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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Leonard L. Manning, Plaintiff, vs. Dora Schriro, et al., Defendants.	No. CV 07-2553-PHX-SMM (LOA) **ORDER**

Pending before the Court are Plaintiff's "Motion For A Preliminary Injunction" (Doc. #9), "Declaration Supporting Plaintiff's Request For A Preliminary Injunction" (Doc. #10), "Motion For An Extension of Time To File An Amended Complaint" (Doc. #11), and "First Amended Complaint" (Doc. #12) (Amended Complaint).

The Court will deny the "Motion For A Preliminary Injunction" (Doc. #9), grant the "Motion For An Extension of Time To File An Amended Complaint" (Doc. #11), require Defendant P. Smith to answer Count II of the Amended Complaint, and dismiss the remaining counts and Defendants for failure to state a claim upon which relief may be granted.

I. Procedural Background

On December 17, 2007, Plaintiff Leonard L. Manning, who is confined in the Arizona State Prison Complex-Eyman (ASPC-Eyman), filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. #1) and an Application to Proceed *In Forma Pauperis* (Doc. #3). By Order filed April 28, 2008 (Doc. #4), the Court granted the Application to Proceed *In*

Forma Pauperis, assessed an initial partial filing fee, and dismissed the Complaint for failure to state a claim. Plaintiff was given 30 days from the filing date of the Order to file a first amended complaint in compliance with the Order.

On May 28, 2008, Plaintiff filed a "Motion For Extension of Time to File Amended Complaint" (Doc. #7), which the Court granted by Order filed June 3, 2008 (Doc. #8). Plaintiff was given 20 days from the filing date of the Order to file a first amended complaint.

II. Motion for Extension of Time to File Amended Complaint

On July 1, 2008, Plaintiff filed a "Motion For An Extension of Time To File An Amended Complaint" (Doc. #11), in which he requests a 20-day extension of time to file his Amended Complaint. Plaintiff's Motion will be granted.

III. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints and amended complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

IV. Amended Complaint

On July 1, 2008, Plaintiff filed his Amended Complaint (Doc. #12). With regard to his Amended Complaint, Plaintiff should take notice that all causes of action alleged in an original complaint which are not alleged in an amended complaint are waived. Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1990) ("an amended pleading supersedes the original"); King v. Atiyeh, 814 F.2d 565 (9th Cir. 1987). Accordingly, the Court will consider only those claims specifically asserted in Plaintiff's Amended Complaint with respect to only those Defendants specifically named in the Amended Complaint.

Named as Defendants in the Amended Complaint are: (1) Dora Schriro, Director of the Arizona Department of Corrections (ADOC); (2) D. Edwards, Deputy Warden,

Disciplinary Appeals Officer, Morey Unit, Arizona State Prison Complex-Lewis (ASPC-Lewis); (3) Jackson, Corrections Officer (CO) IV, Morey Unit, ASPC-Lewis; (4) Stuart, Captain, Disciplinary Hearing Officer, Morey Unit, ASPC-Lewis; (5) O'Brian, CO III; (6) Carbajal, CO II; (7) Banes, CO II, Security Officer; (8) Vargas, Sergeant (Sgt.), Security Officer; (9) Kuntzi, Correctional Medical Worker; (10) Anita Nugent, Educational Administrator; (11) P. Smith, Institutional Chaplain; and (12) S. Latto, Librarian II.

Plaintiff alleges three counts in the Amended Complaint. In Count I, Plaintiff claims that his rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution have been violated with regard to a threat of retaliation and disciplinary proceedings. In Count II, Plaintiff claims that his rights under the Religious Freedom Restoration Act and the First Amendment of the United States Constitution have been violated with regard to exercise of his religion. In Count III, Plaintiff claims that his rights under Bounds v. Smith, 430 U.S. 817, 821 (1977), and the First and Fourteenth Amendments of the United States Constitution have bee violated with regard to access to the court.

Plaintiff seeks a jury trial, injunctive relief, and compensatory and punitive monetary damages.

V. Discussion

A. Count I

In Count I, Plaintiff claims that his rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution have been violated with regard to a threat of retaliation and disciplinary proceedings. Plaintiff complains about two separate disciplinary proceedings in Count I. The first disciplinary proceeding was for using abusive language towards Defendant Banes and the second disciplinary proceeding was for refusing Defendant Vargas' direct order to shave.

1. Due Process and Equal Protection Claims

In the first disciplinary proceeding, Plaintiff alleges that his due process and equal protection rights were violated when Defendant Banes issued him a disciplinary citation on September 18, 2005, for using abusive language. Plaintiff claims that Defendant Banes did

not "see" Plaintiff using any abusive language "toward" him and "singled" him out from several other inmates for punishment. Plaintiff further claims that the Disciplinary Hearing Officer, Defendant Stuart, abusively failed to dismiss the disciplinary citation for lack of evidence at the disciplinary hearing and that the Disciplinary Hearing Officer, Defendant Edwards, upheld the disciplinary finding with the reasoning: "My CO's are not racist. I advise you to not pursue this matter."

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

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

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

To determine whether the sanctions are atypical and a significant hardship, courts look to prisoner's conditions of confinement, the duration of the sanction, and whether the sanction will affect the duration of the prisoner's sentence. See Keenan v. Hall, 83 F.3d 1083, 1088-89 (9th Cir. 1996). "Atypicality" requires not merely an empirical comparison, but turns on the importance of the right taken away from the prisoner. See Carlo v. City of Chino, 105 F.3d 493, 499 (9th Cir. 1997). See, *e.g.*, Sandin, 515 U.S. at 472 (30 days' disciplinary segregation is not atypical and significant); Torres v. Fauver, 292 F.3d 141, 151 (3rd Cir. 2002) (four months in administrative segregation is not atypical and significant); Jacks v. Crabtree, 114 F.3d 983 (9th Cir. 1997) (denial of year sentence reduction is not an

atypical and significant hardship); Jones v. Baker, 155 F.3d 810 (6th Cir. 1998) (two and one-half years of administrative segregation is not atypical and significant); Griffin v. Vaughn, 112 F.3d 703, 706-708 (3rd Cir. 1997) (fifteen months' administrative segregation is not atypical and significant); Beverati v. Smith, 120 F.3d 500, 504 (4th Cir. 1997) (six months of confinement in especially disgusting conditions that were "more burdensome than those imposed on the general prison population were not "atypical . . . in relation to the ordinary incidents of prison life.").

Plaintiff has not alleged or shown that sanctions imposed as a result of his first disciplinary conviction violated a liberty interest he had under the Due Process Clause itself, or imposed an "atypical and significant hardship" on him. Sandin, 515 U.S. at 484. Although Plaintiff has not specifically alleged what sanctions were imposed on him, he does allege that "as a result" of this "Disciplinary Citation," he was "dis[]allowed a work assignment, for a period of 6 months," and it "contributed to him being reclassified to a more restrictive custody." Neither of these "results" rise to the level of an atypical and significant hardship. Thus, Plaintiff has failed to identify a liberty interest that would require due process protections.

For purposes of equal protection, prisoners are not a suspect class. See Webber v. Crabtree, 158 F.3d 460, 461 (9th Cir. 1998); McQueary v. Blodgett, 924 F.2d 829, 834 (9th Cir. 1991). Inmates are not entitled to identical treatment as other inmates merely because they are all inmates. See Norvell v. Illinois, 373 U.S. 420 (1963). A mere demonstration of inequality is not enough to establish a violation of the Equal Protection Clause. When a suspect class is not implicated, the complainant must allege invidious discriminatory intent. McQueary, 924 F.2d at 834-35. However, conclusory allegations alone do not establish an equal protection violation without proof of invidious discriminatory intent. See Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 265 (1977). In addition, when a suspect class is not implicated, the court must determine whether the alleged discrimination is "patently arbitrary and bears no rational relationship to a legitimate governmental interest." Vermouth v. Corrothers, 827 F.2d 599, 602 (9th Cir. 1987) (internal

quotations omitted).

Here, Plaintiff has failed to allege that he is a member of a suspect class, or that Defendants' conduct was the result of purposeful or invidious discrimination, or that the conduct bore no rational relationship to a legitimate governmental interest. Plaintiff's conclusory allegation that the Disciplinary Report "was arbitrary, and/or racist, because it singled []out the Plaintiff, from amongst several other inmates, for punishment," is not sufficient to state a claim under the Equal Protection Clause of the Fourteenth Amendment.

2. Deliberate Indifference Claim

In the second disciplinary proceeding, Plaintiff alleges that after Defendant Vargas seized a copy of Plaintiff's "Grooming (Shaving) Waiver" and told Plaintiff to shave, Defendant Vargas issued Plaintiff a disciplinary citation on September 17, 2006, for disobeying his direct order to shave. Plaintiff also alleges that Defendant Kuntzi "'falsely' indicated" to Defendant Vargas that Plaintiff's "Grooming (Shaver) Waiver" had "expired" and that this was included in Defendant Vargas' Disciplinary Report. Plaintiff further alleges that Defendant Carbajal, Coordinator of Discipline, and Defendant Stuart, Disciplinary Hearing Officer, had a "duty to dispose" of Defendant Vargas' disciplinary citation when Plaintiff presented both of them with a copy of his "permanent Medical Shaving Prescription." Presumably, they both failed to "dispose" of the disciplinary citation. Plaintiff claims that the actions of Defendants Vargas, Kuntzi, Carbajal, and Stuart were "consistent to deliberate indifference to [P]laintiff's medical prescription."

To state a claim under the Eighth Amendment for prison medical care, a prisoner must allege "deliberate indifference to serious medical needs." Jett v. Penner, 439 F.3d 1091 (9th Cir. 2006) (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)). A plaintiff must show (1) a "serious medical need" by demonstrating that failure to treat the condition could result in further significant injury or the unnecessary and wanton infliction of pain and (2) the defendant's response was deliberately indifferent. Jett, 439 F.3d at 1096 (quotations omitted). To act with deliberate indifference, a prison official must both know of and disregard an excessive risk to inmate health; the official must both be aware of facts from

which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

The indifference must be substantial. Estelle, 429 U.S. at 105-06. The action must rise to a level of "unnecessary and wanton infliction of pain." Id. at 106. Claims of "indifference," "negligence," or "medical malpractice" do not support a claim under 42 U.S.C. § 1983. Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980). "A difference of opinion does not amount to deliberate indifference to [a plaintiff's] serious medical needs." Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). A mere delay in medical care, without more, is insufficient to state a claim against prison officials for deliberate indifference. See Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). The indifference must be substantial. The action must rise to a level of "unnecessary and wanton infliction of pain." Estelle, 429 U.S. at 105-06. Not every claim by a prisoner that he or she has received inadequate medical treatment states a violation of the Eighth Amendment.

In the instant case, Plaintiff has failed to allege facts that show that Defendant Vargas, Kuntzi, Carbajal, or Stuart was deliberately indifferent to a serious medical need of Plaintiff. Simply having a medical waiver from shaving does not show that Plaintiff had a serious medical need and Plaintiff does not allege that he had a serious medical condition that prevented him from shaving. Generally, the discomfort that a prisoner might experience while shaving does not rise to the level of a serious medical need protected by the Eighth Amendment. See Shabazz v. Barnauskas, 790 F.2d 1536, 1538 (11th Cir. 1986) (injuries associated with shaving, including "bleeding, inflamation, irritation, ingrowing of hairs, infection, purulence and pain" did not constitute a sufficiently serious medical problem to warrant Eighth Amendment protection). Moreover, Plaintiff does not allege that he was actually forced to shave.

3. Threat of Retaliation Claim

In Count I, Plaintiff also makes a threat of retaliation claim against Defendants Edwards, Jackson, O'Brian, Nugent, Vargas, Kuntzi, Carbajal, and Stuart. Although

Plaintiff's threat of retaliation claim is both conclusory and vague, it appears that it is based on Defendant Edwards' "reasoning" in denying Defendant Stuart's disciplinary finding that "[m]y CO's are not racist. I advise you to not pursue this matter." Plaintiff states that he "perceived Mr. Edward's admonitory 'advisement[,'] to not pursue an appeal, of his decision, as a very serious threat to himself."

Plaintiff claims that actions of Defendant Jackson, in keeping him locked in an isolation holding cage outside of Defendant Jackson's office for hours, was "consistent to Mr. Edwards threat of retaliation and a pattern of harassment." Plaintiff further claims that Defendant O'Brian's actions in failing to respond to an April 9, 2007 Informal Grievance regarding his "GED" test scores "was consistent to the Deputy Warden's threat and policy of harassment." Similarly, Plaintiff claims that the actions of Defendant Anita Nugent in not correcting incorrect "GED" test scores and not finding out what happened to Plaintiff's test results was "consistent to Deputy Warden Edward's threat, of retaliation and harassment." Lastly, Plaintiff claims that the actions of Defendants Vargas, Kunzi, Carbajal, and Stuart with regard to his disciplinary proceedings concerning his refusal to shave were "consistent to . . . Deputy Edward[s'] policy of threats, intimidation and harassment."

"A prisoner suing prison officials under section 1983 for retaliation must allege that he was retaliated against for exercising his constitutional rights and that the retaliatory action does not advance legitimate penological goals, such as preserving institutional order and discipline." Barnett v. Centoni, 31 F.3d 813, 815-16 (9th Cir. 1994). Thus, to succeed on the merits of a retaliation claim, a prisoner must demonstrate that he was retaliated against for exercising his constitutional rights, and he must also demonstrate that the retaliatory action does not advance a legitimate penological goal, or is not narrowly tailored to achieve that goal. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985).

Although *pro se* pleadings are liberally construed, Haines v. Kerner, 404 U.S. 519 (1972), conclusory and vague allegations will not support a cause of action. Ivey v. Board of Regents of the University of Alaska, 673 F.2d 266 (9th Cir. 1982). Further, a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that

were not initially pled. Id. at 268.

Plaintiff has not alleged in Count I that any of the Defendants retaliated against him for exercising a particular constitutional right. Moreover, even if the Court were to infer such an allegation from some of the reasons Plaintiff gives for the retaliation, Plaintiff has clearly failed to allege that the retaliatory action did not advance a legitimate penological goal, or was not narrowly tailored to achieve that goal.

Also, all of Plaintiff's retaliation claims are extremely conclusory and vague. Mere allegations that a Defendant's actions were "consistent" with a vague threat that Defendant Edwards made one to two years prior to the actions in question are not sufficient to state a constitutional retaliation claim.

Accordingly, for the above reasons, Count I will be dismissed for failure to state a claim for relief upon which relief may be granted.

B. Count II

In Count II, Plaintiff claims that his rights under the Religious Freedom Restoration Act and the First Amendment of the United States Constitution have been violated with regard to exercise of his religion. Plaintiff alleges that his religious belief is "the Religion of Shabazz," which is based on the tenets of "the Honorable Elijah Muhammad," and that on August 4, 2005, he "forwarded" an Inmate Letter to Defendant P. Smith, in which he requested to be placed on a "Kosher Religious Diet," to have his "Religious Preference" indicate "Coptic Monophysitic Christianity," and to be authorized to attend "Catholic Services" because they were somewhat similar to his own faith. Plaintiff further alleges that Defendant Smith refused to authorize a "Kosher diet" per his religious tenets and told Plaintiff he would have to submit a "change of Religious Preference Form" along with a "letter of membership[] from a Catholic Organization" if he wanted "authorization to attend 'a' prison religious service."

Liberally construed, Plaintiff has stated a claim against Defendant Smith in Count II. Accordingly, the Court will require Defendant Smith to answer Count II of the Amended Complaint.

C. Count III

In Count III, Plaintiff claims that his rights under Bounds v. Smith, 430 U.S. 817, 821 (1977) and First and Fourteenth Amendments of the United States Constitution have been violated with regard to access to the court. In order to state a viable constitutional claim under 42 U.S.C. § 1983, Plaintiff must show an affirmative link between the alleged injury and the conduct of an individual Defendant. Rizzo v. Goode, 423 U.S. 362, 371-72, 377 (1976). However, as he did with his access to the court claim in the original Complaint, Plaintiff has not referred to any named Defendant in Count III.

In the Court's April 28, 2008 Order (Doc. #4) dismissing the original Complaint with leave to amend, Plaintiff was specifically admonished that in any amended complaint, he must write out short, plain statements telling the Court (1) the constitutional right Plaintiff believes was violated; (2) the name of the person who violated the right; (3) exactly what that individual did or failed to do; (4) how the action or inaction of that person is connected to the violation of Plaintiff's constitutional rights; and (5) what specific injury Plaintiff suffered because of that person's conduct. See Rizzo, 423 U.S. at 371-72, 377. Plaintiff has failed to comply with the Court's admonition in Count III.

Accordingly, Count III will be dismissed for failure to state a claim upon which relief may be granted.

VI. Dismissal of Defendants

Because no claims now remain against them, Defendants Dora Schriro, D. Edwards, Jackson, Stuart, O'Brian, Carbajal, Banes, Vargas, Kuntzi, Anita Nugent, and S. Latto, will be dismissed from this action for failure to state a claim upon which relief may be granted.

VII. Motion for A Preliminary Injunction

On June 24, 2008, Plaintiff filed a "Motion For A Preliminary Injunction" (Doc. #9) (Motion), which includes a "Memorandum of Points and Authorities" (Memorandum), and a "Declaration Supporting Plaintiff's Request For A Preliminary Injunction" (Doc. #10) (Declaration). It is unclear precisely what injunctive relief Plaintiff is seeking. In his Motion, Plaintiff merely states that he "hereby request[s] a Preliminary Injunction,

Fed.R.Civ.P., Rule 65(a)." The closest Plaintiff comes to clarifying his request comes in his Memorandum where he states that he "hereby moves for a Preliminary Injunction to ensure that he is not further deprived of legal services, and adequate court access."

The purpose of preliminary injunctive relief is to preserve the status quo or to prevent irreparable injury pending the resolution of the underlying claim. Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984). The Ninth Circuit recognizes two tests for determining whether a district court should grant a preliminary injunction. Under the traditional standard, a plaintiff must show: (1) a strong likelihood of success on the merits; (2) a possibility of irreparable injury should the injunction not be granted; (3) that the balance of hardships tips in his favor; and in some cases (4) that an injunction advances the public interest. Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995). Alternatively, the plaintiff may show "either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and balance of hardships tips sharply in his favor." Id. Under either test, the movant bears the burden of persuasion, Mattel, Inc. v. Greiner & Hausser GmbH, 354 F.3d 857, 869 (9th Cir. 2003), and must demonstrate a significant threat of irreparable injury. AGCC v. Coalition for Economic Equity, 950 F.2d 1401, 1410 (9th Cir. 1991).

Plaintiff's Motion appears to be based primarily on problems and delays that he has experienced in getting access to legal research materials in the library and in getting copies of his Amended Complaint. Apparently, Plaintiff was refused copies of the Amended Complaint because his prison account balance had insufficient funds, and, therefore, he was required to submit the Amended Complaint to the prison paralegal for approval to obtain copies. Plaintiff complains that if he were to have submitted his Amended Complaint to the paralegal for approval, he would not have made the Court's deadline.

Aside from the fact that Plaintiff has not clearly explained who and what he wishes to enjoin with a preliminary injunction, the Court finds that Plaintiff has not demonstrated a significant threat of irreparable injury. As he has done in filing the Amended Complaint, Plaintiff is free to file a motion with this Court asking for extensions of time to file required

pleadings when, and if, he is hindered in making copies for filing purposes.

Accordingly, Plaintiff's Motion will be denied.

VIII. Warnings

A. Address Changes

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

B. Copies

Plaintiff must serve Defendant, or counsel if an appearance has been entered, a copy of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply may result in the filing being stricken without further notice to Plaintiff.

C. Possible Dismissal

If Plaintiff fails to timely comply with every provision of this Order, including these warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to comply with any order of the Court).

IT IS ORDERED:

(1) Plaintiff's "Motion For A Preliminary Injunction" (Doc. #9) is **denied**.

(2) Plaintiff's "Motion For An Extension of Time To File An Amended Complaint" (Doc. #11) is **granted**.

(3) Counts I and III of the Amended Complaint (Doc. #12) are **dismissed without prejudice** for failure to state a claim upon which relief may be granted.

(4) Defendants Dora Schriro, D. Edwards, Jackson, Stuart, O'Brian, Carbajal, Banes, Vargas, Kuntzi, Anita Nugent, and S. Latto are **dismissed from this action** for failure to state a claim upon which relief may be granted.

(5) Defendant P. Smith **must answer** Count II of the Amended Complaint.

(6) The Clerk of Court **must send** Plaintiff a service packet including the Amended Complaint (Doc. #12), this Order, and both summons and request for waiver forms for Defendant P. Smith.

(7) Plaintiff **must complete and return** the service packet to the Clerk of Court within 20 days of the date of filing of this Order. The United States Marshal will not provide service of process if Plaintiff fails to comply with this Order.

(8) **If** Plaintiff does not either obtain a waiver of service of the summons or complete service of the Summons and Amended Complaint on Defendant Smith within 120 days of the filing of the Complaint or within 60 days of the filing of this Order, whichever is later, the action **may be dismissed**. Fed. R. Civ. P. 4(m); LRCiv 16.2(b)(2)(B)(I).

(9) The United States Marshal **must retain** the Summons, a copy of the Amended Complaint (Doc. #12), and a copy of this Order for future use.

(10) The United States Marshal **must notify** Defendant P. Smith of the commencement of this action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal Rules of Civil Procedure. The notice to Defendant must include a copy of this Order. The Marshal must immediately file requests for waivers that were returned as undeliverable and waivers of service of the summons. If a waiver of service of summons is not returned by Defendant within 30 days from the date the request for waiver was sent by the Marshal, the Marshal must:

(a) **personally serve** copies of the Summons, Amended Complaint, and this Order upon Defendant Smith pursuant to Rule 4(e)(2) of the Federal Rules of Civil Procedure; and

(b) within 10 days after personal service is effected, **file** the return of service for Defendant, along with evidence of the attempt to secure a waiver of service of the summons and of the costs subsequently incurred in effecting service upon Defendant. The costs of service must be enumerated on the return of service form (USM-285) and must include the costs incurred by the Marshal for photocopying additional copies of

the Summons, Amended Complaint, or this Order and for preparing new process receipt and return forms (USM-285), if required. Costs of service will be taxed against the personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules of Civil Procedure, unless otherwise ordered by the Court.

(11) **If Defendant agrees to waive service of the Summons and Amended Complaint, he must return the signed waiver forms to the United States Marshal, not the Plaintiff.**

(12) Defendant P. Smith **must answer** Count II of the Amended Complaint or otherwise respond by appropriate motion within the time provided by the applicable provisions of Rule 12(a) of the Federal Rules of Civil Procedure.

(13) This matter is **referred** to Magistrate Judge Lawrence A. Anderson pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings.

DATED this 9th day of September, 2008.

Stephen M. McNamee
United States District Judge