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

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Edwin A. Calderon,

No. CV 11-0969-RCB-ECV

10

Plaintiff,

ORDER

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vs.

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B. Stolc, et al.,

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Defendants.

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Plaintiff Edwin A. Calderon, who is confined in the Red Rock Correctional Center (RRCC), a Corrections Corporation of America (CCA) facility in Eloy, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. (Doc. 1, 2.) The Court will order Defendant Miner to answer Count I of the Complaint and will dismiss the remaining claims and Defendants without prejudice.

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I. Application to Proceed *In Forma Pauperis* and Filing Fee

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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 not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1). The statutory 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.

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

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

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

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

23 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
24 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th
25 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards
26 than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89,
27 94 (2007) (*per curiam*)).

1 **III. Complaint**

2 Plaintiff alleges one count each for excessive use of force, retaliation, and deprivation
3 of property in violation of due process. Plaintiff sues the following RRCC employees:
4 Warden B. Stolc and Sergeant D. Miner. Plaintiff seeks injunctive and compensatory relief.

5 Plaintiff alleges the following facts: On December 22, 2010, he was placed in a
6 confined shower. Defendant Miner then ordered the other officers out and pepper-sprayed
7 Plaintiff in the face and referred to Plaintiff wanting to “hit” his officers. (Doc. 1 at 3.)
8 Following that incident or treatment of Plaintiff’s eyes, Plaintiff was brought to an office for
9 questioning by Chief Booker and Lieutenant Valdez. Before they arrived, however, Miner
10 entered the office and told Plaintiff that he had caused Miner to suffer flashbacks of Iraq.
11 Miner began making threatening gestures that caused Plaintiff to flinch. As Booker and
12 Valdez entered the office, Miner left calling Plaintiff names. At some point while Miner was
13 escorting Plaintiff, Miner kicked off Plaintiff’s shoes, which were left on a walk way.
14 Plaintiff never received his shoes back.

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

16 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
17 conduct about which he complains was committed by a person acting under the color of state
18 law and (2) the conduct deprived him of a federal constitutional or statutory right. Wood v.
19 Ostrander, 879 F.2d 583, 587 (9th Cir. 1989). In addition, to state a valid constitutional
20 claim, a plaintiff must allege that he suffered a specific injury as a result of the conduct of
21 a particular defendant and he must allege an affirmative link between the injury and the
22 conduct of that defendant. Rizzo v. Goode, 423 U.S. 362, 371-72, 377 (1976).

23 **A. Warden Stolc**

24 Plaintiff sues Warden Stolc. While Stolc may be sued, Plaintiff fails to state a claim
25 against him. To state a claim against a defendant, a “plaintiff must allege facts, not simply
26 conclusions, that show that an individual was personally involved in the deprivation of his
27 civil rights.” Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). For an individual

1 to be liable in his official capacity, a plaintiff must allege that the official acted as a result of
2 a policy, practice, or custom or that the official promulgated a policy, practice or custom
3 resulting in the violation. See *Cortez v. County of Los Angeles*, 294 F.3d 1186, 1188 (9th
4 Cir. 2001). Further, there is no *respondeat superior* liability under § 1983, so a defendant's
5 position as the supervisor of someone who allegedly violated a plaintiff's constitutional
6 rights does not make him liable. *Monell v. Dep't of Soc.Servs.*, 436 U.S. 658, 691 (1978);
7 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor in his individual capacity,
8 "is only liable for constitutional violations of his subordinates if the supervisor participated
9 in or directed the violations, or knew of the violations and failed to act to prevent them."
10 *Taylor*, 880 F.2d at 1045.

11 Plaintiff fails to allege any facts against Warden Stolc. Plaintiff fails to allege facts
12 to support that Stolc directly violated Plaintiff's constitutional rights. He also fails to allege
13 facts to establish that Stolc promulgated or endorsed a policy, custom, or practice resulting
14 in a violation of Plaintiff's rights. Accordingly, Stolc will be dismissed as a Defendant.

15 **B. Count II**

16 Plaintiff designates Count II as a claim for retaliation. To state a claim for retaliation,
17 a plaintiff must allege the following five basic elements: (1) that a state actor took some
18 adverse action against the inmate (2) because of (3) that prisoner's protected conduct and that
19 such action (4) chilled the inmate's exercise of his First Amendment rights (or that the inmate
20 suffered more than minimal harm) and (5) was not narrowly tailored to advance a legitimate
21 correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-58 (9th Cir. 2005); see also
22 *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994); *Rizzo v. Dawson*, 778 F.2d 527, 532
23 (9th Cir. 1985). An objective standard applies to whether an inmate's exercise of First
24 Amendment rights were chilled so that a plaintiff need not allege that the exercise of his
25 constitutional rights were actually inhibited or suppressed but only that the adverse actions
26 would "chill or silence a person of ordinary firmness from future First Amendment
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1 activities.” Brodheim v. Cry, 584 F.3d 1262, 1271 (9th Cir. 2009) (citing Rhodes, 408 F.3d
2 at 568-69).

3 In Count II, Plaintiff alleges that after he was taken to the office for questioning,
4 Defendant Miner entered the office and verbally threatened him and gestured threateningly
5 to make Plaintiff “flinch.” As an initial matter, verbal harassment or abuse, alone, is
6 insufficient to state a violation of a constitutional right under § 1983. Oltarzewski v.
7 Ruggiero, 830 F. 2d 136, 139 (9th Cir. 1987); see Corales v. Bennett, 567 F.3d 554 (9th Cir.
8 2009) (citing Gaut v. Sunn, 810 F.2d 923 (9th Cir. 1987)) (verbal threats alone do not create
9 a cause of action under § 1983 nor are they “prohibited by the Constitution” because they are
10 not “equivalent to doing the act itself.”). Plaintiff thus fails to state a claim for retaliation
11 based upon Miner’s verbal threats. Plaintiff otherwise fails to state a claim for retaliation
12 because he does not allege that Miner took adverse action against him in retaliation for
13 Plaintiff’s exercise of a constitutionally-protected conduct. Plaintiff only alleges that Miner
14 made him flinch by making intimidating gestures. Absent more, that is not sufficient to state
15 a claim for retaliation and Count II will be dismissed.

16 **C. Count III**

17 Plaintiff designates Count III as a Fourteenth Amendment due process claim for
18 deprivation of property without due process after Miner kicked Plaintiff’s shoes off and left
19 them in a walkway and the shoes were never returned. Due process claims related to prisoner
20 property commonly arise when property is taken or destroyed by random and unauthorized
21 conduct of a prison official without an opportunity for the prison to provide meaningful
22 pre-deprivation due process. Under Supreme Court doctrine in Parratt v. Taylor, 451 U.S.
23 527, 537 (1981), and Hudson v. Palmer, 468 U.S. 517, 530-36 (1984), neither unauthorized
24 intentional nor negligent deprivations of property give rise to a due process claim so long as
25 the State provides an adequate post-deprivation remedy. Thus, the availability of an adequate
26 state post-deprivation remedy, such as a state tort action, for unauthorized deprivations
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1 precludes a claim for violation of due process. King v. Massarweh, 782 F.2d 825, 826 (9th
2 Cir. 1986).

3 The availability of a common-law tort suit against a private prison employee
4 constitutes an adequate post-deprivation remedy. Hudson, 468 U.S. at 534-35. Plaintiff has
5 an available post-deprivation remedy under state law via an action for conversion. See
6 Howland v. State, 818 P.2d 1169, 1172-73 (Ariz. Ct. App. 1991) (prison officials’
7 confiscation of and failure to return prisoner’s personal property states a state law claim for
8 conversion)¹; see also Wright v. Riveland, 219 F.3d 905, 918 (9th Cir. 2000) (prisoners in
9 Washington have adequate post-deprivation remedies to challenge deductions from inmate
10 accounts by utilizing the prison grievance procedure or by filing a state tort action). Because
11 Plaintiff has an available state law remedy, he cannot state a due process claim for the
12 deprivation of property. Accordingly, Count III will be dismissed for failure to state a claim.

13 **V. Claim for Which an Answer Will be Required**

14 In Count I, Plaintiff alleges an Eighth Amendment claim for use of excessive force
15 by Defendant Miner. Plaintiff alleges that on December 22, 2010, Plaintiff was placed in a
16 confined shower. Defendant Miner then ordered the other officers out and pepper-sprayed
17 Plaintiff in the face and referred to Plaintiff wanting to “hit” his officers. (Doc. 1 at 3.) The
18 pepper spray caused Plaintiff serious eye injury. Plaintiff sufficiently states a claim for
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21 ¹ Arizona Revised Statute 31-201.01(L) does not preclude Plaintiff from seeking
22 relief for conversion because he sues private prison employees. Section 31-201.01(L)
23 provides that:

24 A person who is convicted of a felony offense and who is incarcerated while
25 awaiting sentence or while serving a sentence imposed by a court of law may
26 not bring a cause of action seeking damages or equitable relief from the state
27 or its political subdivisions, agencies, officers or employees for injuries
28 suffered while in the custody of the state or its political subdivisions or
agencies unless the complaint alleges specific facts from which the court may
conclude that the plaintiff suffered serious physical injury or the claim is
authorized by a federal statute.

1 excessive use of force in Count I and Defendant Miner will be required to respond to that
2 Count.

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

20 **D. Possible Dismissal**

21 If Plaintiff fails to timely comply with every provision of this Order, including these
22 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
23 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
24 comply with any order of the Court).

25 **IT IS ORDERED:**

26 (1) Plaintiff's Application to Proceed *In Forma Pauperis* is **granted**. (Doc. 2.)
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1 (2) As required by the accompanying Order to the appropriate government agency,
2 Plaintiff must pay the \$350.00 filing fee and is not assessed an initial partial filing fee.

3 (3) Counts II and III and Defendant Stolc are **dismissed** without prejudice.

4 (4) Defendant Miner must answer Count I. (Doc. 1.)

5 (5) The Clerk of Court must send Plaintiff a service packet including the
6 Complaint (Doc. 1), this Order, and both summons and request for waiver forms for
7 Defendant D. Miner.

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

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

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

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

24 (b) within 10 days after personal service is effected, file the return of service
25 for Defendant, along with evidence of the attempt to secure a waiver of service of the
26 summons and of the costs subsequently incurred in effecting service upon Defendant.
27 The costs of service must be enumerated on the return of service form (USM-285) and
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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 (9) **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 (10) Defendant must answer the Complaint or otherwise respond by appropriate
9 motion within the time provided by the applicable provisions of Rule 12(a) of the Federal
10 Rules of Civil Procedure.

11 (11) 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 (11) This matter is referred to Magistrate Judge Edward C Voss pursuant to Rules
15 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as authorized
16 under 28 U.S.C. § 636(b)(1).

17 DATED this 15th day of June, 2011.

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21 Robert C. Broomfield
22 Senior United States District Judge
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