

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

McSherry v. Nhan

McSherry · No. 24-cv-2367-RSH-DTF · Decided May 2, 2025

OPINION

McSherry v. Nhan

PER CURIAM.

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9 UNITED STATES DISTRICT COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 12 FRANCIS T. McSHERRY, Case No.: 24-cv-2367-RSH-DTF

CDCR #K-26680,

13 ORDER: Plaintiff, 14

v. (1) GRANTING MOTION TO

15

PROCEED IN FORMA PAUPERIS,

LARRY NHAN, Correctional Officer, 16 Defendant. (2) DENYING AS MOOT MOTIONS 17

TO EXCEED PAGE LIMIT AND TO

18 PROCEED BY MAIL; and 19

(3) DIRECTING U.S. MARSHAL TO

20 EFFECT SERVICE OF COMPLAINT

AND SUMMONS PURSUANT TO 28

21 U.S.C. § 1915(d) & Fed. R. Civ. P. 22 4(c)(3) 23 Plaintiff Francis T. McSherry, a state prisoner
proceeding pro se, has filed a civil 24 rights Complaint pursuant to 42 U.S.C. § 1983. ECF No. 1.
Plaintiff claims that while 25 housed at the Richard J. Donovan Correctional Facility (“RJD”) in
San Diego, California, 26 Defendant RJD Correctional Officer Larry Nhan deliberately closed a
cell door on his 27 hand. See *id.* at 3. Plaintiff has not paid the civil filing fee but has instead filed
a motion to 28 proceed in forma pauperis (“IFP”). ECF No. 2. Plaintiff has also filed a motion to
proceed 1 by mail and a motion to exceed the page limit. ECF Nos. 3–4. 2 I. Motion to Proceed
IFP 3 Anyone instituting a civil action in a district court of the United States must typically 4 pay
a filing fee of \$405, consisting of a \$350 statutory fee plus an additional administrative 5 fee of
\$55, although the administrative fee does not apply to persons granted leave to 6 proceed IFP. See
28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court 7 Misc. Fee Schedule,
§ 14 (eff. Dec. 1, 2023)). The action may proceed despite a plaintiff’s 8 failure to prepay the entire
fee only if he is granted leave to proceed IFP pursuant to 28 9 U.S.C. § 1915(a). See *Andrews v.*

Cervantes, 493 F.3d 1047, 1051 (9th Cir. 2007). Section 10 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a “certified copy of 11 the trust fund account statement (or institutional equivalent) for . . . the 6-month period 12 immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the 14 Court assesses an initial payment of 20% of (a) the average monthly deposits in the account 15 for the past six months, or (b) the average monthly balance in the account for the past six 16 months, whichever is greater, unless the prisoner has insufficient assets. See 28 U.S.C. 17 §§ 1915(b)(1), (b)(4); *Bruce v. Samuels*, 577 U.S. 82, 84 (2016). Prisoners who proceed 18 IFP must pay any remaining balance in “increments” or “installments,” regardless of 19 whether their action is ultimately dismissed. 28 U.S.C. §§ 1915(b)(1)–(b)(2); *Bruce*, 577 20 U.S. at 84. 21 In support of his IFP motion, Plaintiff has submitted a copy of his California 22 Department of Corrections and Rehabilitation (“CDCR”) Inmate Statement Report which 23 indicates that during the six months prior to filing suit, Plaintiff had an average monthly 24 balance of \$75.47, average monthly deposits of \$57.50, and an available balance of \$0.01 25 in his account at the time he filed suit. ECF No. 5 at 1. 26 The Court grants Plaintiff’s motion to proceed IFP and assesses no initial partial 27 filing fee. See *Taylor v. Delatoore*, 281 F.3d 844, 850 (9th Cir. 2002) (finding that 28 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case 1 based solely on a “failure to pay . . . due to the lack of funds available to him when payment 2 is ordered.”). Plaintiff remains obligated to pay the \$350 balance of the filing fee required 3 by 28 U.S.C. § 1914 pursuant to the installment payment provisions of 28 U.S.C. 4 § 1915(b)(1). 5 II. Screening Pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b) 6 A. Standard of Review 7 Because Plaintiff is a prisoner proceeding IFP, the Complaint requires a pre-answer 8 screening pursuant to 28 U.S.C. §§ 1915(e)(2), 1915A(b). The Court must sua sponte 9 dismiss a prisoner’s IFP complaint, or any portion of it, which is frivolous, malicious, fails 10 to state a claim, or seeks damages from defendants who are immune. *Lopez v. Smith*, 203 11 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc) (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)). 13 “The standard for determining whether a plaintiff has failed to state a claim upon 14 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of 15 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watson v. Carter*, 668 F.3d 16 1108, 1112 (9th Cir. 2012); see also *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 17 2012) (noting that § 1915A screening “incorporates the familiar standard applied in the 18 context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).”). Rule 19 12(b)(6) requires a complaint to “contain sufficient factual matter, accepted as true, to ‘state 20 a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), 21 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Determining whether 22 a complaint states a plausible claim for relief [is] . . . a context-specific task that requires 23 the reviewing court to draw on its judicial experience and common sense.” *Id.* 24 B. Allegations in the

Complaint 25 Plaintiff alleges that around 6:30 a.m. on August 27, 2023, his cell door opened 26 slightly. ECF No. 1 at 3. Holding his cane in one hand, Plaintiff placed his other hand on 27 the cell door. Id. Defendant RJD Correctional Officer Nhan was in the tower and Plaintiff 28 yelled at him, “What’s this for?” Id. Defendant Nhan immediately pressed the open button 1 and Plaintiff “fell with the door causing my finger to get stuck in the door.” Id. Plaintiff 2 heard a crack in his hand and screamed in pain. Id. Plaintiff “kept yelling help, help and 3 C/O Larry Nhan smiled down at me while he finally opened the door.” Id. Plaintiff claims 4 Nhan “did this on purpose, he and I had several altercations in the past. I remember calling 5 him a bitch and he was furious at me.” Id. Plaintiff’s finger was broken and bleeding, and 6 he was sent to an outside hospital where he received seven stitches. Id. He claims Nhan’s 7 actions were deliberate and malicious in violation of the Eighth Amendment’s prohibition 8 on cruel and unusual punishment. Id. at 3–4. 9

C. Discussion 10 The Cruel and Unusual Punishments Clause of the Eighth Amendment forbids 11 prison officials from “the unnecessary and wanton infliction of pain.” *Whitley v. Albers*, 12 475 U.S. 312, 319 (1986). “[A] prison official violates the Eighth Amendment only when 13 two requirements are met. First, the deprivation alleged must be, objectively, ‘sufficiently 14 serious.’” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Second, Plaintiff must allege the 15 prison official he seeks to hold liable had a “‘sufficiently culpable state of mind’ . . . [T]hat 16 state of mind is one of ‘deliberate indifference’ to inmate health and safety.” Id. (quoting 17 *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). A prison official can be held liable only if he 18 “knows of and disregards an excessive risk to inmate health and safety”; he “must both be 19 aware of facts from which the inference could be drawn that a substantial risk of serious 20 harm exists, and he must also draw the inference.” Id. at 837. 21 Plaintiff’s allegations are sufficient to survive the “low threshold” of the screening 22 required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b) with respect to an Eighth Amendment 23 claim against Defendant Nhan, the only defendant named in the Complaint. *Wilhelm*, 680 24 F.3d at 1123; see also *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (“Conditions must 25 not involve the wanton and unnecessary infliction of pain.”). Accordingly, Plaintiff is 26 entitled to have the U.S. Marshal effect service of the summons and Complaint against 27 Defendant Nhan. See 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve 28 all process, and perform all duties in [IFP] cases.”); Fed. R. Civ. P. 4(c)(3) (“[T]he court 1 may order that service be made by a United States marshal or deputy marshal . . . if the 2 plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915.”). The Court 3 cautions Plaintiff, however, that the sua sponte screening process is “cumulative of, not a 4 substitute for, any subsequent [motion to dismiss] that the defendant may choose to bring.” 5 *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007). 6

III. Additional Motions 7 Plaintiff has filed a motion to proceed through the mail rather than e-filing, stating 8 that he prefers the mail and does not know how to use a computer. ECF No. 4 at 1. Southern 9 District of California General Order 653 requires prisoners incarcerated at RJD who wish 10 to file § 1983 actions in forma pauperis to submit their initial filings electronically with 11 the Clerk of the

Court, and provides that any initial documents subject to General Order 12 653 that are received by the Clerk but which are not in conformance with General Order 13 653 are “accepted by the Clerk of Court for filing and docketed, but may be stricken by 14 Court order as authorized by Local Civil Rule 83.1.” See S.D. Cal. Gen. Order 653 ¶ 2. 15 Because only the Complaint is required to be filed electronically in this case, see *id.*, and 16 because the Court has already excused Plaintiff’s failure to comply by declining to strike 17 his mailed Complaint, the motion is denied as moot. Plaintiff has also filed a motion to 18 exceed General Order 653’s page limit on complaints. ECF No. 3. However, Plaintiff’s 19 Complaint does not exceed the page limit. Thus, the motion is denied as moot. 20 IV. Conclusion 21 Accordingly, the Court: 22 1) GRANTS Plaintiff’s motion to proceed IFP [ECF No. 2]. 23 2) ORDERS the Secretary of the CDCR, or his designee, to collect from 24 Plaintiff’s trust account the \$350 filing fee in monthly payments in an amount equal to 25 twenty percent (20%) of the preceding month’s income to the Clerk of the Court each time 26 the amount in Plaintiff’s account exceeds \$10 pursuant to 28 U.S.C. § 1915(b) (2). 27 3) DIRECTS the Clerk of the Court to serve a copy of this Order by U.S. Mail 28 on Jeff Macomber, Secretary, California Department of Corrections and Rehabilitation, 1 P.O. Box 942883, Sacramento, California, 94283-0001. 2 4) DENIES Plaintiff’s motion to exceed page limits [ECF No. 3] and motion to 3 file by mail [ECF No. 4] as moot. 4 5) DIRECTS the Clerk to issue a summons as to Plaintiff’s Complaint [ECF No. 5 1] for Defendant Nhan and forward it to Plaintiff along with a blank U.S. Marshal Form 6 285. The Clerk will provide Plaintiff with certified copies of the Complaint and summons 7 for use in serving Defendant. Upon receipt of this “In Forma Pauperis Package,” Plaintiff 8 must complete the USM Form 285 as completely and accurately as possible, include an 9 address where Defendant may be found and/or subject to service pursuant to CivLR 4.1(c), 10 and return the forms to the United States Marshal according to the instructions the Clerk 11 provides in the letter accompanying the In Forma Pauperis Package. 12 6) ORDERS the U.S. Marshal to serve a copy of the Complaint and summons 13 upon Defendant Nhan as directed by Plaintiff on the USM Form 285. Costs of service will 14 be advanced by the United States. See 28 U.S.C. § 1915(d); Fed. R. Civ. P. 4(c)(3). 15 7) ORDERS Defendant, once served, to reply to Plaintiff’s Complaint and any 16 subsequent pleading Plaintiff files in this matter in which Defendant is named as a party 17 within the time provided by the applicable provisions of Federal Rules of Civil Procedure 18 12(a) and 15(a)(3). See 42 U.S.C. § 1997e(g)(1) (while Defendant may occasionally be 19 permitted to “waive the right to reply to any action brought by a prisoner confined in any 20 jail, prison, or other correctional facility under section 1983,” once the Court has conducted 21 its sua sponte screening Defendant is required to respond). 22 8) ORDERS Plaintiff, after service has been made by the U.S. Marshal, to serve 23 upon Defendant, or if appearance has been entered by counsel, upon Defendant’s counsel, 24 a copy of every further pleading, motion, or other document submitted for the Court’s 25 consideration pursuant to Fed. R. Civ. P. 5(b). Plaintiff must include with every original 26 document sought to be filed with the Clerk, a certificate stating the manner in which a true 27 and

correct copy of that document has been served on Defendant or his counsel, and the 28 date of that service. See CivLR 5.2. Any document received by the Court that has not been | properly filed with the Clerk or which fails to include a Certificate of Service upon a 2 || Defendant, or their counsel, may be disregarded. 3 IT IS SO ORDERED. 4 Dated: May 2, 2025 5 fekut C Low 6 Hon. Robert S.Huic 7 United States District Judge 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 7 a ee