

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JAN 13 2021

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

JASON ALAN SMITH,

No. 20-35703

Plaintiff-Appellant,

D.C. No. 3:19-cv-06199-BHS  
Western District of Washington,  
Tacoma

v.

CITY OF BREMERTON,

ORDER

Defendant-Appellee.

Before: WARDLAW, CHRISTEN, and MILLER, Circuit Judges.

Upon a review of the record, the response to the October 30, 2020 order to show cause, and the opening brief received on October 1, 2020, we conclude this appeal is frivolous. We therefore deny appellant's motions to proceed in forma pauperis (Docket Entry Nos. 2 and 6), *see* 28 U.S.C. § 1915(a), and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

All other pending motions are denied as moot.

**DISMISSED.**

FILED

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

OCT 30 2020

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

JASON ALAN SMITH,

Plaintiff-Appellant,

v.

CITY OF BREMERTON,

Defendant-Appellee.

No. 20-35703

D.C. No. 3:19-cv-06199-BHS  
Western District of Washington,  
Tacoma

ORDER

A review of the record suggests that this appeal may be frivolous. An appeal is considered frivolous “when the result is obvious or the appellant’s arguments are wholly without merit.” *Blixseth v. Yellowstone Mountain Club, LLC*, 796 F.3d 1004, 1007 (9th Cir. 2015). This court may dismiss a case at any time, if the court determines the case is frivolous. *See* 28 U.S.C. § 1915(e)(2).

Within 35 days after the date of this order, appellant must:

- (1) file a motion to dismiss this appeal, *see* Fed. R. App. P. 42(b); OR
- (2) file a statement explaining why the appeal is not frivolous and should go forward.

If appellant does not move to dismiss this appeal, the court may dismiss the appeal as frivolous, without further notice. Any determination of whether the appeal is frivolous will be based on the opening brief received on October 6, 2020, and appellant’s statement, if any, in response to this order.

The briefing schedule for this appeal remains stayed.

The Clerk shall serve on appellant: (1) a form motion to voluntarily dismiss the appeal, and (2) a form statement that the appeal should go forward. Appellant may use the enclosed forms for any motion to dismiss this appeal or statement that the appeal should go forward.

FOR THE COURT:

MOLLY C. DWYER  
CLERK OF COURT

By: Lance C. Cidre  
Deputy Clerk  
Ninth Circuit Rule 27-7

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JASON ALAN SMITH,

CASE NO. C19-6199 BHS

Plaintiff,

## ORDER ADOPTING REPORT AND RECOMMENDATION

## CITY OF BREMERTON,

Defendant.

This matter comes before the Court on the Report and Recommendation (“R&R”)

of the Honorable David W. Christel, United States Magistrate Judge, Dkt. 7, and Plaintiff

Jason Alan Smith's ("Smith") objections to the R&R. Dkt. 8

On December 12, 2019, Smith filed a motion for leave to proceed in forma

pauperis, a proposed complaint, and a motion to appoint counsel. Dkt. 1. On January 6,

<sup>2020</sup> Judge Christel dismissed the complaint without prejudice, granted leave to amend

and renoted Smith's motion to proceed in forma pauperis, Dkt. 3. On February 6, 2020,

Smith responded, Dkt. 4. On February 21, 2020, Judge Christel ordered Smith to file an

amended complaint and rejected Smith's application to proceed in forma pauperis. Dkt. #10.

1 On March 6, 2020, Smith filed a proposed amended complaint. Dkt. 6. On March 27,  
2 2020, Judge Christel issued the R&R recommending that the Court deny Smith's  
3 application to proceed in forma pauperis and dismiss Smith's claims without prejudice.  
4 Dkt. 7. On April 16, 2020, Smith filed objections. Dkt. 8.

5 The district judge must determine de novo any part of the magistrate judge's  
6 disposition that has been properly objected to. The district judge may accept, reject, or  
7 modify the recommended disposition; receive further evidence; or return the matter to the  
8 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

9 Smith's proposed amended complaint names four defendants—the City of  
10 Bremerton ("City"), City Attorney Roger Lubovich ("Lubovich"), Mayor Greg Wheeler  
11 ("Wheeler"), and Bremerton Police Chief Jim Burchett ("Burchett"). Dkt. 6. It describes  
12 a series of events beginning with an incident where Smith was detained on November 23,  
13 2018 by members of the Bremerton Police Department, Smith's subsequent attempt to  
14 report the incident, and two instances of damage to his vehicle (vandalism including  
15 license plate tab defacement, as well as later removal of a brake caliper bolt) that he  
16 suspects were caused by the police. *Id.* Following these events, Smith asked Wheeler for  
17 assistance and filed five tort claims with the City Attorney's office. *Id.*

18 In his objections, Smith first requests that the Court vacate the referral to Judge  
19 Christel, arguing that referral to a magistrate judge is inappropriate because the referral is  
20 on a dispositive matter. Dkt. 8 at 1. This objection is without merit, because Fed. R. Civ.  
21 P. 72(b) permits referral of dispositive motions to a magistrate judge. The magistrate  
22 judge then reviews the motion and provides a recommended disposition which the district

1 judge then reviews and accepts, rejects, or modifies after the parties are afforded time to  
 2 file objections. Fed. R. Civ. P. 72(b)

3         Second, Smith refers to video and audio evidence, which he argues is on file with  
 4 the Clerk's office along with a copy of a letter from the City Attorney's office denying  
 5 the five tort claims he filed. *Id.* at 4.<sup>1</sup> Smith argues Judge Christel should have considered  
 6 this evidence and should consider that he can gather other evidence supporting his claims.  
 7 *Id.* at 4–6. However, proof of Smith's allegations is not relevant to the question of  
 8 whether his proposed amended complaint states a claim against the named defendants. In  
 9 considering whether a complaint states a claim, Judge Christel was required to, and did,  
 10 assume that the facts Smith pled are true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

11         Third, Smith argues that he did not consent to have his case heard by a magistrate  
 12 judge, and it was thus inappropriate for Judge Christel to dismiss his first proposed  
 13 complaint. Dkt. 8 at 3 (citing Dkt. 3). However, when a party seeks to proceed in forma  
 14 pauperis, the Court must screen the complaint to determine whether it states a claim.  
 15 *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc) (citing 28 U.S.C.  
 16 § 1915(e)). *See also Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (28 U.S.C.  
 17 § 1915(e)(2)(B) is not limited to prisoners). Judge Christel's initial screening order, Dkt.  
 18 3, issued on January 6, 2020, was non-dispositive—it determined Smith's proposed  
 19 complaint did not state a claim, granted leave to amend, and renoted his petition to  
 20 proceed in forma pauperis. *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

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21  
 22         <sup>1</sup> Smith appears to refer to filings in his other pending case, C19-5479-BHS, Dkt. 7,  
 Objections/Response to R&R, and Dkt. 8, Notice of Filing SD Media Card with Digitized Evidence.

1 Objections to a magistrate's order in a non-dispositive matter must be made within 14  
 2 days. Fed. R. Civ. P. 72(a). Even if Smith's objection was timely, it is without merit as  
 3 Judge Christel's order concluding Smith had failed to state a claim against the named  
 4 defendants was not "clearly erroneous" or "contrary to law" for the same reasons the  
 5 instant proposed amended complaint fails to state a claim against the named defendants.

6 *Id.*

7 Fourth, Smith disputes Judge Christel's characterization of the facts alleged in his  
 8 proposed amended complaint. Dkt. 8 at 5–7. The problem, as Judge Christel explained, is  
 9 that even liberally construed, the complaint does not plausibly allege facts showing how  
 10 the named defendants—the City, Lubovich, Wheeler, or Burchett—caused or personally  
 11 participated in causing constitutional injuries or violations of federal law. Dkt. 7 at 4.  
 12 Smith provides conclusory additional allegations in his objections, arguing that his suit is  
 13 for hiring "faulty agents and officers," for "what must be a dismal lapse in training," for  
 14 retaining the "faulty agents and officers," for failing to protect Smith and supporting  
 15 retaliatory actions against him, and for not investigating his early complaints. Dkt. 8 at  
 16 12.

17 A local government may be held liable under 28 U.S.C. § 1983 "when  
 18 implementation of its official policies or established customs inflicts the constitutional  
 19 injury," *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691–92 (1978), when an omission  
 20 such as a pervasive failure to train amounts to an official policy, *Clouthier v. Cty. of*  
 21 *Contra Costa*, 591 F.3d 1232, 1249 (9th Cir. 2012) *overruled on other grounds by Castro*  
 22 *v. Cty. of LA*, 833 F.3d 1060, 1070 (9th Cir. 2016), or when an official with final policy-

1 making authority “ratified a subordinate’s unconstitutional decision or the action and the  
2 basis for it,” *Gilette v. Delmore*, 979 F.2d 1342, 1346–47 (9th Cir. 1992). Judge Christel  
3 previously informed Smith that he should allege facts showing how the named defendants  
4 caused or personally participated in causing the harm alleged and what specific  
5 constitutional right that harm infringed. Dkt. 3 at 4 (citing *Albright v. Oliver*, 510 U.S.  
6 266, 271 (1994); *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981)). Smith’s proposed  
7 amended complaint does not describe the policies or customs he believes caused harm or  
8 how they are attributable to the City, does not identify the type of training he believes is  
9 lacking or how that lack of training amounts to an official policy, and does not explain  
10 how the policies, customs, or actions he describes were created or caused by the City or  
11 through the personal participation of Burchett, Lubovich, or Wheeler. Nor does it explain  
12 how Lubovich or Wheeler’s alleged conduct violated a particular constitutional right.  
13 Even liberally construing a complaint, the Court “may not supply essential elements of  
14 the claim that were not initially pled.” *Ivey v. Board of Regents of Univ. of Alaska*, 673  
15 F.2d 266, 268 (9th Cir. 1982). Therefore, Smith’s objections to the R&R’s  
16 characterization of his allegations are without merit.

17 The Court having considered the R&R, Smith’s objections, and the remaining  
18 record, does hereby find and order as follows:

- 19 (1) The R&R is **ADOPTED**;
- 20 (2) Smith’s application to proceed in forma pauperis, Dkt. 1, is **DENIED** and  
21 the case is **DISMISSED without prejudice**; and

1 (3) The Clerk shall enter a **JUDGMENT** and close the case.

2 Dated this 7th day of July, 2020.

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BENJAMIN H. SETTLE  
United States District Judge

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JASON ALAN SMITH,

Plaintiff,

V.

## CITY OF BREMERTON.

Defendant.

CASE NO. 3:19-CV-6199-BHS-DWC

## REPORT AND RECOMMENDATION

Noting Date: April 17, 2020

Plaintiff Jason Allen Smith, proceeding *pro se*, filed this action alleging violations of his constitutional rights. *See* Dkt. 6. The District Court has referred Plaintiff's pending Application to Proceed *In Forma Pauperis* ("IFP") and Proposed Complaint to United States Magistrate Judge David W. Christel pursuant to Amended General Order 02-19.

Having reviewed and screened Plaintiff's Proposed Amended Complaint under 28 U.S.C. § 1915(e)(2), the Court finds Plaintiff has failed to state a claim. The Court recommends the Application to Proceed IFP be denied and the Proposed Amended Complaint be dismissed.

1       **I.     Background**

2           **A. Procedural History**

3           On January 6, 2020, the undersigned reviewed Plaintiff's Proposed Complaint and  
4 determined it failed to state a claim upon which relief could be granted. Dkt. 3. The Court  
5 dismissed the Proposed Complaint and directed Plaintiff to file an amended pleading that could  
6 cure the deficiencies identified by the Court. *Id.* On February 6, 2020, Plaintiff filed a response  
7 to the Court's Order. Dkt. 3. The Court instructed Plaintiff to file an amended complaint or face  
8 dismissal of this action. Dkt. 5. Plaintiff filed the Proposed Amended Complaint on March 6,  
9 2020. Dkt. 6.

10          **B. Factual Allegations**

11          In the Proposed Amended Complaint, Plaintiff alleges his constitutional rights were  
12 violated arising from a series of events related to an initial encounter with Bremerton police  
13 officers. *See* Dkt. 6. Plaintiff contends Officer Ejde violated Plaintiff's constitutional rights in an  
14 AutoZone parking lot by retaliating and using excessive force against Plaintiff. *Id.* at p. 10. He  
15 contends Sergeant Garrity failed to intervene and refused to document Plaintiff's complaint. *Id.*  
16 Later, Plaintiff's vehicle was vandalized and Plaintiff believes Tom Wolfe, a police officer, was  
17 aware the police would make a pretextual stop regarding Plaintiff's vehicle tabs. *Id.* at p. 11.  
18 Plaintiff states his brakes were damaged after the pretextual stop. *Id.* at p. 12. After someone  
19 tampered with Plaintiff's brakes, Sheriff Deputy McGovern refused to document Plaintiff's  
20 complaint regarding Plaintiff's ongoing issues with the Bremerton Police Department. *Id.*  
21 Plaintiff states he contacted the mayor, but the mayor's responses seemed to be timed with the  
22 acts of vandalism to his vehicle. *Id.* Plaintiff also states he filed five lawsuits with the city  
23 attorney and all the lawsuits were denied by the city attorney's office. *Id.* Plaintiff does not name  
24 Ejde, Garrity, Wolfe, or McGovern as defendants in this action. *See* Dkt. 6.

1           **II.     Discussion**

2           The district court may permit indigent litigants to proceed IFP upon completion of a  
 3 proper affidavit of indigency. *See* 28 U.S.C. § 1915(a). However, the “privilege of pleading *in*  
 4 *forma pauperis* . . . in civil actions for damages should be allowed only in exceptional  
 5 circumstances.” *Wilborn v. Escalderon*, 789 F.2d 1328 (9th Cir. 1986). The Court has broad  
 6 discretion in denying an application to proceed IFP. *Weller v. Dickson*, 314 F.2d 598 (9th Cir.  
 7 1963), *cert. denied* 375 U.S. 845 (1963).

8           Notwithstanding IFP status, the Court must subject each civil action commenced pursuant  
 9 to 28 U.S.C. § 1915(a) to mandatory screening and order the *sua sponte* dismissal of any case  
 10 that is “frivolous or malicious,” “fails to state a claim on which relief may be granted,” or “seeks  
 11 monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B);  
 12 *see also* *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C. §  
 13 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir.  
 14 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not only permits but requires” the court to *sua*  
 15 *sponte* dismiss an IFP complaint that fails to state a claim). An IFP complaint is frivolous if “it  
 16 ha[s] no arguable substance in law or fact.” *Tripati v. First Nat'l Bank & Trust*, 821 F.2d 1368,  
 17 1369 (9th Cir. 1987) (citing *Rizzo v. Dawson*, 778 F.2d 527, 529 (9th Cir. 1985); *see also*  
 18 *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984).

19           A *pro se* plaintiff’s complaint is to be construed liberally, but like any other complaint it  
 20 must nevertheless contain factual assertions sufficient to support a facially plausible claim for  
 21 relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550  
 22 U.S. 544, 570 (2007)). A claim for relief is facially plausible when “the plaintiff pleads factual  
 23 content that allows the court to draw the reasonable inference that the defendant is liable for the  
 24 misconduct alleged.” *Iqbal*, 556 U.S. at 678.

1 In the Proposed Amended Complaint, Plaintiff alleges his constitutional rights were  
 2 violated under 42 U.S.C. § 1983. Dkt. 6. To state a claim for relief under § 1983, a plaintiff must  
 3 show: (1) he suffered a violation of rights protected by the Constitution or created by federal  
 4 statute, and (2) the violation was proximately caused by a person acting under color of state law.  
 5 *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The first step in a § 1983 claim is  
 6 therefore to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510  
 7 U.S. 266, 271 (1994). To satisfy the second prong, a plaintiff must allege facts showing how  
 8 individually named defendants caused, or personally participated in causing, the harm alleged in  
 9 the complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

10 Plaintiff names the City of Bremerton, City Attorney Roger Lubovich, Mayor Greg  
 11 Wheeler, and Bremerton Police Chief Jim Burchett as Defendants in this action. *See* Dkt. 6. The  
 12 Proposed Amended Complaint, however, contains no allegations regarding any wrong-doing by  
 13 the City of Bremerton or Chief Burchett. *See* Dkt. 6, pp. 10-12. While the allegations in his  
 14 Proposed Amended Complaint appear to have occurred in Bremerton, Washington and involve  
 15 the Bremerton Police Department, Plaintiff has not explained how the City of Bremerton or  
 16 Defendant Burchett violated his constitutional rights. Therefore, Petitioner failed to state a claim  
 17 against the City of Bremerton and Defendant Burchett.

18 Further, the Proposed Amended Complaint contains only bare allegations against  
 19 Defendants Lubovich and Wheeler. *See id.* at p. 12. Plaintiff alleges he “filed five tort claims  
 20 with the city attorney” and all his “claims were denied by the city attorney[’s] office.” *Id.*  
 21 Plaintiff does not allege facts showing Defendant Lubovich, the city attorney, was in receipt of  
 22 Plaintiff’s claims or was the individual responsible for denying the claims. *See id.* Regardless,  
 23 Plaintiff has not shown how the alleged denial of his claims by the city attorney’s office violated  
 24 his constitutional rights.

1 Plaintiff also contends he contacted “the mayor seeking official assistance to resolve the  
 2 issues” and the mayor’s responses “seemed to be very oddly timed with the acts of vandalism  
 3 and destruction to the car brakes.” *Id.* There are no allegations regarding Defendant Wheeler’s  
 4 alleged responses to Plaintiff’s requests for assistance, nor any explanation regarding the  
 5 assistance Plaintiff sought. Moreover, there are no allegations Defendant Wheeler violated  
 6 Plaintiff’s constitutional rights or vandalized Plaintiff’s vehicle. These thread-bare allegations  
 7 are insufficient to state a claim against either Defendant Lubovich or Wheeler.

8 As Plaintiff has provided only conclusory allegations that fail to show his constitutional  
 9 rights were violated by the named Defendants, the Proposed Amended Complaint fails to state a  
 10 claim upon which relief can be granted. *See Iqbal*, 556 U.S. at 678 (2009) (a pleading must be  
 11 more than an “unadorned, the-defendant-unlawfully-harmed-me accusation”); *see also Twombly*,  
 12 550 U.S. at 545 (to state a claim for relief, “[f]actual allegations must be enough to raise a right  
 13 to relief above the speculative level”).

14 The Ninth Circuit has “established that a pro se litigant bringing a civil rights suit must  
 15 have an opportunity to amend the complaint to overcome deficiencies unless it is clear that they  
 16 cannot be overcome by amendment.” *Eldridge v. Block*, 832 F.2d 1132, 1135-36 (9th Cir. 1987).  
 17 Plaintiff has been allowed to amend his Proposed Complaint and the Court instructed Plaintiff  
 18 regarding the deficiencies of his Proposed Complaint. *See* Dkt. 3. The Court also instructed  
 19 Plaintiff that he must allege facts showing how individually named defendants caused, or  
 20 personally participated in causing, the harm alleged to state a claim for relief. *Id.* Furthermore,  
 21 Plaintiff is proceeding in a separate case on the underlying events alleged in the Proposed  
 22 Amended Complaint. *See Smith v. Bremerton Police Department, et al.*, 3:19-CV-5479-BHS  
 23 (W.D. Wash.). Therefore, the Court recommends Plaintiff not be given additional leave to  
 24 amend. *See Swearington v. California Dep’t of Corr. & Rehab.*, 624 F. App’x 956, 959 (9th Cir.

1 2015) (finding the district court did not abuse its discretion in dismissing without leave to amend  
2 because the plaintiff did not cure the complaint's deficiencies despite the district court's specific  
3 instructions about how to do so); *see also Fid. Fin. Corp. v. Fed. Home Loan Bank of San*  
4 *Francisco*, 792 F.2d 1432, 1438 (9th Cir.1986) ("The district court's discretion to deny leave to  
5 amend is particularly broad where the court has already given the plaintiff an opportunity to  
6 amend his complaint.").

7 **III. Conclusion**

8 As Plaintiff has failed to state a claim upon which relief may be granted, the Court  
9 recommends the Application to Proceed IFP (Dkt. 1) be denied and this case be dismissed  
10 without prejudice.

11 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
12 Procedure, the parties shall have fourteen (14) days from service of this Report to file written  
13 objections. *See also Fed. R. Civ. P. 6.* Failure to file objections will result in a waiver of those  
14 objections for purposes of appeal. *Thomas v Arn*, 474 U.S. 140 (1985). Accommodating the time  
15 limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on April 17,  
16 2020, as noted in the caption.

17 Dated this 27th day of March, 2020.

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David W. Christel  
United States Magistrate Judge

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JASON ALAN SMITH,

Plaintiff,

V.

## SARGENT GARRITY,

Defendant.

CASE NO. C19-6200 BHS

ORDER DISMISSING  
COMPLAINT WITHOUT  
PREJUDICE

13 This matter comes before the Court on the Honorable Theresa L. Fricke's, United  
14 States Magistrate Judge, order to show cause, Dkt. 3, and Plaintiff Jason Smith's  
15 ("Smith") response, Dkt. 4.

16 On December 13, 2019, Smith filed a motion to proceed *in forma pauperis* and a  
17 proposed complaint. Dkts. 1, 1-1. On April 20, 2020, Judge Fricke issued an order to  
18 show cause why the complaint should not be dismissed without prejudice because it is  
19 duplicative of *Smith v. Bremerton Police Dep’t.*, C19-5479-BHS. Dkt. 3. On May 20,  
20 2020, Smith responded and informed the Court that he was gathering more information  
21 and that he seeks to hold Defendant Sargent Garrity personally liable for the alleged  
22 violations of Smith’s civil rights. Dkt. 4. Smith, however, fails to respond to the main

1 issue of a duplicative proceeding. Therefore, the Court **DISMISSES** the complaint  
2 without prejudice as duplicative.

3 **IT IS SO ORDERED.**

4 Dated this 10th day of June, 2020.

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BENJAMIN H. SETTLE  
United States District Judge

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JASON ALAN SMITH,

Plaintiff,

V.

D. EDJE,

Defendant.

CASE NO. C19-5479 BHS

ORDER DISMISSING  
COMPLAINT WITHOUT  
PREJUDICE AND REVOKING *IN  
FORMA PAUPERIS* STATUS

This matter comes before the Court on review of the file.

14 On November 19, 2019, the Court dismissed the majority of Plaintiff Jason Alan  
15 Smith’s (“Smith”) claims and granted him leave to amend his claim against Defendant D.  
16 Ejde. Dkt. 10. The Court set a deadline of December 13, 2019 for Smith to file an  
17 amended complaint. *Id.* On January 30, 2020, the Court denied Smith’s motion to  
18 appoint counsel and reset the deadline for an amended complaint to February 21, 2020.  
19 Dkt. 12. On February 19, 2020, Smith submitted a letter, Dkt. 13, and on February 20,  
20 2020, Smith responded to the Court’s order denying his motion to appoint, Dkt. 14.  
21 Neither of these filings constitute an amended complaint.

1 On June 10, 2020, the Court requested Smith to show cause why his complaint...  
2 should not be dismissed without prejudice for failure to prosecute. Dkt. 15. The Court  
3 set June 26, 2020 as the deadline for any response. As of today's date, Smith has failed  
4 to respond. Therefore, the Court **DISMISSES without prejudice** Smith's complaint and  
5 **REOVES** his *in forma pauperis* status for purposes of appeal.

6 **IT IS SO ORDERED.**

7 Dated this 7th day of July, 2020.

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10 BENJAMIN H. SETTLE  
United States District Judge

United States District Court  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JASON ALAN SMITH,

Plaintiff,

v.

CITY OF BREMERTON,

Defendant.

**JUDGMENT IN A CIVIL CASE**

Case No. 3:19-CV-06199-BHS

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT:

The Report and Recommendation is adopted and approved. Plaintiff's Amended Proposed Complaint is DISMISSED WITHOUT PREJUDICE and this case is closed.

Dated this \_\_\_\_\_ day of Pick date..

WILLIAM M. MCCOOL  
Clerk

Deputy Clerk

1 HONORABLE RONALD B. LEIGHTON  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

9 JASON SMITH,

CASE NO. 3:19-cv-06187-RBL

10 v. Plaintiff,

ORDER

11 TOM WOLFE,

12 Defendant.

13  
14 THIS MATTER is before the Court on Plaintiff Jason Smith's Motion to Proceed In  
15 Forma Pauperis, supported by his Declaration and Proposed Complaint. Dkt. # 1.

16 A district court may permit indigent litigants to proceed *in forma pauperis* upon  
17 completion of a proper affidavit of indigency. *See* 28 U.S.C. § 1915(a). The court has broad  
18 discretion in resolving the application, but "the privilege of proceeding *in forma pauperis* in civil  
19 actions for damages should be sparingly granted." *Weller v. Dickson*, 314 F.2d 598, 600 (9th Cir.  
20 1963), *cert. denied* 375 U.S. 845 (1963). The standard governing *in forma pauperis* eligibility  
21 under 28 U.S.C. § 1915(a)(1) is "unable to pay such fees or give security therefor." A person is  
22 eligible if they are unable to pay the costs of filing and still provide the necessities of life. *See*

1 *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 203 (1993)  
 2 (internal quotations omitted).

3 The Court allows litigants to proceed *in forma pauperis* only when they have sufficiently  
 4 demonstrated an inability to pay the filing fee. This generally includes incarcerated individuals  
 5 with no assets and persons who are unemployed and dependent on government assistance. *See*,  
 6 *e.g., Ilagan v. McDonald*, 2016 U.S. Dist. LEXIS 79889, at \*2 (D. Nev. June 16, 2016) (granting  
 7 petition based on unemployment and zero income); *Reed v. Martinez*, 2015 U.S. Dist. LEXIS  
 8 80629, at \*1, 2015 WL 3821514 (D. Nev. June 19, 2015) (granting petition for incarcerated  
 9 individual on condition that applicant provides monthly payments towards filing fee). It does not  
 10 include those whose access to the court system is not blocked by their financial constraints, but  
 11 rather are in a position of having to weigh the financial constraints pursuing a case imposes. *See*  
 12 *Sears, Roebuck & Co. v. Charles W. Sears Real Estate, Inc.*, 686 F. Supp. 385, 388 (N.D. N.Y.),  
 13 *aff'd*, 865 F.2d 22 (2d Cir. 1988) (denying petition to proceed IFP because petitioner and his  
 14 wife had a combined annual income of between \$34,000 and \$37,000).

15 In addition, a court should "deny leave to proceed *in forma pauperis* at the outset if it  
 16 appears from the face of the proposed complaint that the action is frivolous or without merit."  
 17 *Tripathi v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1369 (9th Cir. 1987) (citations omitted); *see*  
 18 *also* 28 U.S.C. § 1915(e)(2)(B)(i). An *in forma pauperis* complaint is frivolous if "it ha[s] no  
 19 arguable substance in law or fact." *Id.* (citing *Rizzo v. Dawson*, 778 F.2d 527, 529 (9th Cir.  
 20 1985); *see also Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984). A *pro se* Plaintiff's  
 21 complaint is to be construed liberally, but like any other complaint it must nevertheless contain  
 22 factual assertions sufficient to support a facially plausible claim for relief. *Ashcroft v. Iqbal*, 556  
 23 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atlantic Corp. v. Twombly*,  
 24

1 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim for relief is facially  
2 plausible when “the plaintiff pleads factual content that allows the court to draw the reasonable  
3 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.  
4 Ordinarily, the Court will permit pro se litigants an opportunity to amend their complaint in order  
5 to state a plausible claim. *See United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir.  
6 2011) (“Dismissal without leave to amend is improper unless it is clear, upon de novo review,  
7 that the complaint could not be saved by any amendment.”).

8 Here, Smith states that he has received a total of \$14,200 in the past twelve months from  
9 Uber driving, social security disability benefits, and a “graduation gift.” Dkt. # 1 at 1. He also  
10 makes a monthly salary of \$200 by driving for Uber, although this amount does not match the  
11 \$6,000 that he received through Uber driving over the past 12 months. *Id.* While it is a close call,  
12 Smith’s reliance on government benefits and low monthly income are sufficient for IFP status.

13 However, Smith nonetheless does not qualify for IFP because his proposed complaint  
14 does not plausibly state a claim. When explaining the facts underlying his claim, Smith states, “5  
15 police on the scene, with a supervisor who became complicit in illegal actions against me, and  
16 refused to take my complaint but instead took part in plan to cause damage and risk safety of  
17 public.” Dkt. # 1-1 at 6. This statement is far too vague for the Court to have any notion of what  
18 actually happened to Smith, much less why it warrants relief. While a lengthy factual description  
19 is not necessary, Smith must state *specifically* the events underlying his legal claim.

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Smith's Motion is DENIED. Within 21 days of this Order, Smith must either (1) file a proposed amended complaint addressing the deficiencies noted above, or (2) pay the filing fee. If Smith fails to do either of these things his case will be dismissed without further notice.

IT IS SO ORDERED.

Dated this 16<sup>th</sup> day of December, 2019.

Ronald B. Lightner

Ronald B. Leighton  
United States District Judge