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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Serafin Jr. Reyes,
Plaintiff,
vs.
A.D.O.C. Director Dora Schriro, et al.,
Defendants.

No. CV 07-718-PHX-SMM (DKD)

ORDER

Plaintiff Serafin Jr. Reyes, who is confined in the Arizona State Prison Complex-Eyman in Florence, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983, an Application to Proceed *In Forma Pauperis*, a document entitled “Motioning U.S. District, Clerk, for the District of Arizona. Late Filing Fee for a Civil Action,” and a Motion for Appointment of Counsel. The Court will grant the Application to Proceed, deny the other motions, and dismiss the Complaint with leave to amend.

I. Application to Proceed *In Forma Pauperis* and Filing Fee

Plaintiff’s Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1). The Court will assess an initial partial filing fee of \$9.61. The remainder of the fee will be collected monthly in payments of 20% of the previous month’s income each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government agency to collect and forward the fees according to the statutory formula.

1 In his “Motioning U.S. District, Clerk, for the District of Arizona. Late Filing Fee for
2 a Civil Action,” Plaintiff requests an extension of time to partially pay the filing fee.
3 Because the Court is granting Plaintiff’s Application to Proceed, the Court will deny this
4 motion as moot.

5 **II. Statutory Screening of Prisoner Complaints**

6 The Court is required to screen complaints brought by prisoners seeking relief against
7 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
8 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
9 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
10 be granted, or that seek monetary relief from a defendant who is immune from such relief.
11 28 U.S.C. § 1915A(b)(1), (2). If the Court determines that a pleading could be cured by the
12 allegation of other facts, a *pro se* litigant is entitled to an opportunity to amend a complaint
13 before dismissal of the action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000)
14 (*en banc*).

15 The Court should not, however, advise the litigant how to cure the defects. This type
16 of advice “would undermine district judges’ role as impartial decisionmakers.” Pliler v.
17 Ford, 542 U.S. 225, 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide
18 whether the court was required to inform a litigant of deficiencies). Plaintiff’s Complaint
19 will be dismissed for failure to state a claim, with leave to amend because the Complaint may
20 possibly be saved by amendment.

21 **III. Complaint**

22 In his three-count Complaint, Plaintiff sues Defendants Arizona Department of
23 Corrections’ Director Dora Schriro, South Unit Administrative, Cell Block Six
24 Administrative, and Corrections Officer III Puntney.

25 In Counts One and Two, Plaintiff presents a lengthy narrative¹ challenging, under the
26 Due Process Clause and the Fifth and Sixth Amendments, Defendants’ failure to follow the

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28 ¹This lengthy narrative fails to comply with Rule 8(a)(2) of the Federal Rules of Civil
Procedure, which requires a “short and plain statement of the claim.” Fed. R. Civ. P. 8(a)(2).

1 Arizona Department of Corrections's (ADOC) inmate disciplinary system. He alleges that
2 these failures resulted in Plaintiff being found guilty of stalking a corrections officer, an
3 inability to appeal that finding, and an increase in his security classification. In Count
4 Three, Plaintiff alleges that the stalking allegation and subsequent inability to appeal the
5 guilty finding were retaliation by Defendant South Unit Administrative because Plaintiff
6 complained of alleged sexual misconduct by another corrections officer.

7 In his Request for Relief, Plaintiff requests the removal of the disciplinary charge, a
8 reduction of his security classification, and monetary damages.

9 **IV. Failure to State a Claim**

10 **A. Failure to Link Defendant with Injuries**

11 To state a valid claim under § 1983, plaintiffs must allege that they suffered a specific
12 injury as a result of specific conduct of a defendant and show an affirmative link between the
13 injury and the conduct of that defendant. See Rizzo v. Goode, 423 U.S. 362, 371-72, 377
14 (1976). To state a claim against a supervisory official, the civil rights complainant must
15 allege that the supervisory official personally participated in the constitutional deprivation
16 or that the supervisory official was aware of widespread abuses and, with deliberate
17 indifference to the inmate's constitutional rights, failed to take action to prevent further
18 misconduct. See Ortez v. Washington County, 88 F.3d 804, 809 (9th Cir. 1996); Taylor v.
19 List, 880 F.2d 1040, 1045 (9th Cir. 1989); King v. Atiyeh, 814 F.2d 565, 568 (9th Cir. 1987);
20 see also Monell v. New York City Department of Social Services, 436 U.S. 658, 691-92
21 (1978). There is no *respondeat superior* liability under § 1983, and therefore, a defendant's
22 position as the supervisor of persons who allegedly violated Plaintiff's constitutional rights
23 does not impose liability. Monell, 436 U.S. at 691-92; Taylor, 880 F.2d at 1045.

24 Plaintiff does not allege that Defendant Schriro personally participated in the
25 constitutional deprivation or that she was aware of widespread abuses and, with deliberate
26 indifference to Plaintiff's constitutional rights, failed to take action to prevent further
27 misconduct, or that she formed policies that resulted in Plaintiff's injuries. Because Plaintiff
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1 has failed to demonstrate a link between Defendant Schriro's conduct and Plaintiff's alleged
2 injuries, the Court will dismiss Defendant Schriro without prejudice.

3 Defendants South Unit Administrative and Cell Block Six Administrative are not
4 proper defendants. They appear to be groups of defendants. Although it appears that the
5 Court could identify the individuals who make up these groups by parsing through the
6 lengthy narrative in the body of the Complaint, it is not the Court's responsibility to search
7 the pleadings in order to determine the names and numbers of the parties Plaintiff intends to
8 sue. Plaintiff must clearly identify the defendants in accordance with the instructions
9 provided with the court-approved complaint form. Therefore, the Court will dismiss
10 Defendants South Unit Administrative and Cell Block Six Administrative without prejudice.
11 Similarly, the Court will dismiss Count Three on this same basis because Plaintiff does not
12 identify any conduct by any specifically named Defendant; he alleges that "South Unit
13 Administrative wanted revenge by retaliating against [Plaintiff]."

14 **B. Counts One and Two**

15 In analyzing a due process claim, the Court must first decide whether Plaintiff was
16 entitled to any process, and if so, whether he was denied any constitutionally required
17 procedural safeguard.

18 Liberty interests that entitle an inmate to due process are "generally limited to freedom
19 from restraint which, while not exceeding the sentence in such an unexpected manner as to
20 give rise to protection by the Due Process Clause of its own force, nonetheless imposes
21 atypical and significant hardship on the inmate in relation to the ordinary incidents of prison
22 life." Sandin v. Conner, 515 U.S. 472, 484 (1995) (internal citations omitted).

23 Therefore, to determine whether an inmate is entitled to the procedural protections
24 afforded by the Due Process Clause, the Court must look to the particular restrictions
25 imposed and ask whether they "present the type of atypical, significant deprivation in which
26 a state might conceivably create a liberty interest." Mujahid v. Meyer, 59 F.3d 931, 932 (9th
27 Cir. 1995) (quoting Sandin, 515 U.S. at 486).

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1 In this case, Plaintiff alleges that his disciplinary conviction resulted in a change to
2 his security classification. A prisoner has no constitutional right to enjoy a particular security
3 classification. Meachum v. Fano, 427 U.S. 215, 224-25 (1976) (no liberty interest protected
4 by the Due Process Clause is implicated in a prison's reclassification and transfer decisions).
5 See also Myron v. Terhune, 476 F.3d 716, 718 (9th Cir. 2007) (classification in level 4 prison
6 rather than level 3 prison did not present an atypical and significant hardship). "As long as
7 the conditions or degree of confinement to which the prisoner is subjected is within the
8 sentence imposed upon him and is not otherwise violative of the Constitution, the Due
9 Process Clause does not in itself subject an inmate's treatment by prison authorities to
10 judicial oversight." Montanye v. Haymes, 427 U.S. 236, 242 (1976). Plaintiff alleges no
11 other atypical or significant sanctions resulting from his disciplinary conviction and therefore
12 fails to state a claim.

13 Accordingly, the Court will dismiss Counts One and Two for failure to state a claim.

14 **V. Leave to Amend**

15 For the foregoing reasons, Plaintiff's Complaint will be dismissed for failure to state
16 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a first
17 amended complaint to cure the deficiencies outlined above. The Clerk of Court will mail
18 Plaintiff a court-approved form to use for filing a first amended complaint. If Plaintiff fails
19 to use the court-approved form, the Court may strike the amended complaint and dismiss this
20 action without further notice to Plaintiff.

21 Plaintiff must clearly designate on the face of the document that it is the "First
22 Amended Complaint." The first amended complaint must be retyped or rewritten in its
23 entirety on the court-approved form and may not incorporate any part of the original
24 Complaint by reference. Plaintiff may include only one claim per count.

25 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963
26 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,
27 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as
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1 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original
2 complaint is waived if it is not raised in a first amended complaint. King, 814 F.2d at 567.

3 If Plaintiff files an amended complaint, Plaintiff must write **short, plain statements**
4 telling the Court: (1) the constitutional right Plaintiff believes was violated; (2) the name of
5 the Defendant who violated the right; (3) exactly what that Defendant did or failed to do;
6 (4) how the action or inaction of that Defendant is connected to the violation of Plaintiff's
7 constitutional right; and (5) what specific injury Plaintiff suffered because of that
8 Defendant's conduct. See Rizzo, 423 U.S. at 371-72, 377.

9 Plaintiff must repeat this process for each person he names as a Defendant. If Plaintiff
10 fails to affirmatively link the conduct of each named Defendant with the specific injury
11 suffered by Plaintiff, the allegations against that Defendant will be dismissed for failure to
12 state a claim. Conclusory allegations that a Defendant or group of Defendants have violated
13 a constitutional right are not acceptable and will be dismissed.

14 **VI. Motion for Appointment of Counsel**

15 Appointment of counsel under 28 U.S.C. § 1915(e)(1) is required only when
16 "exceptional circumstances" are present. Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir.
17 1991). A determination with respect to exceptional circumstances requires an evaluation of
18 the likelihood of success on the merits as well as the ability of Plaintiff to articulate his
19 claims *pro se* in light of the complexity of the legal issue involved. Id. "Neither of these
20 factors is dispositive and both must be viewed together before reaching a decision." Id.
21 (quoting Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986)).

22 Having considered both elements, it does not appear at this time that exceptional
23 circumstances are present that would require the appointment of counsel in this case.
24 Accordingly, the Court will DENY without prejudice Plaintiff's motion for appointment of
25 counsel.

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1 **VII. Warnings**

2 **A. Release**

3 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.
4 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay
5 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result
6 in dismissal of this action.

7 **B. Address Changes**

8 Plaintiff must file and serve a notice of a change of address in accordance with Rule
9 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
10 relief with a notice of change of address. Failure to comply may result in dismissal of this
11 action.

12 **C. Copies**

13 Plaintiff must submit an additional copy of every filing for use by the Court. See
14 LRCiv 5.4. Failure to comply may result in the filing being stricken without further notice
15 to Plaintiff.

16 **D. Possible “Strike”**

17 Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails
18 to file an amended complaint correcting the deficiencies identified in this Order, the
19 dismissal will count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g).
20 Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil
21 judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior
22 occasions, while incarcerated or detained in any facility, brought an action or appeal in a
23 court of the United States that was dismissed on the grounds that it is frivolous, malicious,
24 or fails to state a claim upon which relief may be granted, unless the prisoner is under
25 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

26 **E. Possible Dismissal**

27 If Plaintiff fails to timely comply with every provision of this Order, including these
28 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at

1 1260-61 (a district court may dismiss an action for failure to comply with any order of the
2 Court).

3 **IT IS HEREBY ORDERED:**

4 (1) Plaintiff's Application to Proceed *In Forma Pauperis*, filed with the Complaint,
5 is **GRANTED**.

6 (2) As required by the accompanying Order to the appropriate government agency,
7 Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$9.61.

8 (3) Plaintiff's "Motioning U.S. District, Clerk, for the District of Arizona. Late
9 Filing Fee for a Civil Action" (Doc. #4) is **DENIED as MOOT**.

10 (4) Plaintiff's Motion for Appointment of Counsel (Doc. #3) is **DENIED without**
11 **prejudice**.

12 (5) The Complaint (Doc. #1) is **DISMISSED** for failure to state a claim. Plaintiff
13 has **30 days** from the date this Order is filed to file a first amended complaint in compliance
14 with this Order.

15 (6) If Plaintiff fails to file an amended complaint by **May 16, 2007**, the Clerk of
16 Court must, without further notice, enter a judgment of dismissal of this action with prejudice
17 that states that the dismissal counts as a "strike" under 28 U.S.C. § 1915(g).

18 (7) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil
19 rights complaint by a prisoner.

20 DATED this 16th day of April, 2007.

21 

22 Stephen M. McNamee
23 United States District Judge