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

Michael Reyna,

Plaintiff,

vs.

Herb Haley, et al.,

Defendants.

) No. CV 10-430-PHX-DGC (LOA)

) **ORDER**

On February 25, 2010, Plaintiff Michael Reyna, who is confined in the Arizona State Prison Complex-Lewis (ASPC-Lewis) in Buckeye, Arizona, filed a *pro se* civil rights Complaint and an Application to Proceed *In Forma Pauperis*. In a April 1, 2010 Order, the Court granted the Application and dismissed the Complaint for lack of subject matter jurisdiction. The Court gave Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the Order.

On April 22, 2010, Plaintiff filed his First Amended Complaint (Doc. #7). The Court will order Defendants Haley, Tucker, and Zaborsky to answer the First Amended Complaint and will dismiss Defendant Carillo and Davenport without prejudice.

I. 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.

1 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
2 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
3 be granted, or that seek monetary relief from a defendant who is immune from such relief.
4 28 U.S.C. § 1915A(b)(1), (2).

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

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

20 **II. First Amended Complaint**

21 In his one-count First Amended Complaint, Plaintiff sues the following Defendants:
22 Protective Segregation Administrator Herb Haley, Deputy Wardens Carillo and Alex
23 Davenport, and Correctional Officers IV Tucker and Zaborsky. Plaintiff alleges that
24 Defendants violated his Eighth and Fourteenth Amendment rights. He contends that he
25 requested protective segregation placement after he arrived at the Rynning Unit at ASPC-
26 Lewis and two inmates told him that they would kill him for snitching if he did not leave the
27 unit immediately. Plaintiff contends that Defendants Tucker and Zaborsky were deliberately
28 indifferent to the threat to Plaintiff’s safety because they were responsible for coordinating

1 and tracking inmates' requests for protective segregation placement and were required to
2 interview the inmate and begin preliminary processing of the inmate's request, but they did
3 not interview Plaintiff, conducted no investigation, and recommended that Plaintiff's
4 protective segregation request be denied and that Plaintiff be returned to the general
5 population unit. Plaintiff claims Defendants Davenport, Carillo, and Haley accepted
6 Defendants Tucker and Zaborsky's recommendation and denied his request for protective
7 segregation placement. Plaintiff also contends that Defendants Tucker and Zaborsky did not
8 give him notice of the decision and did not advise him that he could appeal the decision.
9 Plaintiff states that he was returned to the general population unit and, within a few hours,
10 was viciously and brutally attacked and had to be rushed to the hospital.

11 Plaintiff also asserts that Defendant Haley "deliberately refused to enforce the
12 [Arizona Department of Corrections' protective segregation] policies with the intention to
13 prevent and deny otherwise qualified inmates to enter [protective segregation] for the sake
14 of minimizing the current [protective segregation] population" and avoiding the need to
15 transfer protective segregation inmates to a larger facility.

16 Plaintiff seeks declaratory relief and monetary damages.

17 **III. Failure to State a Claim**

18 To state an Eighth Amendment failure-to-protect claim, an inmate must show that
19 prison officials acted with deliberate indifference. To state a claim of deliberate indifference,
20 plaintiffs must meet a two-part test. First, the alleged constitutional deprivation must be,
21 objectively, "sufficiently serious"; the official's act or omission must result in the denial of
22 "the minimal civilized measure of life's necessities." Farmer v. Brennan, 511 U.S. 825, 834
23 (1994). Second, the prison official must have a "sufficiently culpable state of mind," *i.e.*, he
24 must act with deliberate indifference to inmate health or safety. Id. In defining "deliberate
25 indifference" in this context, the Supreme Court has imposed a subjective test: "the official
26 must both be aware of facts from which the inference could be drawn that a substantial risk
27 of serious harm exists, and he must also draw the inference." Id. at 837 (emphasis added).

1 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,
2 1060 (9th Cir. 2004). Deliberate indifference is a higher standard than negligence or lack of
3 ordinary due care for the prisoner’s safety. Farmer, 511 U.S. at 835. “Neither negligence
4 nor gross negligence will constitute deliberate indifference.” Clement v. California Dep’t of
5 Corrections, 220 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); see also Broughton v. Cutter
6 Labs., 622 F.2d 458, 460 (9th Cir. 1980) (mere claims of “indifference,” “negligence,” or
7 “medical malpractice” do not support a claim under § 1983). The indifference must be
8 substantial. The action must rise to a level of “unnecessary and wanton infliction of pain.”
9 Estelle v. Gamble, 429 U.S. 97, 105-06 (1976).

10 Plaintiff’s allegations against Defendants Carillo and Davenport suggest, at best, that
11 these Defendants were negligent in accepting Defendants Tucker and Zaborsky’s
12 recommendation. His allegations do not support a claim that Defendants Carillo and
13 Davenport were deliberately indifferent. Thus, the Court will dismiss without prejudice
14 Defendants Carillo and Davenport.

15 **IV. Claims for Which an Answer Will be Required**

16 Liberally construed, Plaintiff has stated Eighth Amendment deliberate-indifference
17 claims against Defendants Tucker, Zaborsky, and Haley. The Court will require these
18 Defendants to answer the First Amended Complaint.

19 **V. Warnings**

20 **A. Release**

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

25 **B. Address Changes**

26 Plaintiff must file and serve a notice of a change of address in accordance with Rule
27 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
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1 relief with a notice of change of address. Failure to comply may result in dismissal of this
2 action.

3 **C. Copies**

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

9 **D. Possible Dismissal**

10 If Plaintiff fails to timely comply with every provision of this Order, including these
11 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
12 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
13 comply with any order of the Court).

14 **IT IS ORDERED:**

15 (1) Defendants Carillo and Davenport are **dismissed** without prejudice.

16 (2) Defendants Tucker, Zaborsky, and Haley must answer the First Amended
17 Complaint.

18 (3) The Clerk of Court must send Plaintiff a service packet including the First
19 Amended Complaint (Doc. #7), this Order, and both summons and request for waiver forms
20 for Defendants Tucker, Zaborsky, and Haley.

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

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

1 (6) The United States Marshal must retain the Summons, a copy of the First
2 Amended Complaint, and a copy of this Order for future use.

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

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

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

22 (8) **A Defendant who agrees to waive service of the Summons and First**
23 **Amended Complaint must return the signed waiver forms to the United States Marshal,**
24 **not the Plaintiff.**

25 (9) Defendants must answer the First Amended Complaint or otherwise respond
26 by appropriate motion within the time provided by the applicable provisions of Rule 12(a)
27 of the Federal Rules of Civil Procedure.

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