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

Roy C. Earley,

Plaintiff,

vs.

Charles L. Ryan, et al.,

Defendants.

) No. CV 09-1988-PHX-MHM (JRI)

) **ORDER**

Plaintiff Roy C. Earley, who is confined in the Arizona State Prison Complex-Eyman, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. The Court will 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 \$6.00. 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.

II. Statutory Screening of Prisoner Complaints

The Court is required to screen 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

1 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
2 be granted, or that seek monetary relief from a defendant who is immune from such relief.
3 28 U.S.C. § 1915A(b)(1), (2).

4 A pleading must contain a “short and plain statement of the claim *showing* that the
5 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not
6 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
7 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
8 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
9 statements, do not suffice.” Id.

10 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
11 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,
12 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
13 that allows the court to draw the reasonable inference that the defendant is liable for the
14 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for
15 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
16 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual
17 allegations may be consistent with a constitutional claim, a court must assess whether there
18 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

19 If the Court determines that a pleading could be cured by the allegation of other facts,
20 a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the
21 action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The Court
22 should not, however, advise the litigant how to cure the defects. This type of advice “would
23 undermine district judges’ role as impartial decisionmakers.” Pliler v. Ford, 542 U.S. 225,
24 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide whether the court was
25 required to inform a litigant of deficiencies). Plaintiff’s Complaint will be dismissed for
26 failure to state a claim, with leave to amend because the Complaint may possibly be saved
27 by amendment.

28 . . .

1 **III. Complaint**

2 Plaintiff sues: Arizona Department of Corrections Director Charles L. Ryan; Associate
3 Deputy Warden R. Cluff; Chief of Operations Captain Faye; and Corrections Officer IV J.T.
4 Neal.

5 Plaintiff raises three grounds for relief:

- 6 (1) Plaintiff’s Eighth Amendment rights are violated because he has been housed
7 in a sex offender unit even though he is currently incarcerated for first-degree
8 burglary and aggravated assault;
- 9 (2) Plaintiff’s safety is threatened in violation of the Eighth Amendment because
10 Defendants Faye and Cluff failed to transfer Plaintiff to the general population
11 even though Plaintiff does not have a current sex offense; and
- 12 (3) Plaintiff’s equal protection rights are violated because Defendant Cluff refuses
13 to transfer Plaintiff from the sex offender unit to general population and failed
14 to answer Plaintiff’s related grievances.

15 Plaintiff seeks money damages and injunctive relief.

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

17 **A. Housing Classification Claims**

18 A prisoner has no constitutional right to enjoy a particular security classification.
19 Meachum v. Fano, 427 U.S. 215, 224-25 (1976) (no liberty interest protected by the Due
20 Process Clause is implicated in a prison’s reclassification and transfer decisions). See also
21 Hewitt v. Helms, 459 U.S. 460, 466 (1983); Lucero v. Russell, 741 F.2d 1129 (9th Cir.
22 1984). “As long as the conditions or degree of confinement to which the prisoner is
23 subjected is within the sentence imposed upon him and is not otherwise violative of the
24 Constitution, the Due Process Clause does not in itself subject an inmate’s treatment by
25 prison authorities to judicial oversight.” Montanye v. Haymes, 427 U.S. 236, 242 (1976).

26 Similarly, a prisoner has no right to be housed in any particular cellblock or to object
27 to his transfer from one cellblock to another. Hewitt v. Helms, 459 U.S. 460, 466-68 (1983)
28 (transfer from general population to administrative segregation does not involve a protected

1 interest); Caldwell v. Miller, 790 F.2d 589, 604-05 (7th Cir. 1986) (where difference between
2 pre- and post-transfer conditions is one of degree not of kind no protected liberty interest in
3 implicated); Lucero v. Russell, 741 F.2d 1129 (9th Cir. 1984) (transfer to maximum security
4 does not infringe on any protected liberty interest); Lyon v. Farrier, 727 F.2d 766, 768 (8th
5 Cir. 1984) (transfer within a prison is within the discretion of prison officials).

6 Accordingly, Plaintiff's allegation that Defendants have wrongly housed him in a sex
7 offender unit, even though he is not presently incarcerated for a sex offense, does not state
8 a claim for a violation of his constitutional rights.

9 **B. Threat to Safety Claims**

10 The Supreme Court has held that mere negligent failure to protect an inmate from
11 another inmate is not actionable under § 1983. Davidson v. Cannon, 474 U.S. 344 (1986).
12 A prison official violates the Eighth Amendment in failing to protect one inmate from
13 another only when two conditions are met. First, the alleged constitutional deprivation must
14 be, objectively, "sufficiently serious;" the official's act or omission must result in the denial
15 of "the minimal civilized measure of life's necessities." Farmer v. Brennan, 511 U.S. 825,
16 834 (1994). Second, the prison official must have a "sufficiently culpable state of mind," *i.e.*,
17 he must act with deliberate indifference to inmate health or safety. Id. In defining "deliberate
18 indifference" in this context, the Supreme Court has imposed a subjective test:

19 the official must both be aware of the facts from which the inference could be
20 drawn that a substantial risk of serious harm exists, and he must also draw the
inference.

21 Id. at 839 (emphasis supplied).

22 Plaintiff appears to claim that his safety is threatened by his erroneous classification
23 as a sex offender. However, Plaintiff has not alleged facts demonstrating that Defendants
24 were deliberately indifferent to a substantial risk of serious harm to Plaintiff's safety;
25 Plaintiff has not described specific threats to his safety or described why his safety is
26 threatened by his present housing and classification assignments. Accordingly, Plaintiff
27 allegations fail to state a threat-to-safety claim.
28

1 **C. Equal Protection Claims**

2 In Count III, Plaintiff claims that “there have been several inmates that have been
3 transferred to general population but the denial of the Plaintiff borders on discrimination due
4 to the fact that the Plaintiff is not affiliated with a political group and several of these inmates
5 are.”

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

19 Here, Plaintiff has failed to allege that he is a member of a suspect class, or that
20 Defendants’ conduct was the result of purposeful or invidious discrimination, or that the
21 conduct bore no rational relationship to a legitimate governmental interest. Plaintiff has
22 therefore failed to state an equal protection claim.

23 **D. Grievance Claims**

24 In Count III, Plaintiff also appears to claim that his civil rights were violated because
25 his “grievance was never answered or rectified pursuant to this institution’s rules and
26 procedures.” An inmate has no free-standing constitutional right to a grievance process. In
27 Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988), the Ninth Circuit held that a prisoner
28 does not have a protected liberty interest in prison grievance procedures. Other circuits have

1 held similarly. See Antonelli v. Sheahan, 81 F.3d 1422, 1430 (7th Cir.1996); Adams v. Rice,
2 40 F.3d 72, 75 (4th Cir. 1994); Flick v. Alba, 932 F.2d 728, 729 (8th Cir. 1991). Without a
3 liberty interest, Plaintiff has no procedural due process rights at stake and his grievance
4 allegations fail to state a claim.

5 **V. Leave to Amend**

6 For the foregoing reasons, Plaintiff’s Complaint will be dismissed for failure to state
7 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a first
8 amended complaint to cure the deficiencies outlined above. The Clerk of Court will mail
9 Plaintiff a court-approved form to use for filing a first amended complaint. If Plaintiff fails
10 to use the court-approved form, the Court may strike the amended complaint and dismiss this
11 action without further notice to Plaintiff.

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

16 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963
17 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,
18 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as
19 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original
20 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d
21 565, 567 (9th Cir. 1987).

22 **VI. Motion to Appoint Counsel**

23 Plaintiff has requested appointment of counsel. There is no constitutional right to
24 appointment of counsel in a civil case. See Ivey v. Bd. of Regents of Univ. of Alaska, 673
25 F.2d 266 (9th Cir. 1982). The appointment of counsel in a civil rights case is required only
26 when exceptional circumstances are present. Aldabe v. Aldabe, 616 F.2d 1089 (9th Cir.
27 1980); Wilborn v. Escalderon, 789 F.2d 1328 (9th Cir. 1986). “A finding of exceptional
28 circumstances requires an evaluation of both ‘the likelihood of success on the merits [and]

1 the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the
2 legal issues involved.’” Wilborn, 789 F.2d at 1331 (quoting Weygandt v. Look, 718 F.2d
3 952, 954 (9th Cir. 1983)). The Court must review both of these factors together in deciding
4 whether or not to appoint counsel. Id.

5 The Court has reviewed and evaluated the Complaint and finds this action presents
6 no “exceptional circumstances” requiring the appointment of counsel at this time.
7 Accordingly, Plaintiff’s Motion for Appointment of Counsel (Doc. #4) will be denied.

8 **VII. Warnings**

9 **A. Release**

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

14 **B. Address Changes**

15 Plaintiff must file and serve a notice of a change of address in accordance with Rule
16 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
17 relief with a notice of change of address. Failure to comply may result in dismissal of this
18 action.

19 **C. Copies**

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

23 **D. Possible “Strike”**

24 Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails
25 to file an amended complaint correcting the deficiencies identified in this Order, the
26 dismissal may count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g).
27 Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil
28 judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior

1 occasions, while incarcerated or detained in any facility, brought an action or appeal in a
2 court of the United States that was dismissed on the grounds that it is frivolous, malicious,
3 or fails to state a claim upon which relief may be granted, unless the prisoner is under
4 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

5 **E. 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, 963 F.2d at
8 1260-61 (a district court may dismiss an action for failure to comply with any order of the
9 Court).

10 **IT IS ORDERED:**

11 (1) Plaintiff’s Application to Proceed *In Forma Pauperis* (Doc. #3) is **granted**.

12 (2) As required by the accompanying Order to the appropriate government agency,
13 Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$6.00.

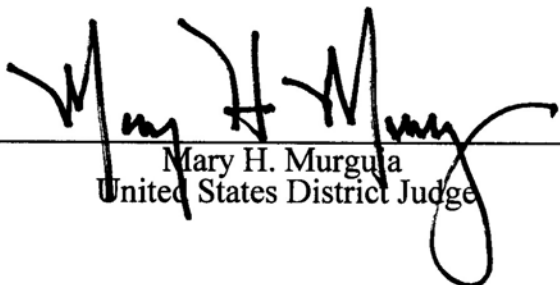
14 (3) Plaintiff’s Motion for Appointment of Counsel (Doc. #4) is denied.

15 (4) The Complaint (Doc. #1) is **dismissed** for failure to state a claim. Plaintiff has
16 **30 days** from the date this Order is filed to file a first amended complaint in compliance with
17 this Order.

18 (5) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of
19 Court must, without further notice, enter a judgment of dismissal of this action with prejudice
20 that states that the dismissal may count as a “strike” under 28 U.S.C. § 1915(g).

21 (6) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil
22 rights complaint by a prisoner.

23 DATED this 5th day of November, 2009.

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25
26 
27 _____
28 Mary H. Murgula
United States District Judge