

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

DEC 12 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JUSTIN ODELL LANGFORD,

Plaintiff-Appellant,

v.

WILLIAM G. COBB,

Defendant-Appellee.

No. 19-17008

D.C. No. 3:19-cv-00326-MMD-
CBC

District of Nevada, Reno

ORDER

Before: WALLACE, CANBY, and TASHIMA, Circuit Judges.

The district court certified that this appeal is frivolous and not taken in good faith. *See* 28 U.S.C. § 1915(a). On October 16, 2019 the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the response to the court's October 16, 2019 order, and the opening brief received on October 25, 2019, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 4) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

DISMISSED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JUSTIN ODELL LANGFORD,

Plaintiff,

v.

WILLIAM G. COBB,

Defendant.

Case No. 3:19-cv-00326-MMD-CBC

ORDER

Plaintiff Justin Odell Langford, who is in the custody of the Nevada Department of Corrections ("NDOC"), brings this action under 42 U.S.C. § 1983 against Magistrate Judge William G. Cobb for using Plaintiff's name in two screening orders in another case, which he contends violated his constitutional rights. (ECF No. 1-1 at 1, 4; see also ECF No. 5 at 5-6.) Plaintiff also submits an application to proceed *in forma pauperis* ("IFP Application"). (ECF No. 1.) Before the Court is the Report and Recommendation ("R&R" or "Recommendation") of United States Magistrate Judge Carla B. Carry (ECF No. 4) recommending that the Court grant the IFP Application, dismiss the proposed Complaint, assess a strike under 28 U.S.C. § 1915(g), and deny Plaintiff's motion for summary judgment as moot. Plaintiff filed an objection. (ECF No. 5.) The Court overrules Plaintiff's objection and adopts the R&R in full.

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party timely objects to a magistrate judge's report and recommendation, then the Court is required to "make a *de novo* determination of those portions of the [report and recommendation] to which objection is made." *Id.* Where a party fails to object, however,

1 the court is not required to conduct “any review at all . . . of any issue that is not the
2 subject of an objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Indeed, the Ninth
3 Circuit has recognized that a district court is not required to review a magistrate judge’s
4 report and recommendation where no objections have been filed. *See United States v.*
5 *Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003) (disregarding the standard of review
6 employed by the district court when reviewing a report and recommendation to which no
7 objections were made); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D.
8 Ariz. 2003) (reading the Ninth Circuit’s decision in *Reyna-Tapia* as adopting the view that
9 district courts are not required to review “any issue that is not the subject of an objection.”).
10 Thus, if there is no objection to a magistrate judge’s recommendation, then the Court may
11 accept the recommendation without review. *See, e.g., Johnstone*, 263 F. Supp. 2d at
12 1226 (accepting, without review, a magistrate judge’s recommendation to which no
13 objection was filed).

14 The Court agrees with Judge Carry that Plaintiff’s IFP Application should be
15 granted because he has shown that he cannot pay the filing fee. (ECF No. 4 at 2.) Plaintiff
16 objects to Judge Carry’s recommendation on the ground that the IFP Application is a
17 contract “entered into based upon fraud.” (ECF No. 5 at 5.) The fraud Plaintiff identifies
18 relates to his belief that paper currency is a debt and that “debt can’t pay debt.” (*Id.* at 5-
19 6.) Regardless of Plaintiff’s beliefs, his Complaint cannot be filed unless he pays the \$350
20 filing fee, 28 U.S.C. § 1914, or submits an IFP Application seeking court authorization to
21 commence a suit without prepayment of fees, *see id.* § 1915. Plaintiff submitted an IFP
22 Application that shows he cannot pay the \$350 filing fee. (ECF No. 1.) Accordingly,
23 Plaintiff’s objection is overruled.

24 Moreover, the Court agrees with Judge Carry that the Complaint should be
25 dismissed for failure to state a claim. First, Defendant Judge Cobb is entitled to judicial
26 immunity. (ECF No. 4 at 3-4.) Plaintiff objects that immunity does not apply here (ECF
27 No. 5 at 4-5), but his argument is unpersuasive. Moreover, Plaintiff’s Complaint lacks a
28 legal cause of action. Plaintiff alleges violations of his constitutional rights (ECF No. 1-1

1 at 2) but contends he is not bringing his lawsuit under 42 U.S.C. § 1983 (ECF No. 5 at 2).
2 Indeed, Plaintiff's Complaint does not allege a cause of action under § 1983. (ECF No. 1-
3 1 at 2.) Furthermore, § 1983 is the exclusive remedy for the constitutional deprivations
4 Plaintiff alleges in the Complaint.

5 The Court also agrees with Judge Carry in assessing a strike under 28 U.S.C. §
6 1915(g) based on Plaintiff's failure to state a claim.¹ (ECF No. 4 at 4.) Plaintiff fails to state
7 a claim because he has not identified a cause of action and because Judge Cobb is
8 entitled to judicial immunity. While judicial immunity is an affirmative defense, see
9 *Hiramanek v. Clark*, No. C-13-0228 EMC, 2014 WL 107634, at *7 (N.D. Cal. Jan. 10,
10 2014), that affirmative defense appears on the face of the Complaint. Plaintiff identifies
11 Judge Cobb as a United States Magistrate Judge and explains that his Complaint arises
12 from Judge Cobb's judicial orders. (See ECF No. 1-1 at 2-3.) Thus, it is appropriate to
13 assess a strike. See *El-Shaddai v. Zamora*, 833 F.3d 1036, 1044 (9th Cir. 2016).

14 It is therefore ordered that Judge Carry's Report and Recommendation (ECF No.
15 4) is adopted in full.

16 It is further ordered that Plaintiff's application to proceed *in forma pauperis* (ECF
17 No. 1) without having to prepay the full filing fee is granted. The Clerk of Court is instructed
18 to file the Complaint. (ECF No. 1-1). Plaintiff will not be required to pay an initial
19 installment fee. Nevertheless, the full filing fee will still be due, pursuant to 28 U.S.C. §
20 1915, as amended by the Prisoner Litigation Reform Act. Plaintiff is permitted to maintain
21 this action to conclusion without the necessity of prepayment of fees or costs or the giving
22 of security therefor. This order granting *in forma pauperis* status will not extend to the
23 issuance and/or service of subpoenas at government expense.

24 ¹Plaintiff objects that he has filed a "regular civil suit," not a § 1983 action, and
25 therefore his Complaint should not have been screened by Judge Carry and cannot be
26 assessed a strike. (ECF No. 5 at 2, 8.) This objection is unpersuasive because Plaintiff
27 has no way of advancing his constitutional claims except through 42 U.S.C. § 1983. (See
28 ECF No. 1-1 at 2 (alleging violations of constitutional rights).) Moreover, the Court is
required to screen Plaintiff's Complaint under 28 U.S.C. § 1915(a)(1) because he is
seeking *in forma pauperis* status. See *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir.
2000).

1 It is further ordered that, pursuant to 28 U.S.C. § 1915, as amended by the PLRA,
2 the NDOC must pay to the Clerk of the United States District Court, District of Nevada,
3 20% of the preceding month's deposits to the account of Justin Odell Langford, #1159546
4 (in months that the account exceeds \$10.00) until the full \$350 filing fee has been paid
5 for this action. The Clerk is instructed to send a copy of this order to the attention of Chief
6 of Inmate Services for the Nevada Department of Prisons, P.O. Box 7011, Carson City,
7 NV 89702.

8 It is further ordered that, even though this action will be dismissed, the full filing fee
9 will still be due, pursuant to 28 U.S.C. §1915, as amended by the PLRA.

10 It is further ordered that the Complaint (ECF No. 1-1) is dismissed for failure to
11 state a claim. Plaintiff is also assessed a strike under 28 U.S.C. § 1915(g) based on that
12 dismissal.

13 It is further ordered that Plaintiff's motion for summary judgment (ECF No. 3) is
14 denied as moot.

15 This Court certifies that any *in forma pauperis* appeal from its order of dismissal
16 would be frivolous or would not be taken "in good faith" pursuant to 28 U.S.C. §
17 1915(a)(3).

18 The Clerk of Court is directed to enter judgment in accordance with this order and
19 close this case.

20 DATED THIS 27th day of September 2019.

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23 MIRANDA M. DU
24 CHIEF UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JUSTIN ODELL LANGFORD,

Plaintiff,

v.

WILLIAM G. COBB,

Defendant.

3:19-cv-00326-MMD-CBC

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹**

Before the Court is Plaintiff Justin Odell Langford's ("Langford"), application to proceed *in forma pauperis* (ECF No. 1), his *pro se* civil rights complaint (ECF No. 1-1), and his motion for summary judgment (ECF No. 3). For the reasons stated below, the Court recommends that Langford's *in forma pauperis* application (ECF No. 1) be granted, his complaint (ECF No. 1-1) be dismissed for failure to state a claim, and his motion for summary judgment (ECF No. 3) be denied as moot.

I. IN FORMA PAUPERIS APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]."

¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 The application must be made on the form provided by the court and must include a financial
2 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

3 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with some
4 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir.
5 1981) (quotation marks and citation omitted). A litigant need not "be absolutely destitute to
6 enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331,
7 339 (1948).

8 A review of the application to proceed IFP reveals Langford cannot pay the filing fee;
9 therefore, the Court recommends that the application be granted.

10 **II. SCREENING STANDARD**

11 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A
12 provides, in relevant part, that "the court shall dismiss the case at any time if the court
13 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim
14 upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is
15 immune from such relief." 28 U.S.C. § 1915A(b). A complaint is frivolous when "it lacks an
16 arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). This
17 includes claims based on legal conclusions that are untenable (e.g., claims against
18 defendants who are immune from suit or claims of infringement of a legal interest which
19 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
20 delusional scenarios). *Id.* at 327–28; see also *McKeever v. Block*, 932 F.2d 795, 798 (9th
21 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same
22 standard applied in the context of a motion to dismiss under Federal Rule of Civil Procedure
23 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which requires dismissal
24 where the complaint fails to "state a claim for relief that is plausible on its face," *Bell Atl.*
25 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

26 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*
27 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must

1 accept as true all well-pled factual allegations, set aside legal conclusions, and verify that
2 the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679
3 (2009). The complaint need not contain detailed factual allegations, but must offer more
4 than “a formulaic recitation of the elements of a cause of action” and “raise a right to relief
5 above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is taken in reviewing
6 the pleadings of a *pro se* party, for a more forgiving standard applies to litigants not
7 represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Still, a liberal
8 construction may not be used to supply an essential element of the claim not initially pled.
9 *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is appropriate, a *pro se*
10 plaintiff should be given leave to amend the complaint and notice of its deficiencies, unless
11 it is clear that those deficiencies cannot be cured. *Cato v. United States*, 70 F.3d 1103,
12 1107 (9th Cir. 1995).

13 III. SCREENING OF COMPLAINT

14 In his complaint, Langford, an inmate currently in the custody of the Nevada
15 Department of Corrections (“NDOC”), sues Defendant Magistrate Judge William G. Cobb
16 (“Judge Cobb”) under 42 U.S.C. § 1983. (See ECF No. 1-1 at 1-2). Langford alleges the
17 following: On March 20, 2019, Langford filed a Civil Rights complaint against various NDOC
18 officials in case number 3:19-cv-00155-MMD-WGC. (*Id.* at 2). Judge Cobb used Langford’s
19 “strawman” in two orders in the civil rights lawsuit. (*Id.* at 2-3). Langford filed a “billing
20 invoice” for Judge Cobb’s use of the “strawman” and violation of Langford’s “rights and
21 contract.” (*Id.* at 3-4). Judge Cobb has “failed to challenge said violation and chosen to
22 remain silent” and “now [it] is time for him to pay his debt.” (*Id.* at 4). Langford requests
23 \$1.5 million in damages. (*Id.*)

24 It is well-established that “[j]udges and those performing judge-like functions are
25 absolutely immune from damage liability for acts performed in their official capacities.”
26 *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc). The scope of judicial
27 immunity is broadly construed so as to promote the underlying goal of independent and

1 disinterested judicial decision-making. *Id.* at 1078. As such, judicial immunity applies no
2 matter "how erroneous the act may have been, and however injurious in its consequences
3 it may have proved to the plaintiff," and is unaffected by motive or intent. *Id.* at 1075, 1078
4 (quoting *Cleavinger v. Saxner*, 474 U.S. 193, 199-200, 106 S.Ct. 496, 88 L.Ed.2d 507
5 (1985)); *see also Stump v. Sparkman*, 435 U.S. 349, 356, 98 S.Ct. 1099, 55 L.Ed.2d 331
6 (1978).

7 Judicial immunity is subject to two qualifications. "First, the immunity covers only
8 those acts which are 'judicial in nature.'" *O'neil v. City of Lake Oswego*, 642 F.2d 367, 369
9 (9th Cir. 1981) (quoting *Stump*, 435 U.S. at 360-64). Second, a judge may be held liable
10 when he or she "acted in the 'clear absence of all jurisdiction.'" *Id.* (quoting *Stump*, 435 U.S.
11 at 356-57). Neither circumstance is present here. Langford accuses Judge Cobb of issuing
12 orders using Langford's "strawman," which the Court assumes is Langford's name. Issuing
13 orders is clearly "judicial in nature." *O'neil*, 642 F.2d at 369. Accordingly, the Court
14 recommends that the complaint be dismissed for failure to state a claim.

15 The Court intends for this dismissal to be considered a strike under 28 U.S.C. §
16 1915(g) and recommends that the District Court assess a strike based on a dismissal for
17 failure to state a claim. Finally, because the Court recommends dismissal of the complaint,
18 the Court recommends that Langford's motion for summary judgment (ECF No. 3) be denied
19 as moot.

20 **IV. CONCLUSION**

21 For the reasons articulated above, the Court recommends that Langford's application
22 to proceed *in forma pauperis* (ECF No. 1) be granted, that Langford's complaint (ECF No.
23 1-1) be dismissed for failure to state a claim, and that the motion for summary judgment
24 (ECF No. 3) be denied as moot.

25 The parties are advised:

26 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
27 Practice, the parties may file specific written objections to this Report and Recommendation

1 within fourteen days of receipt. These objections should be entitled "Objections to
2 Magistrate Judge's Report and Recommendation" and should be accompanied by points
3 and authorities for consideration by the District Court.

4 2. This Report and Recommendation is not an appealable order and any notice
5 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District
6 Court's judgment.

7 **V. RECOMMENDATION**

8 **IT IS THEREFORE RECOMMENDED** that Langford's application to proceed *in forma*
9 *pauperis* (ECF No. 1) be **GRANTED**;

10 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** Langford's complaint (ECF
11 No. 1-1);

12 **IT IS FURTHER RECOMMENDED** that Langford's complaint (ECF No. 1-1) be
13 **DISMISSED** for failure to state a claim;

14 **IT IS FURTHER RECOMMENDED** that Langford be assessed a strike under 28
15 U.S.C. § 1915(g); and

16 **IT IS FURTHER RECOMMENDED** that the motion for summary judgment (ECF No.
17 3) be **DENIED** as moot.

18 **DATED:** August 28, 2019.

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UNITED STATES MAGISTRATE JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**