire fee only if he is granted leave to proceed 18 IFP pursuant to 28 U.S.C. § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007) (“Plaintiffs normally must pay \$350 to file a civil complaint in federal district 20 court, 28 U.S.C. § 1914(a), but 28 U.S.C. § 1915(a)(1) allows the district court to waive 21 the fee, for most individuals unable to afford it, by granting IFP status.”). 22 However, a prisoner seeking leave to proceed IFP must submit a “certified copy of 23 the trust fund account statement (or institutional equivalent) for ... the 6-month period 24 immediately preceding the filing of the complaint[.]” 28 U.S.C. § 1915(a)(2); see also 25 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005) (“[P]risoners must demonstrate that 26 they are not able to pay the filing fee with an affidavit and submission of their prison trust 27 account records[.]”). From the certified trust account statement, the Court assesses an 28 initial payment of 20% of (a) the average monthly deposits in the account for the past six 1 months, or (b) the average monthly balance in the account for the past six months, 2 whichever is greater, unless the prisoner has insufficient assets. See 28 U.S.C. 3 § 1915(b)(1), (4); *Bruce v. Samuels*, 577 U.S. 82, 84 (2016). Prisoners who proceed IFP 4 must pay any remaining balance in “increments” or “installments,” regardless of whether 5 their action is ultimately dismissed. See 28 U.S.C. § 1915(b)(1), (2); *Bruce*, 577 U.S. at 6 84. 7 The prison certificate attached to Plaintiff’s IFP Motion shows he had an average 8 monthly balance of \$38.71 and average monthly deposits of \$43.01 for the six months 9 preceding the filing of Plaintiff IFP Motion. (Doc. 2 at 5.) However, an updated prison 10 certificate shows that Plaintiff had an average monthly balance of \$40.69 and average 11 monthly deposits of \$46.98 for the six months preceding the filing of the updated 12 certificate. (Doc. 5 at 1.) The updated prison certificate also shows that the Plaintiff had 13 an available balance of \$21.58 at the time of filing. (Id.) 14 Accordingly, the Court GRANTS Plaintiff’s IFP Motion and imposes an initial 15 partial filing fee of \$9.40 pursuant to 28 U.S.C. § 1915(b)(1). Plaintiff remains obligated 16 to pay the \$340.60 balance of the filing fee required by 28 U.S.C. § 1914 pursuant to the 17 installment payment provisions set forth in 28 U.S.C. § 1915(b)(1). However, this initial 18 fee only need be collected if sufficient funds are available in Plaintiff’s account at the time 19 of this Order. See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be 20 prohibited from bringing a civil action or appealing a civil action or criminal judgment for 21 the reason that the prisoner has no assets and no means by which to pay the initial partial 22 filing fee.”); *Taylor v. Delatoore*, 281 F.3d 844, 850 (9th Cir. 2002) (finding that 28 U.S.C. 23 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based 24 solely on a “failure to pay

... due to the lack of funds available to him when payment is 25 ordered.”).

26 II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2), 1915A(b)

27 Because Plaintiff is a prisoner proceeding IFP, his Complaint requires pre-answer 28 screening pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b). See *Rhodes v. Robinson*, 1 621 F.3d 1002, 1004 (9th Cir. 2010) (citing 28 U.S.C. § 1915A(a)). The Court must 2 dismiss sua sponte a prisoner’s IFP complaint, or any portion of it, that is frivolous, 3 malicious, fails to state a claim on which relief may be granted, or seeks monetary relief 4 from defendants who are immune. See *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 5 2000) (en banc) (citing 28 U.S.C. § 1915(e) (2)). 6 “The standard for determining whether a plaintiff has failed to state a claim upon 7 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of 8 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d 9 1108, 1112 (9th Cir. 2012); see also *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 10 2012) (noting that § 1915A screening “incorporates the familiar standard applied in the 11 context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).”) Rule 12 12(b)(6) requires a complaint to “contain sufficient factual matter, accepted as true, to ‘state 13 a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) 14 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Determining whether a 15 complaint states a plausible claim for relief [is] a context-specific task that requires the 16 reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. 17 In the Complaint, Plaintiff asserts a claim under 42 U.S.C. § 1983, alleging that 18 Defendants were deliberately indifferent to his Eighth Amendment rights. (Doc. 1 19 [Complaint] at 1, 4.) Section 1983 “creates a private right of action against individuals 20 who, acting under color of state law, violate federal constitutional or statutory rights.” 21 *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). “To establish § 1983 liability, 22 a plaintiff must show both (1) deprivation of a right secured by the Constitution and laws 23 of the United States, and (2) that the deprivation was committed by a person acting under 24 color of state law.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012). 25 Here, the prison official Defendant acted under the color of state law, so the Court 26 limits its analysis to the first element—the “deprivation of a right secured by the 27 Constitution and laws of the United States[.]” *Id.* As Plaintiff’s claim is premised on 28 1 alleged violations of his Eighth Amendment rights, Plaintiff must sufficiently allege the 2 deprivation of those rights to state a Section 1983 claim. 3 Under the Eighth Amendment, “[p]rison officials have a duty to ensure that prisoners 4 are provided adequate shelter, food, clothing, sanitation, medical care and personal safety.” 5 *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000) (citations omitted). “The 6 circumstances, nature, and duration of a deprivation of these necessities must be considered 7 in determining whether a constitutional violation has occurred.” *Id.* Subjecting “a prisoner 8 to lack of sanitation that is severe or prolonged can constitute an infliction of pain within 9 the meaning of the Eighth Amendment.” *Anderson v. County of Kern*, 45 F.3d 1310, 1314 10 (9th Cir. 1995) (citations omitted). However, the temporary imposition of such conditions 11 is not sufficient. See *id.* at 1315. 12 Further, “a

prison official violates the Eighth Amendment only when two 13 requirements are met.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). “First, the 14 deprivation alleged must be, objectively, ‘sufficiently serious[.]’” *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Second, the “prison official must have a ‘sufficiently 16 culpable state of mind.’” *Id.* (quoting *Wilson*, 501 U.S. at 297). “In prison-conditions 17 cases that state of mind is one of ‘deliberate indifference’ to inmate health or safety[.]” *Id.* 18 (quoting *Wilson*, 501 U.S. at 302–303). 19 “[D]eliberate indifference describes a state of mind more blameworthy than 20 negligence” but “something less than acts or omissions for the very purpose of causing 21 harm or with knowledge that harm will result.” *Id.* at 835. With this in mind, the Supreme 22 Court has held “that a prison official cannot be found liable under the Eighth Amendment 23 for denying an inmate humane conditions of confinement unless the official knows of and 24 disregards an excessive risk to inmate health or safety; the official must both be aware of 25 facts from which the inference could be drawn that a substantial risk of serious harm exists, 26 and he must also draw the inference.” *Id.* at 837 (emphasis added). “[A]n official’s failure 27 to alleviate a significant risk that he should have perceived but did not, while no cause for 28 commendation, cannot under our cases be condemned as the infliction of punishment.” *Id.* 1 at 838. 2 Here, Plaintiff alleges that Defendants have for years failed to follow California state 3 regulations regarding food and safety, thereby showing deliberate indifference to inmate 4 health in violation of the prohibition against cruel and unusual punishment under the Eighth 5 Amendment. (See generally Doc. 1 [Complaint].) Specifically, Plaintiff alleges that when 6 he reported for work in the RJD E-yard kitchen on May 24, 2024, he was told by Defendant 7 Goff, “I know you are not medically cleared to be in here, but I need all the help I can get.” 8 (*Id.* at 12.) Likewise, Plaintiff alleges that Defendant Ward told him, “I would give you a 9 better pay number [and] job as a cook if I’d like. But need to see medical to make the ‘no 10 food-handling chrono go away.’” (*Id.*) He also told Plaintiff that he “[b]etter not get us in 11 trouble for now.” (*Id.*) 12 Plaintiff then alleges that the RJD E-yard kitchen is run by Defendants Goff, Ward, 13 Hernandez, and Acosta, who are responsible for screening and training inmates in sanitary 14 food handling techniques but who failed to provide Plaintiff any training when he worked 15 there. (*Id.* at 12–13.) Plaintiff also alleges that, during the “month or two” he worked in 16 the E-yard kitchen, the dishwasher was not working, and he was told to use degreaser when 17 they ran out of soap, and to scrub trays, pans, cookie sheets, and food equipment with dirty 18 towels meant for cleaning kitchen tables and machinery. (*Id.* at 13–15.) Plaintiff alleges 19 that, after a memorandum was posted on August 6, 2024 noting the use of degreaser in 20 place of soap, Defendant Acosta attempted “damage control” by conducting “walk- 21 throughs which were staged in an effort to fool us and the administration.” (*Id.* at 16–17.) 22 Plaintiff concludes that Defendants Acosta, Ward, Goff and Hernandez showed deliberate 23 indifference to inmate health and safety through their negligent acts. (*Id.* at 17–18.) 24 The Court finds that, as alleged, Plaintiff describes conditions that appear to be the 25 result of ordinary budget restrictions and do not amount to “[in]humane conditions of 26 confinement.” See

Farmer, 511 U.S. at 834, 837 (explaining that the conditions and 27 sanitation issues alleged must be “sufficiently serious” to support an Eighth Amendment 28 violation). The Court also finds that, while the conduct described by Plaintiff may amount 1 to negligence, it does not rise to the level of “deliberate indifference.” While the individual 2 Defendants might have been “aware of facts from which the inference could be drawn that 3 a substantial risk of serious harm exists,” Plaintiff does not include any allegations that the 4 Defendants drew such an inference. See *id.* at 837. 5 Accordingly, Plaintiff’s Complaint is DISMISSED for failure to state a claim. 6 However, the Court grants Plaintiff leave to amend his Complaint. See *Rosati v. Igbinoso*, 7 791 F.3d 1037, 1039 (9th Cir. 2015) (“A district court should not dismiss a pro se complaint 8 without leave to amend [pursuant to 28 U.S.C. § 1915(e)(2)] unless ‘it is absolutely clear 9 that the deficiencies of the complaint could not be cured by amendment.’”) (quoting *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012)).

11 III. CONCLUSION

12 Based on the foregoing, the Court GRANTS Plaintiff’s IFP Motion (Doc. 2) and 13 ORDERS the Secretary of the CDCR, or her designee, to collect from Plaintiff’s prison 14 trust account the \$350 filing fee by collecting monthly payments from Plaintiff’s account 15 in an amount equal to twenty percent (20%) of the preceding month’s income and 16 forwarding those payments to the Clerk of the Court each time the amount in the account 17 exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). All payments should be clearly identified 18 by the name and number assigned to this action. (See also Section I (imposing an initial 19 partial filing fee of \$9.40).) 20 The Court DISMISSES all claims against all Defendants named in the Complaint 21 without prejudice and with leave to amend pursuant to 28 U.S.C. §§ 1915(e)(2) and 22 1915A(b). 23 The Court DENIES AS MOOT Plaintiff’s Excess Pages Motion (Doc. 3) and 24 Plaintiff’s Substitution Motion (Doc. 4). 25 The Court GRANTS Plaintiff forty-five (45) days from the date of this Order to file 26 a First Amended Complaint that cures the deficiencies identified herein. Plaintiff’s First 27 Amended Complaint therefore must be filed on or before May 23, 2025. Plaintiff’s First 28 Amended Complaint must be complete by itself, without reference to his original 1 } Complaint. Defendants not named and any claims not re-alleged in the First Amended 2 Complaint will be considered waived. See *S.D. Cal. Civ. L. R. 15.1*; *Hal Roach Studios, 3 v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended 4 || pleading supersedes the original.”); *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 5 || 2012) (noting that claims dismissed with leave to amend which are not re-alleged in an 6 || amended pleading may be “consider[ed] waived if not repled.”). If Plaintiff fails to amend 7 || his Complaint, the Court will dismiss this action for failure to state a claim and failure to 8 prosecute. See *Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does 9 || not take advantage of the opportunity to fix his complaint, a district court may convert the 10 || dismissal of the complaint into dismissal of the entire action.”). 11 The Court also DIRECTS the Clerk of the Court to serve a copy of this Order on 12 || Jeff Macomber, Secretary, California Department of Corrections and Rehabilitation, P.O.

13 || Box 942883, Sacramento, California 94283-0001. 14 IT IS SO ORDERED. 15 ||DATE: April
8, 2025 ele Merteae
7 HON? RUTH BERMUBEZ MONTENEGRO
UNITED STATES DISTRICT JUDGE
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DAE .. ANVON □□□□