

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**WO**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Brian A. Wilkins,	)	No. CV-09-1380-PHX-LOA
	)	
Plaintiff,	)	<b>ORDER</b>
	)	
vs.	)	
	)	
Maricopa County, et al.,	)	
	)	
Defendants.	)	
	)	

This matter is before the Court on *pro se* Plaintiff's February 26, 2010 Motion for Leave to Amend Second Complaint. (docket # 57) Plaintiff attached a proposed Second Amended Complaint to his motion, docket # 57, attachment, but then lodged separate Second Amended Complaints on February 26 and March 30, 2010. (docket ## 58, 81)

Before the Motion for Leave to Amend was fully briefed, the Court conducted a Rule 16(b) scheduling conference. (docket # 65) The following individuals were present: Plaintiff, representing himself; counsel Sherle R. Flaggman and April Demarviex, Office of General Litigation Services; and S. Lee White, Special Litigation Services, representing Defendants Arpaio or Maricopa County. (docket # 65) Among other topics, the Court and the parties discussed Plaintiff's pending Motion for Leave to Amend Second Complaint, docket # 57. (*Id.* at 1-2) The parties agreed that:

if Plaintiff provides a proposed Second Amended Complaint to defense counsel within 7 days from [the date of the Rule 16 conference] that removes references to issues removed from the litigation by prior court order or not relevant to Plaintiff's current

1 claims, Defendants will agree and stipulate that Plaintiff may file  
2 the agreed-upon Second Amended Complaint. Absent such an agreement,  
3 Defendant(s) shall file an objection to Plaintiff's Motion for Leave to  
4 Amend Second Amended Complaint.

5 (docket # 65 at 2)

6 On March 22 and 23, 2010, Defendants Maricopa County and Arpaio responded in  
7 opposition to Plaintiff's Motion for Leave to Amend. (dockets # 72, 73) On March 30, 2010,  
8 Plaintiff filed a reply. (docket # 80) That same day, Plaintiff filed another pleading entitled  
9 Second Amended Complaint. (docket # 81) Plaintiff presumably filed the second proposed  
10 Second Amended Complaint in response to the parties' discussions during the Rule 16  
11 conference. However, Plaintiff's second proposed Second Amended Complaint does not satisfy  
12 the requirements upon which Defendants and the Court made the filing of a second amended  
13 complaint contingent. (dockets # 65 at 2, # 81) Indeed, Defendant Maricopa County notified  
14 the Court that the parties have not stipulated to Plaintiff's Second Amended Complaint, docket  
15 # 81, in the form submitted to the Court. (docket # 82) Defendants maintain their objections  
16 to the Second Amended Complaint. Because it appears that Plaintiff intends the Second  
17 Amended Complaint, docket # 81, submitted on March 30, 2010, to be the relevant pleading,  
18 the Court will consider the Motion for Leave to Amend Second Complaint in relation to that  
19 pleading.

20 For the reasons set forth below, the Court will grant Plaintiff's request to substitute  
21 Darren Dauch for the previously unidentified defendant referred to as "Jail Guard" in the First  
22 Amended Complaint. Defendant Dauch must answer Plaintiff's Fourteenth Amendment claim  
23 asserted in Count Two of the Second Amended Complaint. The Court will also permit Plaintiff  
24 leave to amend to add a failure-to-train claim. For the reasons set forth below, the Court will  
25 deny Plaintiff's Motion for Leave to Amend Second Complaint in all other respects.

## 26 **I. Background**

27 On June 29, 2009, Plaintiff filed a *pro se* civil rights Complaint pursuant to 42 U.S.C.  
28 § 1983. (docket # 1) On July 6, 2009, the Court granted Plaintiff *in forma pauperis* status.  
(docket # 5) Defendants Joseph M. Arpaio and Maricopa County were served and both filed

1 motions to dismiss. (dockets ## 14, 19) Rather than responding to the motions to dismiss,  
2 Plaintiff filed a Motion for Leave to Amend Complaint, docket # 28, on October 20, 2009.

3 Plaintiff's four-count First Amended Complaint brought pursuant to 42 U.S.C. § 1983  
4 and 42 U.S.C. § 1985(3), sues the following Defendants: Maricopa County, Maricopa County  
5 Sheriff Joseph M. Arpaio, Maricopa County Jail X-ray Technician ("X-ray Technician"), and  
6 Maricopa County Jail Guard ("Jail Guard") for violations of his Fourteenth and Eighth  
7 Amendment rights.

8 Plaintiff's allegations arise from a 58-day period in 2008 during which he was a  
9 pretrial detainee at the Lower Buckeye Jail in Phoenix, Arizona. (docket # 29 at 3) Plaintiff  
10 alleges that on July 22, 2008, he was arrested by the Tempe Police Department and taken to the  
11 Fourth Avenue Jail in Phoenix, Arizona. (*Id.*) Plaintiff alleges that "Maricopa County"  
12 collected information about his medical history; including that he takes medication for  
13 hypertension, and that he had been treated the previous two weeks for a broken hand. (*Id.*) On  
14 July 23, 2008, Plaintiff was transferred to Lower Buckeye Jail. On July 25, 2008, at around  
15 10:30 a.m., Plaintiff was "forcibly given an X-ray against his will, on his broken hand." (*Id.*)  
16 The Defendant X-Ray technician did not provide Plaintiff a "lead apron or [other] garment to  
17 guard against radiation poisoning and/or overexposure." (*Id.* at 3-4)

18 Plaintiff further alleges that Maricopa County has a policy and custom of forcing  
19 pretrial detainees to participate in unsafe, involuntary medical experiments, and that "Maricopa  
20 County doctors" "continually tried to force Plaintiff to allow them to stick needles in him" to  
21 "figure out why [Plaintiff has] high blood pressure." (*Id.* at 4) Plaintiff claims he was  
22 threatened with solitary confinement if he refused to let "Maricopa County" doctors stick  
23 needles in him, and that the doctors eventually "gave up." (*Id.*) Plaintiff alleges that "jail  
24 officials" refused to provide him his medication for hypertension, despite his repeated requests.  
25 (*Id.* at 4-5) Plaintiff further claims that "Maricopa County medical" refused to give him a splint  
26 for his broken hand." (*Id.* at 4)

27 Plaintiff also claims that during his 58 days of confinement, he was given rotten meat  
28 and fruit, moldy bread, and polluted water pursuant to policies of Defendants Maricopa County

1 and Arpaio. (*Id.* at 5) Plaintiff further alleges that, pursuant to the policies of Defendants  
2 Maricopa County and Arpaio, he was forced to “stand in small holding cells with upwards of  
3 60 sick, coughing, bleeding inmates who could not move because of the crowding.” (*Id.*)  
4 Finally, Plaintiff alleges that Defendant Jail Guard forced Plaintiff to strip naked in front of  
5 other guards and “placed his hands on Plaintiff’s genitals.” (*Id.*)

6 On December 21, 2009, the Court dismissed Counts Two and Three of the First  
7 Amended Complaint. (docket # 41 at 16) The Court also dismissed Plaintiff’s Eighth  
8 Amendment claims, and his allegations asserting the rights of detainees other than himself. (*Id.*)

9 The Court directed Defendants Arpaio and Maricopa County to respond to Plaintiff’s  
10 allegations in Count One of the First Amended Complaint that inadequate medical care and  
11 inadequate conditions of confinement violated Plaintiff’s Fourteenth Amendment rights. (*Id.*)

12 The Court also stated that Plaintiff could engage in early discovery to determine the identity  
13 of the unknown Jail Guard identified in Count Four of the First Amended Complaint. (*Id.*)

14 Plaintiff now seeks leave to file a Second Amended Complaint which substitutes  
15 Darren Dauch for the previously unknown jail guard, attempts to re-urge previously dismissed  
16 claims, and adds a failure-to-train claim. Defendants oppose Plaintiff’s amendment motion.

## 17 **II. Review of Proposed Second Amended Complaint**

### 18 **A. Eighth Amendment Claims**

19 In the December 21, 2009 Order, the Court dismissed Plaintiff’s Eighth Amendment  
20 claims. (docket # 41) The Court explained that “[b]ecause Plaintiff’s allegations stem from a  
21 period during which he was a pretrial detainee and he has not been convicted and sentenced,  
22 Plaintiff lacks standing to bring claims under the Eighth Amendment. (*Id.* at 4) The protections  
23 of the Eighth Amendment do not attach until after conviction and sentence. *City of Revere v.*  
24 *Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983) (“Eighth Amendment scrutiny is appropriate  
25 only after the state has secured a formal adjudication of guilt.”).” (*Id.*)

26 In the proposed Second Amended Complaint, docket # 81, Plaintiff attempts to assert  
27 the same Eighth Amendment claims that were previously dismissed. The Court will not  
28 authorize Plaintiff leave to amend to re-assert previously dismissed claims.

1                   **B. Medical Claims**

2                   In the December 21, 2009 Order, the Court dismissed Plaintiff’s medical allegations  
3 regarding forcible x-rays, exposure to radiation, and medical experimentation. (docket # 41)  
4 In the proposed Second Amended Complaint, Plaintiff attempts to resuscitate his allegations  
5 regarding x-rays, radiation, and medical experimentation. (docket # 81) The Court will not  
6 permit Plaintiff leave to amend to add claims that were previously dismissed.

7                   **C. Rights of other Detainees**

8                   In the December 21, 2009 Order, the Court dismissed Plaintiff’s allegations asserting  
9 the rights of other inmates. (docket # 41) In the proposed Second Amended Complaint,  
10 Plaintiff re-urges those previously dismissed claims. The Court will not authorize Plaintiff  
11 leave to amend to add claims that were previously dismissed.

12                   **D. Failure to Train**

13                   In the proposed Second Amended Complaint, Plaintiff seeks to add a claim that  
14 Defendants Maricopa County and Arpaio failed to train their employees regarding the policy,  
15 “J-D-02 E, which states ‘inmates are asked their medical/mental history, including currently  
16 prescribed medication.’” (docket # 81 at 9) Plaintiff alleges that had Defendants trained their  
17 employees to inquire regarding his medications, he would not have suffered the pain and injury  
18 to his hand and highly elevated blood pressure while incarcerated. Plaintiff argues that  
19 Defendants’ failure to train violated his Fourteenth Amendment right to be free from pre-trial  
20 punishment. (*Id.* at 9-10)

21                   Plaintiff may establish municipal liability by demonstrating that the alleged  
22 constitutional violation was caused by a failure to train municipal employees adequately. *City*  
23 *of Canton Ohio v. Harris*, 489 U.S. 378, 388-91 (1989); *Johnson v. Hawe*, 388 F.3d 676, 686  
24 (9<sup>th</sup> Cir. 2004). Such a showing depends on three elements: (1) the training program must be  
25 inadequate “in relation to the tasks the particular officers must perform”; (2) the city officials  
26 must have been deliberately indifferent “to the rights of persons with whom the [local officials]  
27 come into contact”; and (3) the inadequacy of the training “must be shown to have ‘actually  
28

1 caused' the constitutional deprivation at issue." *Merritt v. County of Los Angeles*, 875 F.2d 765,  
2 770 (9<sup>th</sup> Cir. 1989) (internal citations omitted).

3 The indifference of city officials may be shown where, "in light of the duties assigned  
4 to specific . . . employees[,] the need for more or different training is so obvious, and the  
5 inadequacy so likely to result in the violation of constitutional rights, that the policymakers of  
6 the city can reasonably be said to have been deliberately indifferent to that need." *City of*  
7 *Canton*, 489 U.S. at 390; *Berry v. Baca*, 379 F.3d 764, 767 (9<sup>th</sup> Cir. 2004). There is no  
8 heightened pleading standard with respect to the "policy or custom" requirement of  
9 demonstrating municipal liability. *Leatherman v. Tarrant County Narcotics Intelligence &*  
10 *Coordination Unit*, 507 U.S. 163, 167-68 (1993).

11 Plaintiff sufficiently states a plausible failure-to-train claim and will be permitted to  
12 amend his complaint to add that claim. *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949 (2009)  
13 ("A claim has facial plausibility," the Court explained, "when the plaintiff pleads factual content that  
14 allows the court to draw the reasonable inference that the defendant is liable for the misconduct  
15 alleged.").

#### 16 **E. Darren Dauch**

17 In his proposed Second Amended Complaint, Plaintiff identifies Darren Dauch as the  
18 previously unknown "jail guard" in Count Four of the First Amended Complaint.

19 In the proposed Second Amended Complaint, Plaintiff's allegations regarding the  
20 alleged sexual assault by Defendant Dauch are located in Count Two. (docket # 81 at 8-9) As  
21 the Court has previously determined, Plaintiff may pursue his Fourteenth Amendment  
22 allegations against Defendant Dauch.

### 23 **III. Summary**

24 In conclusion, Plaintiff is granted leave to amend to add Defendant Darren Dauch in  
25 Count Two of the Second Amended Complaint. Defendant Dauch must answer Plaintiff's claim  
26 that Defendant Dauch's alleged conduct violated Plaintiff's rights under the Fourteenth  
27 Amendment.

1 Plaintiff is granted leave to amend to add the failure-to-train claim asserted at Count  
2 Three of the Second Amended Complaint. (docket # 81 at 9-10) Plaintiff's motion for leave  
3 to amend is denied in all other respects. To avoid confusion, the Court will not order Plaintiff  
4 to file yet another second amended complaint. (LRCiv 15.1, which provides that, if leave to  
5 amend is granted, the amended pleading shall be filed and served on all parties within fourteen  
6 days, "unless the Court orders otherwise.") Rather, the Court will direct the Clerk of Court to  
7 file the Second Amended Complaint, lodged at docket # 81. However, Defendants are only  
8 directed to answer the claims set forth below. All other claims asserted in the Second Amended  
9 Complaint do not require an Answer as those claims were previously dismissed in the December  
10 21, 2009 Order, docket # 41, and have not been reinstated. If Plaintiff's claims, or any of them,  
11 survive summary judgment, Plaintiff is hereby precluded from reading the Second Amended  
12 Complaint in its entirety to the jury because Plaintiff has included claims in it which have  
13 previously dismissed.

14 In view of the foregoing,

15 **IT IS ORDERED** that Plaintiff's Motion for Leave to Amend Second Complaint,  
16 docket # 57, is **GRANTED** solely to the extent that:

- 17 1) Darren Dauch is added as a defendant, and
- 18 2) the failure-to-train claim asserted in Count Three of the Second Amended  
19 Complaint, docket # 81, is added.

20 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Leave to Amend Second  
21 Complaint, docket # 57, is **DENIED** in all other respects. Plaintiff's previously dismissed  
22 claims (asserting violations of the Eighth Amendment; rights of detainees other than himself;  
23 and medical claims regarding x-rays, radiation, and medical experiments) are **NOT** reinstated.

24 **IT IS FURTHER ORDERED** that the Clerk of Court shall file Plaintiff's proposed  
25 Second Amended Complaint, lodged at docket # 81.

26 **IT IS FURTHER ORDERED** that Defendants Arpaio and Maricopa County shall  
27 answer Plaintiff's allegations in Count One of the Second Amended Complaint that inadequate  
28 medical care (denial of a splint for Plaintiff's broken hand and denial of blood pressure

1 medication) and inadequate conditions of confinement violate the Fourteenth Amendment  
2 within fourteen days of the date this Order is entered.<sup>1</sup>

3 **IT IS FURTHER ORDERED** that Defendant Darren Dauch must answer Plaintiff's  
4 Fourteenth Amendment claim asserted in Count Two the Second Amended Complaint, docket  
5 # 81 at 8. (docket # 41 at 13-15)

6 **IT IS FURTHER ORDERED** that Defendants Arpaio and Maricopa County shall  
7 answer Plaintiff's failure-to-train claim asserted in Count Three of the Second Amended  
8 Complaint, docket # 81 at 9-10, within fourteen days of the date this Order is entered.

9 **IT IS FURTHER ORDERED** that:

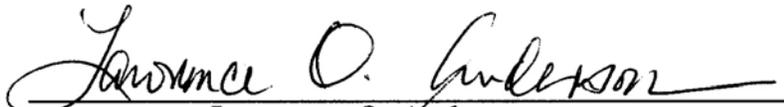
10 1. The Clerk of Court shall send Plaintiff a service packet for Defendant Darren  
11 Dauch.

12 2. Plaintiff shall complete and return the service packet to the Clerk of the Court  
13 within twenty (20) days of filing of this Order. The United States Marshal Service will not  
14 provide service of process if Plaintiff fails to comply with this Order;

15 3. If Plaintiff does not either obtain a voluntary waiver of service of the summons and  
16 Second Amended Complaint or complete service of the Summons and Second Amended  
17 Complaint on Defendant Dauch within **60 days** of the filing of this Order, Plaintiff's claims  
18 against Defendant Dauch may be dismissed. Fed.R.Civ.P. 4(m); LRCiv 16.2(b)(2)(B)(i).

19 **IT IS FURTHER ORDERED** that Defendant Darren Dauch shall file his written  
20 election to either consent to magistrate-judge jurisdiction or elect to proceed before a United  
21 States district judge within 14 days of his appearance herein. LRCiv 3.8(a).

22 Dated this 6<sup>th</sup> day of April, 2010.

23   
24 Lawrence O. Anderson  
25 United States Magistrate Judge

26  
27  
28 <sup>1</sup> These are the same allegations which the Court directed Defendants Arpaio and Maricopa County to answer in the December 21, 2009 Order. (docket # 41 at 6-9)