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

James D. Harmon,
Plaintiff,
vs.
Bruno Stolc,
Defendant.

) No. CV 10-1186-PHX-MHM (MHB)

) **ORDER**

Plaintiff James D. Harmon, who is confined in the Hudson Correctional Facility in Hudson, Colorado, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis* in the United States District Court for the District of Northern California. On June 4, 2010, the California Court transferred the action to this Court. On June 11, 2010, this Court denied Plaintiff's Application to Proceed with leave to refile. On July 9, 2010, Plaintiff filed a new Application to Proceed (Doc. 10). 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 \$37.30. 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 If the Court determines that a pleading could be cured by the allegation of other facts,
26 a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the
27 action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The Court
28 should not, however, advise the litigant how to cure the defects. This type of advice “would

1 undermine district judges' role as impartial decisionmakers." Pliler v. Ford, 542 U.S. 225,
2 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide whether the court was
3 required to inform a litigant of deficiencies). Plaintiff's Complaint will be dismissed for
4 failure to state a claim, with leave to amend because the Complaint may possibly be saved
5 by amendment.

6 **III. Complaint**

7 Plaintiff sues Bruno Stolc, Warden of the Corrections Corporation of America–Red
8 Rock Correctional Center ("CCA-RRCC"). Plaintiff alleges that while housed at CCA-
9 RRCC, Defendant "continued a campaign of harassment" which "included but was not
10 limited to making [inmates] label [their] laundry bags with [their] names, ordering all
11 outgoing mail to be left unsealed by the prisoner, in some instances legal mail, taking some
12 of the better items off the menu for no apparent reason. By better items [Plaintiff] mean[s]
13 specifically hot dogs and pizza." Plaintiff claims that Defendant also eliminated "night-time
14 'pod-porter' jobs because of an escape at another completely unrelated institution." Finally,
15 Plaintiff claims that changes were made to the commissary lists without appropriate notice.

16 Plaintiff seeks money damages.

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

18 Section 1983 provides a cause of action against persons acting under color of state law
19 who have violated rights guaranteed by the United States Constitution and federal law. 42
20 U.S.C. § 1983; see also Buckley v. City of Redding, 66 F.3d 188, 190 (9th Cir. 1995).
21 Plaintiff has failed to show a constitutional deprivation. "It cannot be said that all . . .
22 conditions . . . even if discomfoting or undesirable, amount to deprivations of constitutional
23 dimensions . . . [A] federal court is not the proper forum for challenging or changing every
24 aspect of the harsh realities of confinement unless conditions cannot be tolerated under the
25 Constitution." Thomas v. Smith, 559 F. Supp. 223, 224 (W.D.N.Y. 1983) (citing Griffin v.
26 Smith, 493 F. Supp. 129 (W.D.N.Y. 1980)). Thus, the Court will dismiss without prejudice
27 Plaintiff's Complaint because it fails to state a claim.

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1 Plaintiff should note that conditions-of-confinement claims typically arise under the
2 Eighth Amendment. An Eighth Amendment claim requires a sufficiently culpable state of
3 mind by the Defendants, known as “deliberate indifference.” Farmer v. Brennan, 511 U.S.
4 825, 834 (1994). Deliberate indifference is a higher standard than negligence or lack of
5 ordinary due care for the prisoner’s safety. Id. at 835. To state a claim of deliberate
6 indifference, plaintiffs must meet a two-part test. First, the alleged constitutional deprivation
7 must be, objectively, “sufficiently serious”; the official’s act or omission must result in the
8 denial of “the minimal civilized measure of life’s necessities.” Id. at 834. Second, the prison
9 official must have a “sufficiently culpable state of mind,” *i.e.*, he must act with deliberate
10 indifference to inmate health or safety. Id. In defining “deliberate indifference” in this
11 context, the Supreme Court has imposed a subjective test: “the official must both be aware
12 of facts from which the inference could be drawn that a substantial risk of serious harm
13 exists, and he must also draw the inference.” Id. at 837 (emphasis added).

14 **V. Leave to Amend**

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

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

25 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963
26 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,
27 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as
28 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original

1 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d
2 565, 567 (9th Cir. 1987).

3 **VI. Warnings**

4 **A. Release**

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

9 **B. Address Changes**

10 Plaintiff must file and serve a notice of a change of address in accordance with Rule
11 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
12 relief with a notice of change of address. Failure to comply may result in dismissal of this
13 action.

14 **C. Copies**

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

18 **D. Possible “Strike”**

19 Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails
20 to file an amended complaint correcting the deficiencies identified in this Order, the
21 dismissal may count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g).
22 Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil
23 judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior
24 occasions, while incarcerated or detained in any facility, brought an action or appeal in a
25 court of the United States that was dismissed on the grounds that it is frivolous, malicious,
26 or fails to state a claim upon which relief may be granted, unless the prisoner is under
27 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).
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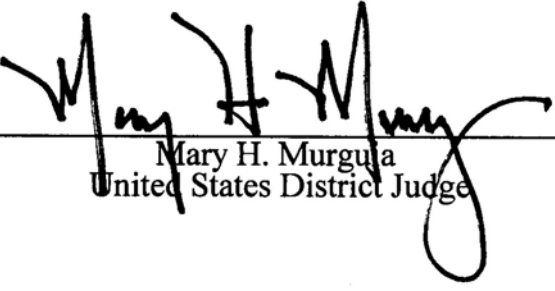
E. Possible Dismissal

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

IT IS ORDERED:

- (1) Plaintiff's Application to Proceed *In Forma Pauperis* (Doc. 10) is **granted**.
- (2) As required by the accompanying Order to the appropriate government agency, Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$37.30.
- (3) The Complaint (Doc. 1) is **dismissed** for failure to state a claim. Plaintiff has **30 days** from the date this Order is filed to file a first amended complaint in compliance with this Order.
- (4) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of Court must, without further notice, enter a judgment of dismissal of this action with prejudice that states that the dismissal may count as a "strike" under 28 U.S.C. § 1915(g).
- (5) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil rights complaint by a prisoner.

DATED this 10th day of August, 2010.



 Mary H. Murgula
 United States District Judge