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

David L. Gossett,

Plaintiff,

vs.

Robert Stewart, et al.,

Defendants.

No. CV 08-2120-PHX-DGC (ECV)

ORDER

Plaintiff David L. Gossett, who is confined in the Arizona State Prison Complex-Eyman, Meadows Unit, in Florence, Arizona, has filed a *pro se* motion for leave to file a civil rights complaint pursuant to 42 U.S.C. § 1983 on other than the court-approved form and lodged a proposed Complaint. (Doc.# 1, 2.)¹ Plaintiff has paid the \$350.00 filing fee. The Court will grant the motion for leave to file on other than the court-approved form. The Court will also order Defendants Fernandez, Bollweg, and Daters to answer Plaintiff’s retaliation, excessive force, and failure to protect claims against them in the Complaint and will dismiss the remaining claims and Defendants without prejudice.

I. Motion for Leave to File Complaint Other than on Court-Approved Form

Plaintiff seeks leave to file his Complaint on other than the court-approved form for prisoners. See LRCiv. 3.4(a). Plaintiff’s Complaint otherwise conforms with federal and local rules for actions filed by incarcerated persons. Id. His motion will be granted.

¹ “Doc.#” refers to the docket number of filings in this action.

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

2 The Court is required to screen complaints brought by prisoners seeking relief against
3 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
4 § 1997(e). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
5 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
6 be granted, or that seek monetary relief from a defendant who is immune from such relief.
7 28 U.S.C. § 1915A(b)(1), (2).

8 **III. Complaint**

9 Plaintiff alleges claims for excessive force, failure to train, failure to protect, and
10 retaliation. Plaintiff sues Arizona Department of Corrections (ADC) Eyman Complex
11 Warden Robert Stewart; Cook Unit Deputy Warden Alex Davenport; Lieutenant Barry
12 Fernandez; Corrections Officers Bollweg and Daters; and John and Jane Does I-X. Plaintiff
13 also sues the spouses of the named Defendants. Plaintiff seeks compensatory and punitive
14 relief.

15 Plaintiff alleges the following facts: Plaintiff is 55 years old. He has been diagnosed
16 with a “chronic respiratory disorder” and must use a cane or wheelchair due to multiple back
17 injuries. Since 2000, Plaintiff has been assigned to special medical needs housing that units
18 based on his medical conditions. On November 17, 2007, Plaintiff was transferred to the
19 Cook Unit and assigned to building 5, which complies with the Americans with Disabilities
20 Act (ADA). Plaintiff had a Special Need Order (SNO) from his treating physicians for
21 assignment to a lower bunk.

22 In March 2008, Plaintiff was taken to the infirmary for a respiratory problem and was
23 initially examined by a nurse. When the nurse left the room momentarily, Defendant
24 Fernandez ordered Plaintiff to return to his housing unit. Plaintiff explained to Fernandez
25 that he was waiting to see the doctor, but Fernandez escorted him out of the infirmary and
26 put him in a fenced enclosure. While in the enclosure, Plaintiff complained to Defendant
27 Davenport about Fernandez’s interference with his medical care. Plaintiff was then returned
28 to the infirmary. While Plaintiff received a breathing treatment in the infirmary, Fernandez

1 appeared, looking angry, and told Plaintiff that he was putting him “on report” for disobeying
2 a direct order. Following completion of the treatment, Fernandez put Plaintiff back in the
3 enclosure and told him that he was going to be transferred to the Special Management Unit
4 (SMU) and placed in isolation. While confined at SMU, Plaintiff complained in writing to
5 Defendants Stewart and Davenport about Fernandez’s actions and requested an investigation,
6 but they failed to take action. Plaintiff was found guilty of disobeying a direct order, but the
7 charge was dismissed on appeal.

8 On July 3, 2008, Plaintiff was transferred back to the Cook Unit and assigned to
9 Building 5. On July 8, 2008, he was informed that he was being transferred to an upper bunk
10 in a building without ADA accommodations. Plaintiff informed staff of the SNO that
11 required his assignment to a lower bunk in an ADA-compliant facility. Fernandez was
12 summoned and Plaintiff repeated that he had a SNO and that his record documented his need
13 to be housed in an ADA-compliant facility. Stating that Plaintiff did not have a reason to
14 remain in the medical housing unit, Fernandez escorted Plaintiff to the transportation
15 enclosure. Without warning, Fernandez and Defendant Bollweg snatched Plaintiff’s cane
16 and violently twisted Plaintiff’s hands and wrists behind his back for cuffing, causing
17 Plaintiff to fall in extreme pain and resulting in serious physical injury. Fernandez “drove”
18 his knee into Plaintiff’s back while he, Bollweg, and others continued to twist Plaintiff’s
19 hands, wrists, and arms beyond that necessary to cuff him. Defendant Dater and other
20 corrections staff witnessed the excessive use of force, but failed to intervene to protect
21 Plaintiff. Fernandez then ordered that Plaintiff be shackled. The shackles were so tightly
22 applied, despite the absence of resistance by Plaintiff, that he again suffered extreme and
23 unnecessary pain. Shortly after his placement in the transportation enclosure, Lieutenant
24 Sutton and Officer Madsen approached the enclosure and confirmed that Plaintiff had a
25 verified need to be housed in Building 5 and Plaintiff was taken to the infirmary. There,
26 Plaintiff received injections for pain and the physician ordered Plaintiff’s meals to be
27 delivered to him in Building 5. Fernandez and housing unit staff charged Plaintiff with
28 disobeying direct orders and Fernandez also charged Plaintiff with using his cane as a

1 weapon. Plaintiff was found guilty of disobeying a direct order for which he received a
2 verbal reprimand and 15 days loss of phone privileges. The other charge was dismissed.
3 Plaintiff spoke to Stewart and Davenport regarding this incident and requested that
4 Fernandez, Bollweg, and others be disciplined, but they took no action.

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

6 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
7 conduct about which he complains was committed by a person acting under the color of state
8 law and (2) the conduct deprived him of a federal constitutional or statutory right. Wood v.
9 Ostrander, 879 F.2d 583, 587 (9th Cir. 1989). In addition, a plaintiff must allege that he
10 suffered a specific injury as a result of the conduct of a particular defendant and he must
11 allege an affirmative link between the injury and the conduct of that defendant. Rizzo v.
12 Goode, 423 U.S. 362, 371-72, 377 (1976).

13 **A. Fictitiously-Named Defendants**

14 Plaintiff sues several John and Jane Does as Defendants. Generally, the use of
15 anonymous type appellations to identify defendants is not favored. Rule 10(a) of the Federal
16 Rules of Civil Procedure requires the plaintiff to include the names of the parties in the
17 action. As a practical matter, it is impossible in most instances for the United States Marshal
18 or his designee to serve a summons and complaint or amended complaint upon an
19 anonymous defendant.

20 The Ninth Circuit has held that where identity is unknown prior to the filing of a
21 complaint, the plaintiff should be given an opportunity through discovery to identify the
22 unknown defendants, unless it is clear that discovery would not uncover the identities, or that
23 the complaint would be dismissed on other grounds. Wakefield v. Thompson , 177 F.3d
24 1160, 1163 (9th Cir. 1999) (citing Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)).
25 Plaintiff may use the discovery processes to obtain the names of the persons whom he
26 believes violated his constitutional rights. If Plaintiff discovers the identities of these
27 fictitious defendants through the discovery process, or otherwise, he may seek leave of the
28 Court to amend to name these individuals.

1 **B. Stewart and Davenport**

2 Although Stewart and Davenport may properly be sued for constitutional violations,
3 Plaintiff fails to state a claim against either. “A plaintiff must allege facts, not simply
4 conclusions, that show that an individual was personally involved in the deprivation of his
5 civil rights.” Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). For an individual
6 to be liable in his official capacity, a plaintiff must allege that the official acted as a result of
7 a policy, practice, or custom. See Cortez v. County of Los Angeles, 294 F.3d 1186, 1188
8 (9th Cir. 2001). Further, there is no *respondeat superior* liability under § 1983, so a
9 defendant’s position as the supervisor of a someone who allegedly violated a plaintiff’s
10 constitutional rights does not make the supervisor liable. Monell v. Dep’t of Soc. Servs., 436
11 U.S. 658, 691 (1978); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor in
12 his individual capacity, “is only liable for constitutional violations of his subordinates if the
13 supervisor participated in or directed the violations, or knew of the violations and failed to
14 act to prevent them.” Taylor, 880 F.2d at 1045.

15 Plaintiff alleges that Stewart and Davenport are the policymakers, respectively, of the
16 Eyman Complex and Cook Unit. Plaintiff also alleges that he complained to them about the
17 two incidents, but they failed to act on his complaints. Plaintiff contends that Stewart and
18 Davenport thereby condoned the alleged use of excessive force, failure to protect, and
19 retaliation against inmates who exercise their constitutional rights. Plaintiff further asserts
20 they condoned such violations by failing to properly train, supervise, and discipline their
21 staff. Plaintiff’s allegations are not sufficient to support that either Stewart or Davenport
22 participated in or directed the alleged violations or to support that they knew of the violations
23 but failed to act to prevent them. Plaintiff’s allegations reflect that they only learned of the
24 alleged violations after they occurred. Plaintiff also fails to set forth facts to support that his
25 constitutional rights were violated pursuant to a policy established by either Defendant.

26 Plaintiff also fails to allege facts to support a claim for failure to train against Stewart
27 or Davenport. To state a claim for failure to train, a plaintiff must allege facts to support that
28 the alleged failure amounted to deliberate indifference. Edgerly v. City and County of San

1 Francisco, 495 F.3d 645, 661 (9th Cir. 2007) (citing Cannell v. Lightner, 143 F.3d 1210,
2 1213 (9th Cir. 1998) (holding that, to establish supervisor liability for failure to train, a
3 plaintiff must show that the failure “amounted to deliberate indifference”). A plaintiff must
4 allege facts to support that not only was particular training inadequate, but also that such
5 inadequacy was the result of “a ‘deliberate’ or ‘conscious’ choice” on the part of the
6 defendant. Cannell, 143 F.3d at 1213; see Clement v. Gomez, 298 F.3d 898, 905 (9th Cir.
7 2002) (a plaintiff must allege facts to support that “in light of the duties assigned to specific
8 officers or employees, the need for more or different training is obvious, and the inadequacy
9 so likely to result in violations of constitutional rights, that the policy-makers ... can
10 reasonably be said to have been deliberately indifferent to the need.”) Plaintiff fails to allege
11 facts to support that any particular training was inadequate or that such inadequacy was the
12 result of a deliberate choice. For the reasons discussed, Stewart and Davenport will be
13 dismissed.

14 **V. Claims for Which an Answer Will be Required**

15 Plaintiff alleges that Defendant Fernandez and Bollweg used excessive force against
16 him and that Defendant Daters failed to intervene to protect Plaintiff. Plaintiff further alleges
17 that Fernandez retaliated against him for seeking redress of grievances and medical care.
18 Plaintiff sufficiently states a claim against Fernandez and Bollweg for excessive force; a
19 claim against Fernandez for retaliation; and a claim against Daters for failure to protect.
20 These Defendants will be required to respond to Plaintiff’s allegations against them.

21 **VI. Warnings**

22 **A. Address Changes**

23 Plaintiff must file and serve a notice of a change of address in accordance with Rule
24 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
25 relief with a notice of change of address. Failure to comply may result in dismissal of this
26 action.

27 **B. Copies**

28 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a copy

1 of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate
2 stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit
3 an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply
4 may result in the filing being stricken without further notice to Plaintiff.

5 **C. Possible Dismissal**

6 If Plaintiff fails to timely comply with every provision of this Order, including these
7 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
8 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
9 comply with any order of the Court).

10 **IT IS ORDERED:**

11 (1) Plaintiff's motion for leave to file a complaint on other than the court-approved
12 form is **granted** and Plaintiff's lodged Complaint must be filed. (Doc.# 1, 2.)

13 (2) Plaintiff's failure to train claims and Defendants Stewart, Davenport, and John
14 and Jane Does 1-X, and their spouses are **dismissed** without prejudice.

15 (3) Defendants Fernandez, Bollweg, and Daters must answer the Complaint.

16 (4) The Clerk of Court must send Plaintiff a service packet including the
17 Complaint (doc.# 2), this Order, and both summons and request for waiver forms for
18 Defendants Fernandez, Bollweg, and Daters.

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

22 (6) If Plaintiff does not either obtain a waiver of service of the summons or
23 complete service of the Summons and Complaint on a Defendant within 120 days of the
24 filing of the Complaint or within 60 days of the filing of this Order, whichever is later, the
25 action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m); LRCiv
26 16.2(b)(2)(B)(I).

27 (7) The United States Marshal must retain the Summons, a copy of the Complaint,
28 and a copy of this Order for future use.

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

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

10 (b) within 10 days after personal service is effected, file the return of service
11 for Defendant, along with evidence of the attempt to secure a waiver of service of the
12 summons and of the costs subsequently incurred in effecting service upon Defendant.
13 The costs of service must be enumerated on the return of service form (USM-285) and
14 must include the costs incurred by the Marshal for photocopying additional copies of
15 the Summons, Complaint, or this Order and for preparing new process receipt and
16 return forms (USM-285), if required. Costs of service will be taxed against the
17 personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules of Civil
18 Procedure, unless otherwise ordered by the Court.

19 (9) **A Defendant who agrees to waive service of the Summons and Complaint**
20 **must return the signed waiver forms to the United States Marshal, not the Plaintiff.**

21 (10) Defendant must answer the Complaint or otherwise respond by appropriate
22 motion within the time provided by the applicable provisions of Rule 12(a) of the Federal
23 Rules of Civil Procedure.

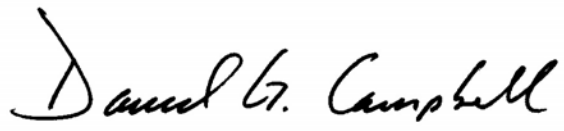
24 (11) Any answer or response must state the specific Defendant by name on whose
25 behalf it is filed. The Court may strike any answer, response, or other motion or paper that
26 does not identify the specific Defendant by name on whose behalf it is filed.

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1 (12) This matter is referred to Magistrate Judge Edward C. Voss pursuant to Rules
2 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings.

3 DATED this 8th day of December, 2008.

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David G. Campbell
United States District Judge