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2024 | Cited 0 times | D. Nevada | May 8, 2024

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA DEVELL MOORE, Plaintiff v. J. LAFRENIERE, KOBOSKI, DITMER, Defendants

Case No.: 3:24-cv-00083-MMD-CSD

Order Re: ECF Nos. 1, 1-1

Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF Nos. 1, 4) and pro se complaint (ECF No. 1-1).

I. IFP APPLICATION A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. 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). 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]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1- 1. “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some particularity, definiteness and certainty.” U.S. v. McQuade , 647 F.2d 938, 940 (9th Cir. 1981) (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the benefits of the statute.” Adkins v. E.I. Du Pont de Nemours & Co., 335 U.S. 331, 339 (1948). An inmate submitting an application to proceed IFP must also “submit a certificate from the institution certifying the amount of funds currently held in the applicant’s trust account at the institution and the net deposits in the applicant’s account for t he six months prior to the date of submission of the application.” LSR 1- 2; see also 28 U.S.C. § 1915(a)(2). If the inmate has been at the institution for less than six months, “the certificate must show the account’s activity for this shortened period.” L SR 1-2. If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an initial partial filing fee that is calculated as 20 percent of the greater of the average monthly deposits or the average monthly balance for the six-month period immediately preceding the filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid, the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody of the prisoner will



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forward payments from the prisoner's account to the court clerk each time the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2). Plaintiff's certified account statement indicates that his average monthly balance for the last six months was \$659.90 and his average monthly deposits were \$80.83. Plaintiff's application to proceed IFP is granted. Plaintiff is required to pay an initial partial filing fee in the amount of \$131.92 (20 percent of \$659.90). Thereafter, whenever his prison account exceeds \$10, he must make monthly payments in the amount of 20 percent of the preceding month's income credited to his account until the \$350 filing fee is paid.

II. SCREENING A. Standard Under the statute governing IFP proceedings, "the court shall dismiss the case at any time if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii). In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint-- (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1) -(2). Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a complaint under these statutes, the court applies the same standard as is applied under Rule 12(b)(6). See e.g. *Watson v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule 12(b)(6) is essentially a ruling on a question of law. See *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted). The court must accept as true the allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotation marks and citation omitted). A complaint must contain more than a "formulaic recitation of the elements of a cause of action," it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a plaintiff should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A dismissal should not be without leave to amend unless it is clear from the face of the complaint that the action is frivolous and could not be amended to state a federal claim, or the district court lacks subject matter jurisdiction over the action. See *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990). B. Plaintiff's Complaint Plaintiff sues Detective J. Lafreniere and Officers Koboski and Ditmer, all of the Las Vegas Metropolitan Police Department (LVMPD) for alleged violations of the Fourth, Fifth,



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Fourteenth, and Eighth Amendments. (ECF No. 1-1.) First, Plaintiff alleges that on October 11, 2008, Plaintiff was at home when the Defendants created an illegal ruse and had Plaintiff's fiancé call him to come pick up her and their children from the park. As Plaintiff was driving to the park, the Defendants pulled Plaintiff over with guns out, told him to exist the vehicle with his hands under the air, and told he was under felony arrest. Plaintiff was handcuffed, arrested, and searched and taken to the Clark County Detention Center (CCDC). He claims the defendants violated his Fourth Amendment rights because they did not give a specific charge for him being stopped or for his arrest, and he was not advised of his rights. Plaintiff further avers that Defendants made no attempt to bring him before a magistrate. (ECF No. 1-1 at 3.) Second, Plaintiff alleges that on October 11, 2008, the Defendants unlawfully arrested Plaintiff without a warrant or due process, and false imprisoned him, depriving him of his liberty. He contends that he was brought to CCDC for illegal questioning, booking and was detained, and not brought before a magistrate. (Id. at 4.) Third, Plaintiff alleges that on October 11, 2008, Plaintiff was given bail from the police department before going in front of a magistrate or being arraigned. He contends that excessive bail and cruel and unusual punishment were inflicted. He also mentions that due to the acts of Defendants, he suffered a series of assaults and batteries, defamation of character including arrest, handcuffing, false imprisonment, being physically searched and forced fingerprinting and booking procedures, as well as harassment. (Id. at 5.)

Section 1983 does not contain its own statute of limitations; therefore, federal courts borrow the statute of limitations for section 1983 claims applicable to personal injury claims in the forum state. See *Wilson v. Garcia*, 471 U.S. 261, 279-80 (1985); *Pouncil v. Tilton*, 704 F.3d 568, 573 (9th Cir. 2012). In Nevada, the statute of limitations for personal injury claims, and therefore section 1983 actions brought here, is two years. Nev. Rev. Stat. 11.190(4)(e); see also *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989).

"A statute of limitations begins to run on the date on which the plaintiff's claim 'accrues.'" *Pouncil*, 704 F.3d at 573 (citation omitted). "Federal law determines when a cause of action for a Section 1983 claim accrues and, hence, when the statute of limitations begins to run." Id. (citation omitted). Under federal law, a claim accrues "when the plaintiff knows or has reason to know of the injury that is the basis of the action." Id. at 574 (citation omitted).

Federal courts apply the forum state's law regarding tolling, including equitable tolling, when not inconsistent with federal law, to civil rights claims filed under section 1983. *Johnson v. State of Cal.*, 207 F.3d 650, 653 (9th Cir. 2000) (citations omitted).

Plaintiffs allegations all indicate that his claims accrued in October 2008; therefore, it appears that they are barred by the statute of limitations. Because it is not clear whether Plaintiff may have an argument for tolling (whether statutory or equitable), in an abundance of caution, the court will permit Plaintiff to file an amended complaint to allege any circumstances that may entitle him to sufficient tolling of the applicable statute of limitations.



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III. CONCLUSION (1) Plaintiff's IFP application (ECF No. 1) is GRANTED; however, within 30 DAYS Plaintiff must pay, through NDOC, an initial partial filing fee in the amount of \$131.92. Thereafter, whenever his prison account exceeds \$10, he is required to make monthly payments in the amount of 20 percent of the preceding month's income credited to his account until the full \$350 filing fee is paid. This is required even if the action is dismissed, or is otherwise unsuccessful. The Clerk must SEND a copy of this Order to the attention of Chief of Inmate Services for the Nevada Department of Corrections, P.O. Box 7011, Carson City, Nevada 89702. (2) The Clerk will FILE the complaint (ECF No. 1-1). (3) The Complaint is DISMISSED WITH LEAVE TO AMEND.

(4) The Clerk shall SEND Plaintiff the instructions for filing a civil rights complaint by an incarcerated individual and form civil rights complaint by an inmate.

(5) Plaintiff has 30 DAYS from the date of this Order to file an amended complaint correcting the deficiencies noted above. The amended complaint must be complete in and of itself without referring or incorporating by reference any previous complaint. Any allegations, parties, or requests for relief from a prior complaint that are not carried forwarded in the amended complaint will no longer be before the court. Plaintiff shall check the box for the first amended complaint on the court's form civil rights complaint. If Plaintiff fails to file an amended complaint within the 30 days, the action may be dismissed.

IT IS SO ORDERED.

Dated: May 8, 2024 _____ Craig S. Denney United States Magistrate Judge

