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

Armando Antonio Marroquin,
Plaintiff,
vs.
Warden MacDonald, et al.,
Defendants.

No. CV 10-596-PHX-DGC (LOA)

ORDER

On March 16, 2010, Plaintiff Armando Antonio Marroquin, who is confined in the Corrections Corporation of America’s La Palma Correctional Center in Eloy, Arizona, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. #1), an Application to Proceed *In Forma Pauperis* (Doc. #3), and a Motion for Appointment of Counsel (Doc. #5). The Court will order Defendants Ward, Unknown Prison Lieutenant, and Hudson to answer Counts Two, Three, and Four of the Complaint and will dismiss the remaining claims and Defendants without prejudice.

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 \$4.13. 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

1 Order requiring the appropriate government agency to collect and forward the fees according
2 to the statutory formula.

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

4 The Court is required to screen complaints brought by prisoners seeking relief against
5 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
6 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
7 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
8 be granted, or that seek monetary relief from a defendant who is immune from such relief.
9 28 U.S.C. § 1915A(b)(1), (2).

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

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

25 **III. Complaint**

26 In his Complaint, Plaintiff sues the following Defendants at the Corrections
27 Corporation of America’s Florence Correctional Center: Warden MacDonald, Case Manager
28

1 J. Ward, an Unknown Prison Lieutenant, Correctional Counselor Hudson, and Doctors T.
2 Jackson and Wilkinson.

3 Plaintiff has listed his counts in the Complaint (Doc. #1) as: Count I; Count II; Count
4 IIIA; Count IIIB, which is a continuation of Count IIIA; Count IIIC; Count III; and Count
5 III. For purposes of clarity, the Court will identify the counts as follows: Count One will
6 include the allegations on Document #1, page 4; Count Two will include the allegations on
7 Document #1, page 5; Count Three will include the allegations on Document #1, pages 6 and
8 7; Count Four will include the allegations on Document #1, page 8; Count Five will include
9 the allegations on Document #1, page 9; and Count Six will include the allegations on
10 Document #1, page 10.

11 In Count One (Doc. #1, p.4), Plaintiff alleges that Defendant MacDonald violated
12 Plaintiff's Eighth and Fourteenth Amendment rights when he violated "his duties to ensure
13 adequate training[,] supervision[,] and direction of subor[d]inate employees." Plaintiff
14 asserts that Defendant MacDonald is therefore liable for his subordinates' conduct.

15 In Count Two (Doc. #1, p.5), Plaintiff contends that Defendant Ward violated
16 Plaintiff's Eighth and Fourteenth Amendment rights by intentionally informing inmates in
17 Plaintiff's unit that the grievance Plaintiff had actually filed against prison officials was a
18 grievance against the inmates. Plaintiff asserts that, as a result, he was assaulted by one of
19 the inmates and suffered multiple facial fractures from the assault. Plaintiff also asserts that
20 Defendant Ward, in retaliation for Plaintiff's grievance, searched Plaintiff's cell daily.

21 In Count Three (Doc. #1, pp.6-7), Plaintiff asserts that, after he was assaulted, he
22 repeatedly requested clean clothes and a shower because he smelled and his clothes were
23 bloody. Plaintiff claims that he told Defendant Prison Lieutenant that he was being subjected
24 to cruel and unusual punishment and Defendant Prison Lieutenant informed Plaintiff that he
25 did not "give a damn" about Plaintiff's constitutional rights. Plaintiff alleges that he
26 requested grievance forms to report Defendant Prison Lieutenant's conduct and Defendant
27 Prison Lieutenant retaliated against Plaintiff, in violation of the Eighth and Fourteenth
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1 Amendments, by placing Plaintiff in a segregation unit without medical care, clothing, or a
2 shower, in an effort to punish Plaintiff.

3 In Count Four (Doc. #1, p.8), Plaintiff alleges that Defendant Hudson violated
4 Plaintiff's Eighth and Fourteenth Amendment rights by intentionally informing inmates in
5 Plaintiff's unit that a grievance Plaintiff had actually filed against prison officials was a
6 grievance filed against the inmates. Plaintiff asserts that Defendant Hudson did this as
7 retaliation and in an effort to get the inmates to hurt Plaintiff. Plaintiff contends that, as a
8 result, he was assaulted by one of the inmates. Plaintiff also asserts that Defendant Hudson,
9 in retaliation for Plaintiff's grievance, searched Plaintiff's cell daily.

10 In Count Five (Doc. #1, p.9), Plaintiff asserts a violation of his Eighth and Fourteenth
11 Amendment rights by Defendant Jackson. He claims Defendant Jackson violated his duty
12 of reasonable care to Plaintiff's medical needs because Defendant Jackson failed to provide
13 a medication and medical supplies that Plaintiff requested.

14 In Count Six (Doc. #1, p.10), Plaintiff alleges a violation of his Eighth and Fourteenth
15 Amendment rights by Defendant Wilkinson. He claims Defendant Wilkinson failed to
16 provide proper medical treatment for Plaintiff because Defendant Wilkinson denied surgery
17 for Plaintiff's disfigured face, denied medial supplies, and denied medication for Plaintiff's
18 severe headaches.

19 In his Request for Relief, Plaintiff demands a jury trial and seeks injunctive and
20 "discretionary" relief, monetary damages, surgery fees, reasonable attorney's fees and his
21 costs of suit.

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

23 Although *pro se* pleadings are liberally construed, Haines v. Kerner, 404 U.S. 519,
24 520-21 (1972), conclusory and vague allegations will not support a cause of action. Ivey v.
25 Board of Regents of the University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). Further,
26 a liberal interpretation of a civil rights complaint may not supply essential elements of the
27 claim that were not initially pled. Id.

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1 **A. Count One**

2 To state a valid claim under § 1983, plaintiffs must allege that they suffered a specific
3 injury as a result of specific conduct of a defendant and show an affirmative link between the
4 injury and the conduct of that defendant. See Rizzo v. Goode, 423 U.S. 362, 371-72, 377
5 (1976). There is no *respondeat superior* liability under § 1983, and therefore, a defendant’s
6 position as the supervisor of persons who allegedly violated Plaintiff’s constitutional rights
7 does not impose liability. Monell v. New York City Department of Social Services, 436 U.S.
8 658, 691-92 (1978); Hamilton v. Endell, 981 F.2d 1062, 1067 (9th Cir. 1992); Taylor v. List,
9 880 F.2d 1040, 1045 (9th Cir. 1989). “Because vicarious liability is inapplicable to . . .
10 § 1983 suits, a plaintiff must plead that each Government-official defendant, through the
11 official’s own individual actions, has violated the Constitution.” Iqbal, 129 S. Ct. at 1948.

12 To state an Eighth Amendment claim based on a failure to train, a plaintiff must allege
13 facts to support that the alleged failure amounted to deliberate indifference. Canell v.
14 Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998). A plaintiff must allege facts to support that
15 not only was particular training inadequate, but also that such inadequacy was the result of
16 “a ‘deliberate’ or ‘conscious’ choice” on the part of the defendant. Id. at 1213-14; see
17 Clement v. Gomez, 298 F.3d 898, 905 (9th Cir. 2002) (a plaintiff must allege facts to support
18 that “in light of the duties assigned to specific officers or employees, the need for more or
19 different training is [so] obvious, and the inadequacy so likely to result in violations of
20 constitutional rights, that the policy[]makers . . . can reasonably be said to have been
21 deliberately indifferent to the need.” (quoting City of Canton v. Harris, 489 U.S. 378, 390
22 (1989))).

23 Plaintiff has failed to allege that Defendant MacDonald was deliberately indifferent
24 to Plaintiff’s safety or that any allegedly inadequate training was the result of a deliberate or
25 conscious choice. Thus, the Court will dismiss without prejudice Defendant MacDonald and
26 Count One.

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1 **B. Counts Five and Six**

2 Not every claim by a prisoner that he has received inadequate medical treatment states
3 a violation of the Eighth Amendment. To state a § 1983 medical claim, a plaintiff must show
4 that the defendants acted with “deliberate indifference to serious medical needs.” Jett v.
5 Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104
6 (1976)). A plaintiff must show (1) a “serious medical need” by demonstrating that failure
7 to treat the condition could result in further significant injury or the unnecessary and wanton
8 infliction of pain and (2) the defendant’s response was deliberately indifferent. Jett, 439 F.3d
9 at 1096 (quotations omitted).

10 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,
11 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must both know
12 of and disregard an excessive risk to inmate health; the official must both be aware of facts
13 from which the inference could be drawn that a substantial risk of serious harm exists and
14 he must also draw the inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

15 Deliberate indifference in the medical context may be shown by a purposeful act or
16 failure to respond to a prisoner’s pain or possible medical need and harm caused by the
17 indifference. Jett, 439 F.3d at 1096. Deliberate indifference may also be shown when a
18 prison official intentionally denies, delays, or interferes with medical treatment or by the way
19 prison doctors respond to the prisoner’s medical needs. Estelle, 429 U.S. at 104-05; Jett, 439
20 F.3d at 1096.

21 Deliberate indifference is a higher standard than negligence or lack of ordinary due
22 care for the prisoner’s safety. Farmer, 511 U.S. at 835. “Neither negligence nor gross
23 negligence will constitute deliberate indifference.” Clement v. California Dep’t of
24 Corrections, 220 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); see also Broughton v. Cutter
25 Labs., 622 F.2d 458, 460 (9th Cir. 1980) (mere claims of “indifference,” “negligence,” or
26 “medical malpractice” do not support a claim under § 1983). “A difference of opinion does
27 not amount to deliberate indifference to [a plaintiff’s] serious medical needs.” Sanchez v.
28 Vild, 891 F.2d 240, 242 (9th Cir. 1989).

1 Plaintiff's allegations in Counts Five and Six are vague and conclusory. Plaintiff has
2 also failed to allege anything more than negligence, which does not constitute deliberate
3 indifference. See Farmer, 511 U.S. at 835; Clement, 220 F. Supp. 2d at 1105. Thus, the
4 Court will dismiss without prejudice Counts Five and Six and Defendants Jackson and
5 Wilkinson.

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

7 Liberally construed, Plaintiff has stated claims in Counts Two, Three, and Four
8 against Defendants Ward, Unknown Prison Lieutenant, and Hudson, respectively. The Court
9 will require these Defendants to answer Counts Two, Three, and Four.

10 **VI. Motion for Appointment of Counsel**

11 There is no constitutional right to appointment of counsel in a civil case. See Ivey,
12 673 F.2d at 269. In proceedings *in forma pauperis*, the court may request an attorney to
13 represent any person unable to afford one. 28 U.S.C. § 1915(e)(1). Appointment of counsel
14 under 28 U.S.C. § 1915(e)(1) is required only when “exceptional circumstances” are present.
15 Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991). A determination with respect to
16 exceptional circumstances requires an evaluation of the likelihood of success on the merits
17 as well as the ability of Plaintiff to articulate his claims *pro se* in light of the complexity of
18 the legal issue involved. Id. “Neither of these factors is dispositive and both must be viewed
19 together before reaching a decision.” Id. (quoting Wilborn v. Escalderon, 789 F.2d 1328,
20 1331 (9th Cir. 1986)).

21 Having considered both elements, it does not appear at this time that exceptional
22 circumstances are present that would require the appointment of counsel in this case.
23 Plaintiff is in no different position than many *pro se* prisoner litigants. Thus, the Court will
24 deny without prejudice Plaintiff's Motion for Appointment of Counsel.

25 **VII. Warnings**

26 **A. Release**

27 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.
28 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay

1 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result
2 in dismissal of this action.

3 **B. Address Changes**

4 Plaintiff must file and serve a notice of a change of address in accordance with Rule
5 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
6 relief with a notice of change of address. Failure to comply may result in dismissal of this
7 action.

8 **C. Copies**

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

14 **D. Possible Dismissal**

15 If Plaintiff fails to timely comply with every provision of this Order, including these
16 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
17 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
18 comply with any order of the Court).

19 **IT IS ORDERED:**

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

21 (2) Plaintiff's Motion for Appointment of Counsel (Doc. #5) is **denied** without
22 prejudice.

23 (3) As required by the accompanying Order to the appropriate government agency,
24 Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$4.13.

25 (4) Counts One, Five, and Six are **dismissed** without prejudice.

26 (5) Defendants MacDonald, Jackson, and Wilkinson are **dismissed** without
27 prejudice.

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1 (6) Defendants Ward, Unknown Prison Lieutenant, and Hudson must answer
2 Counts Two, Three, and Four.

3 (7) The Clerk of Court must send Plaintiff a service packet including the
4 Complaint (Doc. #1), this Order, and both summons and request for waiver forms for
5 Defendants Ward, Unknown Prison Lieutenant, and Hudson.

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

9 (9) If Plaintiff does not either obtain a waiver of service of the summons or
10 complete service of the Summons and Complaint on a Defendant within 120 days of the
11 filing of the Complaint or within 60 days of the filing of this Order, whichever is later, the
12 action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m); LRCiv
13 16.2(b)(2)(B)(i).

14 (10) The United States Marshal must retain the Summons, a copy of the Complaint,
15 and a copy of this Order for future use.

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

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

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

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

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

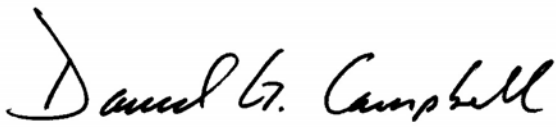
8 (13) Defendants Ward, Unknown Prison Lieutenant, and Hudson must answer the
9 Complaint or otherwise respond by appropriate motion within the time provided by the
10 applicable provisions of Rule 12(a) of the Federal Rules of Civil Procedure.

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

14 (15) This matter is referred to Magistrate Judge Lawrence O. Anderson pursuant to
15 Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as
16 authorized under 28 U.S.C. § 636(b)(1).

17 DATED this 24th day of March, 2010.

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David G. Campbell
United States District Judge