

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-1394

George W. Fisher

Appellant

v.

John Gregory Mermelstein, MO State Public Defender Deputy Director, et al.

Appellees

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:19-cv-04008-BCW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 19, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-1394

George W. Fisher

Plaintiff - Appellant

v.

John Gregory Mermelstein, MO State Public Defender Deputy Director; Margaret Muller
Johnston, MO State Public Defender; State of Missouri

Defendants - Appellees

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:19-cv-04008-BCW)

JUDGMENT

Before COLLTON, BOWMAN and STRAS, Circuit Judges.

The court has reviewed the original file of the United States District Court. Appellant's application to proceed in forma pauperis is granted.

It is ordered by the court that the district court's order denying the motion for appointment of counsel is affirmed.

June 20, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-1394

George W. Fisher

Appellant

v.

John Gregory Mermelstein, MO State Public Defender Deputy Director, et al.

Appellees

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:19-cv-04008-BCW)

ORDER

The \$505 appellate filing and docketing fee has not been paid and is due. Appellant is directed to either pay the fee in the district court or file a motion for leave to proceed in forma pauperis in this court within 28 days of the date of this order. If appellant does not pay the fee or move for IFP status by March 27, 2019, this appeal will be dismissed for failure to prosecute without further notice.

February 27, 2019

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-1394

George W. Fisher

Appellant

v.

John Gregory Mermelstein, MO State Public Defender Deputy Director, et al.

Appellees

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:19-cv-04008-BCW)

ORDER

If the original file of the United States District Court is available for review in electronic format, the court will rely on the electronic version of the record in its review. The appendices required by Eighth Circuit Rule 30A shall not be required. In accordance with Eighth Circuit Local Rule 30A(a)(2), the Clerk of the United States District Court is requested to forward to this Court forthwith any portions of the original record which are not available in an electronic format through PACER, including any documents maintained in paper format or filed under seal, exhibits, CDs, videos, administrative records and state court files. These documents should be submitted within 10 days.

February 27, 2019

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

GEORGE W. FISHER,)
Plaintiff,)
vs.)
JOHN GREGORY MERMELSTEIN, et al.,)
Defendants.)
Case No. 2:19-cv-04008-BCW-P

ORDER

Plaintiff has filed a notice of interlocutory appeal concerning the denial of Plaintiff's motion for appointment of counsel. Doc. 7. Also, Plaintiff has sought leave to proceed *in forma pauperis* on appeal. Doc. 8.

Plaintiff is advised that federal “makes prisoners responsible for their filing fees the moment the prisoner . . . files an appeal.” *Henderson v. Norris*, 129 F.3d 481, 483 (8th Cir. 1997) (citations omitted). Under 28 U.S.C. § 1915(a)(3), an appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith. *See Fed. R. App. P. 24(a)*. Good faith requires that Plaintiff’s argument on appeal must not be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). For the reasons set forth in this Court’s February 14, 2019, Order, Plaintiff’s appeal presents issues that are legally frivolous.

Accordingly, it is **ORDERED** that:

(1) Plaintiff is denied leave to proceed *in forma pauperis* on appeal;

(2) Plaintiff either must pay the \$505 appellate filing and docketing fees or renew his application for leave to proceed *in forma pauperis* with the United States Court of Appeals for the Eighth Circuit within the time set forth in Federal Rule of Appellate Procedure 24(a) if he seeks to proceed with this interlocutory appeal; and

(3) the Clerk of the Court electronically forward this case to the United States Court of Appeals for the Eighth Circuit for further processing of Plaintiff's interlocutory appeal.

IT IS SO ORDERED.

/s/ Brian C. Wimes
BRIAN C. WIMES, JUDGE
UNITED STATES DISTRICT COURT

Dated: February 26, 2019

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

GEORGE W. FISHER,)
Plaintiff,)
vs.) Case No. 2:19-cv-04008-BCW-P
JOHN GREGORY MERMELSTEIN, et al.,)
Defendants.)

ORDER

Plaintiff has filed a motion for appointment of counsel. Doc. 2. “There is no constitutional right to appointed counsel in civil cases.” *Phillips v. Jasper County Jail*, 437 F.3d 791, 794 (8th Cir. 2006) (citing *Edington v. Missouri Dep’t of Corr.*, 52 F.3d 777, 780 (8th Cir. 1995)). Rather, “[i]n civil rights matters the court *may*, pursuant to 28 U.S.C. § 1915, ‘request’ an attorney to represent a party if, within the court’s discretion, the circumstances are such that would properly justify such a request.” *Mosby v. Mabry*, 697 F.2d 213, 214 (8th Cir. 1982). Among the factors to be considered by the district court in determining whether to appoint counsel in a civil case are “the factual complexity of the issues, the ability of the indigent person to investigate the facts, the existence of conflicting testimony, the ability of the indigent person to present the claims, and the complexity of the legal arguments.” *Phillips*, 437 F.3d at 794.

At this point, the record is not sufficiently developed to determine whether appointment of counsel is warranted. Also, this case is subject to review and possibly pre-service dismissal under 28 U.S.C. §1915A.

Accordingly, it is **ORDERED** that Plaintiff’s motion for appointment of counsel (Doc. 2) is DENIED without prejudice.

IT IS SO ORDERED.

/s/ Brian C. Wimes
BRIAN C. WIMES, JUDGE
UNITED STATES DISTRICT COURT

Dated: February 14, 2019

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

GEORGE W FISHER,)
Plaintiff,)
vs.) Case No. 2:19-cv-04008-BCW-P
JOHN GREGORY MERMELSTEIN,)
Defendants.)

ORDER

Plaintiff, who currently is confined at the Fulton State Hospital, in Fulton, Missouri, has filed *pro se* a civil rights action pursuant to 42 U.S.C. § 1983, seeking relief for certain claimed violations of his federally protected rights. For the reasons set forth below, (1) Plaintiff is granted provisional leave to proceed *in forma pauperis*, and (2) this case is DISMISSED without prejudice for failure to state a claim upon which relief may be granted.

Background

Plaintiff asserts claims against three defendants: (1) John Gregory Mermelstein, Missouri State Public Defender Deputy Director, (2) Margaret Muller Johnston, Missouri State Public Defender, and (3) State of Missouri. Doc. 1. As best as the Court can discern, Plaintiff's claims against Defendants Mermelstein and Johnston, both residing in Columbia, Missouri, concern issues in his state court action, *Fisher v. STL Psychiatric Rehab Ctr, et. al.*, Case No. 1522-CC00702, and claim he is being denied medical treatment for cobalt poisoning.

For relief, Plaintiff asserts numerous requests including that the Court issue an order directing the American Civil Liberties Union of Missouri to enter an appearance on his behalf and "enter orders and take actions consistant [sic] with the due process clause of the Fourteenth Amendment[.]" *Id.* at p. 10.

Standard

Pursuant to 28 U.S.C. § 1915A, the Court has the obligation to screen any complaint in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). When determining whether a plaintiff should be

allowed to proceed without paying fees, the Court uses a two-step process. *Martin-Trigona v. Stewart*, 691 F.2d 856, 857 (8th Cir. 1982). First, the Court must decide whether the plaintiff “qualifies by economic status” pursuant to 28 U.S.C. § 1915(a). *Id.* Second, if the Plaintiff does so qualify, the Court considers whether the complaint nonetheless should be dismissed because it is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from relief. *Id.* (citing 28 U.S.C. §§ 1915(e)(2)(B)(i)-(iii)).

In reviewing a *pro se* complaint at this early stage, the Court gives the complaint the benefit of every doubt, no matter how unlikely. *See Denton v. Hernandez*, 504 U.S. 25, 33 (1992). A “*pro se* complaint must be liberally construed, and ‘*pro se* litigants are held to a lesser pleading standard than other parties.’” *Whitson v. Stone Cnty. Jail*, 602 F.3d 920, 922 n.1 (8th Cir. 2010) (citations omitted). However, this standard does not excuse *pro se* complaints from alleging “sufficient facts to support the claims advanced.” *Stone v. Harry*, 364 F.3d 912, 914 (8th Cir. 2004); *see Frey v. City of Herculaneum*, 44 F.3d 667, 672 (8th Cir. 1995) (holding that *pro se* complaint fell “short of meeting even the liberal standard for notice pleading” where it was “entirely conclusory” and gave “no idea what acts the individual defendants were accused of that could result in liability”).

Discussion

A. Economic Status

Plaintiff is civilly committed. *Harmon v. Rogers*, No. 4:18-cv-00467-FJG, Doc. 5. As such, Plaintiff is not subject to the inmate account procedures and three-strikes rule contained within the Prison Litigation Reform Act (PLRA). *Kolocotronis v. Morgan*, 247 F. 3d 726, 728 (8th Cir. 2001). As in *Kolocotronis*, “[P]laintiff is simply an ordinary civil litigant seeking to proceed *in forma pauperis*.” *Id.* Therefore, the Court may grant Plaintiff leave to proceed *in forma pauperis*, depending upon his ability to pay the fees associated with this case under 28 U.S.C. § 1915(a)(1).

Here, the Court notes that Plaintiff has been confined and has not received any money in the past twelve months. Accordingly, the Court grants his motion to proceed *in forma pauperis*.

B. Grounds for Dismissal

Having determined that Plaintiff qualifies by economic status to proceed *in forma pauperis*, the Court must now decide whether Plaintiff meets the second prong of the *Martin-Trigona* test: whether the complaint is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from relief. *See* 28 U.S.C.

§§ 1915(e)(2)(B)(i)-(iii). To state a claim for relief under § 1983, a complaint must plead more than “legal conclusions” and “[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff must demonstrate a plausible claim for relief, which is more than a “mere possibility of misconduct.” *Id.* at 679. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678. Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. *Id.* at 679. A claim is frivolous if it lacks an arguable basis in fact or in law. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). The term “frivolous” in this context “embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.” *Id.*; *see also Wilson v. Johnston*, 68 Fed.Appx. 761 (8th Cir. 2003) (court may dismiss complaint proceeding *in forma pauperis* as “frivolous, and disregard clearly baseless, fanciful, fantastical, or delusional factual allegations”).

Here, Plaintiff’s claims are incoherent, conclusory, unsupported by sufficient factual content to state a claim under § 1983, and the allegations are fantastical and lack an arguable basis in fact or law. Plaintiff has failed to assert any specific claim against Defendants Mermelstein and Johnston, or to allege any facts that would suggest a plausible claim that Plaintiff’s constitutional rights were violated by Defendants’ actions. Although Plaintiff claims he is being denied medical care, Plaintiff does not state how Defendants Mermelstein and Johnston have prevented Plaintiff from obtaining the necessary treatment and care. As alleged, Plaintiff’s complaint only provides conclusory allegations that fail to rise to the level of a constitutional violation. Consequently, because Plaintiff has only provided conclusory allegations and failed to demonstrate a plausible claim for relief, which is more than a mere possibility of misconduct, this cause is dismissed without prejudice.

As to Defendant State of Missouri, suits against a state and “its agencies and institutions are barred by the Eleventh Amendment.” *Alabama v. Pugh*, 438 U.S. 781 (1978). Therefore, the State of Missouri is not a proper defendant in this action and is dismissed.

Therefore, after careful review of the complaint, the Court concludes that Plaintiff does not meet the second prong of the *Martin-Trigona* test as his complaint is legally frivolous, and his case is thus DISMISSED without prejudice.

Conclusion

Accordingly, it is **ORDERED** that:

- (1) Plaintiff is granted provisional leave to proceed *in forma pauperis*; and
- (2) this case is dismissed without prejudice.

IT IS SO ORDERED.

/s/ Brian C. Wimes
BRIAN C. WIMES, JUDGE
UNITED STATES DISTRICT COURT

DATED: August 13, 2019