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

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George Albert Brogdon, Jr.,)

No. CV 11-1389-PHX-RCB (MEA)

10

Plaintiff,)

ORDER

11

vs.)

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City of Phoenix Police Department, et al.,)

13

Defendants.)

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Plaintiff George Albert Brogdon, Jr., who is confined in the Maricopa County Fourth Avenue Jail in Phoenix, Arizona, 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 order Defendants Boardman and Lubker 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*)).

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1 **III. Complaint**

2 Plaintiff alleges three counts for violation of his Fourth Amendment rights,
3 harassment, and an illegal fine. Plaintiff sues the City of Phoenix Police Department and two
4 of its officers, Eric Boardman and Mylen Lubker. Plaintiff seeks compensatory and punitive
5 relief.

6 All of Plaintiff's claims arise from his detention and arrest in Superior Court in
7 Maricopa County case CR2010151332. Except as otherwise indicated, Plaintiff alleges the
8 following: Plaintiff was riding a bicycle at night without a light. Defendants Boardman and
9 Lubker stopped Plaintiff, but left when they received a priority radio call. Plaintiff left the
10 area of the stop. After responding to the priority call, the officers returned looking for
11 Plaintiff. They found him walking his bicycle and stopped him again and asked for his
12 identification. Boardman took Plaintiff's backpack and handed the identification to Lubker,
13 who took it to their patrol car. Plaintiff did not feel free to leave. Boardman searched the
14 backpack and arrested Plaintiff for possession of marijuana and drug paraphernalia. Lubker
15 cited Plaintiff for not having a light on his bicycle, even though Plaintiff was walking rather
16 than riding his bicycle in accordance with their instructions during the first stop. Without
17 reading Plaintiff his Miranda rights, they took him to jail. Plaintiff contends the officers'
18 second stop was unsupported by "independent, reasonable suspicion" for the stop. (Doc. 1
19 at 3.) He also alleges that he was illegally fined for not having a light on his bike, even
20 though he was not riding it at the time.

21 On May 26, 2011, the charges against Plaintiff in CR2010151332 were dismissed
22 without prejudice following a suppression hearing.¹ Plaintiff contends that as a consequence
23 of his allegedly wrongful stop and arrest, he lost his job, his finances were damaged, and his
24 family relationships were adversely affected.

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

26 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the

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28 ¹ See <http://www.courtminutes.maricopa.gov/docs/Criminal/052011/m4744104.pdf>
(last visited Aug. 2, 2011).

1 conduct about which he complains was committed by a person acting under the color of state
2 law and (2) the conduct deprived him of a federal constitutional or statutory right. Wood v.
3 Ostrander, 879 F.2d 583, 587 (9th Cir. 1989). In addition, a plaintiff must allege that he
4 suffered a specific injury as a result of the conduct of a particular defendant and he must
5 allege an affirmative link between the injury and the conduct of that defendant. Rizzo v.
6 Goode, 423 U.S. 362, 371-72, 377 (1976).

7 **A. City of Phoenix Police Department**

8 Plaintiff sues the City of Phoenix Police Department. A municipal police department
9 is not a “person” within the meaning of § 1983. See e.g., Petaway v. City of New Haven
10 Police Dep’t, 541 F. Supp.2d 504 (D. Conn. 2008); Pahle v. Colebrookdale Tp., 227 F.
11 Supp.2d 361 (E.D. Pa. 2002). However, a municipality is a “person” for purposes of § 1983,
12 i.e., a municipality such as a city or county, may be sued. See Leatherman v. Tarrant County
13 Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166 (1993); Monell v. Dep’t of
14 Soc. Servs., 436 U.S. 658, 694 (1978). To state a claim against a municipality under § 1983,
15 a plaintiff must allege facts to support that his constitutional rights were violated pursuant
16 to a policy or custom of the municipality. Cortez v. County of Los Angeles, 294 F.3d 1186,
17 1188 (9th Cir. 2001) (citing Monell, 436 U.S. at 690-91); Thompson v. City of Los Angeles,
18 885 F.2d 1439, 1443 (9th Cir. 1989)). Thus, a municipality may not be sued solely because
19 an injury was inflicted by one of its employees or agents. Long v. County of Los Angeles,
20 442 F.3d 1178, 1185 (9th Cir. 2006). Therefore, a § 1983 claim against a municipal
21 defendant “cannot succeed as a matter of law” unless a plaintiff: (1) contends that the
22 municipal defendant maintains a policy or custom pertinent to the plaintiff’s alleged injury;
23 and (2) explains how such policy or custom caused the plaintiff’s injury. Sadoski v. Mosley,
24 435 F.3d 1076, 1080 (9th Cir. 2006) (affirming dismissal of a municipal defendant pursuant
25 to Fed. R. Civ. P. 12(b)(6)).

26 The City of Phoenix Police Department is not a proper Defendant and it will be
27 dismissed. To the extent that Plaintiff sues the City of Phoenix, he fails to allege facts to
28 support that the City of Phoenix maintained a policy or custom that resulted in the violation

1 of Plaintiff's federal constitutional rights or to explain how his injuries were caused by any
2 municipal policy or custom. Accordingly, Plaintiff also fails to state a claim against the City
3 of Phoenix.

4 **B. Counts II and III**

5 In Count II, Plaintiff alleges a claim for harassment. In Count III, he alleges that he
6 was illegally fined. Neither of these counts alleges a violation of Plaintiff's *constitutional*
7 rights. For that reason, Plaintiff fails to state a claim in either count and they will be
8 dismissed.

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

10 In Count I, Plaintiff alleges that Defendants Boardman and Lubker violated his Fourth
11 Amendment rights when they stopped him the second time and searched his backpack
12 without consent, a warrant, or probable cause.² Defendants Boardman and Lubker will be
13 required to respond to Count I of the Complaint.

14 **VI. Warnings**

15 **A. Release**

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

20 **B. Address Changes**

21 Plaintiff must file and serve a notice of a change of address in accordance with Rule
22 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
23 relief with a notice of change of address. Failure to comply may result in dismissal of this
24 action.

25 **C. Copies**

26 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a copy
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28 ² Plaintiff contends the officers failed to read him his Miranda rights; however, he does not allege that they elicited any inculpatory statements.

1 of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate
2 stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit
3 an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply
4 may result in the filing being stricken without further notice to Plaintiff.

5 **D. 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 v. Bonzelet,
8 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
9 comply with any order of the Court).

10 **IT IS ORDERED:**

11 (1) Plaintiff's Application to Proceed *In Forma Pauperis* is **granted**. (Doc. 2.)

12 (2) As required by the accompanying Order to the appropriate government agency,
13 Plaintiff must pay the \$350.00 filing fee and is not assessed an initial partial filing fee.

14 (3) Counts II and III and Defendant City of Phoenix Police Department are
15 **dismissed** without prejudice.

16 (4) Defendants Boardman and Lubker must answer Count I.

17 (5) The Clerk of Court must send Plaintiff a service packet including the
18 Complaint (Doc. 1), this Order, and both summons and request for waiver forms for
19 Defendants Boardman and Lubker.

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

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

28 (8) The United States Marshal must retain the Summons, a copy of the Complaint,

1 and a copy of this Order for future use.

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

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

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

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

22 (11) Defendant must answer the Complaint or otherwise respond by appropriate
23 motion within the time provided by the applicable provisions of Rule 12(a) of the Federal
24 Rules of Civil Procedure.

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

28 (13) This matter is referred to Magistrate Judge Mark E. Aspey pursuant to Rules

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72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as authorized under 28 U.S.C. § 636(b)(1).

DATED this 7th day of September, 2011.



Robert C. Broomfield
Senior United States District Judge