

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SC

WO

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

Ron Zachary Pettit,)	No. CV 11-2139-PHX-DGC (JFM)
Plaintiff,)	ORDER
vs.)	
Charles L. Ryan, et al.,)	
Defendants.)	

Plaintiff Ron Zachary Pettit, who is confined in the Arizona State Prison Complex-Eyman, Special Management Unit I, in Florence, 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, 8.) Plaintiff has also filed two motions for appointment of counsel. (Doc. 10, 11.) The Court will order Defendants Smith, Morrow, Lague, and Mueller to answer Count I of the Complaint and will dismiss the remaining claims and Defendants without prejudice. The Court will deny the motions.

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 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

1 according to the statutory formula.

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

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

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

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

24 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
25 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th
26 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards
27 than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89,
28 94 (2007) (*per curiam*)).

1 **III. Complaint**

2 Plaintiff alleges two counts for excessive force and denial of constitutionally adequate
3 medical care. Plaintiff sues the following current or former employees of the Arizona
4 Department of Corrections (ADC): Director Charles L. Ryan; Corrections Officer (CO) H.
5 Smith; CO IIs Mueller and Lague; CO IIIs McClellan and Pinson; Sergeant Morrow; Captain
6 Scott; Deputy Warden Curran; Nurse Nelson; ASPC Eyman Complex Facility Health
7 Administrator (FHA); and ASPC Eyman Complex Health Services Regional Operations
8 Director.

9 Plaintiff alleges the following in his Complaint: Plaintiff is considered a “high risk
10 inmate” and all movements out of his cell requires the supervision by a sergeant or higher,
11 a minimum of two correctional officers as escorts, and use of lead chain and shackles, with
12 movements video-recorded.

13 On April 15, 2011, Plaintiff was escorted from the shower back to his cell by Sergeant
14 Morrow and COs Mueller, Lague, and Smith. During the return, Smith became verbally
15 abusive towards Plaintiff and Plaintiff responded in kind. Smith stopped the verbal abuse
16 while Plaintiff was locked in his cell, but resumed it as he instructed Plaintiff to back up to
17 the cell door, ostensibly to remove the shackles through the trap door. Plaintiff’s shackled
18 wrists were extended through the trap door, which was located approximately three and half
19 feet above the floor. While Plaintiff was so-positioned, Smith grabbed Plaintiff’s hands and
20 arms and pulled them through the trap door and against the upper edge of the trap door. He
21 then “violently yanked” the lead chain down while applying backward pressure. (Doc. 1 at
22 3.) This forced Plaintiff into a position between kneeling and standing with both arms fully
23 extended through the trap door and Plaintiff’s shoulders flush against the cell door with most
24 of his weight on his shoulders and arm sockets. Smith yanked Plaintiff’s arms up and down
25 for one to two minutes, while Plaintiff yelled. Mueller, Lague, and Morrow watched without
26 intervening. Plaintiff’s neck, shoulders, right arm, both wrists, and lower back were injured.

27 Plaintiff asked Morrow for medical assistance after the incident for “injuries” to his
28 neck, shoulders, arm sockets, right arm, both wrists, and lower back, but Morrow

1 “categorically” refused. (Id. at 4.) Thirty minutes later, Plaintiff saw Nurse Nelson
2 distributing medication and sought her assistance. Nelson told Plaintiff that she could not
3 assist him without authorization from Morrow. Plaintiff saw Nelson talk to Morrow and
4 leave.

5 Plaintiff requested medical assistance from numerous COs that day and the next, and
6 was told that Morrow had to authorize it. On April 17, 2011, Plaintiff submitted a Health
7 Needs Request (HNR) to medical, but received no response. Plaintiff repeated his request
8 numerous times without success. On April 20, 2011, Plaintiff submitted an informal
9 complaint to Defendant McClellan, who did not respond. Plaintiff then submitted a formal
10 grievance to the FHA, which Defendant Pinson returned unprocessed for failure to submit
11 a copy of McClellan’s response. Pinson also returned unprocessed Plaintiff’s grievance
12 appeal to the Health Services Regional Operations Director. Plaintiff contends that Pinson
13 failed to comply with prison grievance procedures by returning his grievance and grievance
14 appeal unprocessed.

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, a plaintiff must allege that he
20 suffered a specific injury as a result of the conduct of a particular defendant and he must
21 allege an affirmative link between the injury and the conduct of that defendant. Rizzo v.
22 Goode, 423 U.S. 362, 371-72, 377 (1976).

23 **A. Ryan, Curran, and Scott**

24 Plaintiff sues Director Ryan, Deputy Warden Curran, and Captain Scott. Although
25 each may be sued for constitutional violations, Plaintiff fails to state a claim against any of
26 them. “A plaintiff must allege facts, not simply conclusions, that show that an individual was
27 personally involved in the deprivation of his civil rights.” Barren v. Harrington, 152 F.3d
28 1193, 1194 (9th Cir. 1998). For an individual to be liable in his official capacity, a plaintiff

1 must allege that the official acted as a result of a policy, practice, or custom. See Cortez v.
2 County of Los Angeles, 294 F.3d 1186, 1188 (9th Cir. 2001) (citing Monell v. Dep't of Soc.
3 Servs., 436 U.S. 658, 690-91 (1978)). Further, there is no *respondeat superior* liability under
4 § 1983, so a defendant's position as the supervisor of someone who allegedly violated a
5 plaintiff's constitutional rights does not make him liable. Monell, 436 U.S. at 691; Taylor
6 v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor in his individual capacity "is only
7 liable for constitutional violations of his subordinates if the supervisor participated in or
8 directed the violations, or knew of the violations and failed to act to prevent them." Taylor,
9 880 F.2d at 1045.

10 The only basis for liability asserted by Plaintiff against Ryan, Curran, and Scott is
11 *respondeat superior*. As stated above, *respondeat superior* does not constitute a ground for
12 liability under § 1983. Plaintiff has not otherwise alleged facts to support that any of these
13 Defendants enacted or enforced a policy, custom, or practice that resulted in the denial of
14 Plaintiff's constitutional rights or facts to support that any of these Defendants directly
15 violated his constitutional rights or knew of violations but failed to act. Accordingly, these
16 Defendants will be dismissed.

17 **B. FHA, Regional Operations Director, McClellan, and Pinson**

18 Plaintiff sues the Eyman Complex FHA and Health Services Regional Operations
19 Director, whom he has not identified by name, CO IIIs McClellan and Pinson. Plaintiff
20 alleges that McClellan failed to respond to his informal grievance. He alleges that his
21 grievance and grievance appeal to the FHA and the Operations Director were returned to him
22 unprocessed by Pinson in non-compliance with prison grievance procedures.

23 **1. FHA and Operations Director**

24 Rule 10(a) of the Federal Rules of Civil Procedure requires the plaintiff to include the
25 names of the parties in the action. As a practical matter, it is impossible in most instances
26 for the United States Marshal or his designee to serve a summons and complaint or amended
27 complaint upon an anonymous defendant. Where identity of a defendant is unknown prior
28 to the filing of a complaint, the plaintiff should be given an opportunity through discovery

1 to identify the unknown defendants, unless it is clear that discovery would not uncover the
2 identities, or that the complaint would be dismissed on other grounds. Wakefield v.
3 Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999) (citing Gillespie v. Civiletti, 629 F.2d 637,
4 642 (9th Cir. 1980)).

5 In this case, Plaintiff fails to allege facts to support that either the FHA or the
6 Regional Operations Director in any way violated Plaintiff's constitutional rights. Indeed,
7 Plaintiff acknowledges that his efforts to contact the FHA and the Regional Operations
8 Director were returned to him unprocessed by Pinson. Because Plaintiff fails to state a claim
9 against the FHA or the Regional Operations Director, both of these Defendants will be
10 dismissed.

11 **2. McClellan and Pinson**

12 Plaintiff alleges that McClellan failed to respond to his informal grievance. He alleges
13 that Pinson returned his grievance and grievance appeal to the FHA and Operations Director
14 unprocessed and not in compliance prison grievance procedures. Plaintiff characterizes
15 Pinson's acts as an attempt to deny him access to the courts.

16 To the extent that Plaintiff alleges that McClellan or Pinson failed to comply with
17 prison procedures, he fails to state a claim. Non-compliance with prison procedures, absent
18 more, does not rise to the level of a constitutional violation. Accordingly, Plaintiff fails to
19 state a claim against McClellan or Pinson on that basis.

20 Plaintiff otherwise asserts that Pinson attempted to deny him access to the courts. The
21 right of meaningful access to the courts prohibits state officials from actively interfering with
22 an inmate's attempt to prepare or file legal documents. Lewis v. Casey, 518 U.S. 343, 350
23 (1996). That right, however, only encompasses the ability to bring petitions or complaints
24 to court and not to discover or even effectively litigate such claims once filed with a court.
25 Id. at 354; see also Cornett v. Donovan, 51 F.3d 894, 899 (9th Cir. 1995) ("The right of
26 access is designed to ensure that a habeas petition or civil rights complaint of a person in
27 state custody will reach a court for consideration.") The right "guarantees no particular
28 methodology but rather, the conferral of a capability – the capability of bringing

1 contemplated challenges to sentences or conditions of confinement before the courts.”
2 Lewis, 518 U.S. at 356. The plaintiff must allege facts to support that he was actually
3 injured. An “actual injury” is “actual prejudice with respect to contemplated or existing
4 litigation, such as the inability to meet a filing deadline or present a claim.” Lewis, 518 U.S.
5 at 348. In other words, a plaintiff must allege facts to support that a defendant’s conduct
6 prevented him from bringing to court a non-frivolous claim that he wished to present. Id. at
7 351-53. A plaintiff “must identify a nonfrivolous, arguable underlying claim,” and this
8 underlying claim “must be described in the complaint.” Christopher v. Harbury, 536 U.S.
9 403, 414-15 (2002).

10 Plaintiff fails to allege facts to support that he has been actually been injured with
11 respect to any pending or prospective litigation. Clearly, Plaintiff was able to file this action.
12 For that reason, Plaintiff fails to state a claim against Pinson for denial of access to the courts
13 and that portion of Count II will be dismissed.

14 **C. Medical Care**

15 In Count II, Plaintiff alleges that he was denied constitutionally adequate medical care
16 after Smith used excessive force against him and injured him. Not every claim by a prisoner
17 relating to inadequate medical treatment states a violation of the Eighth or Fourteenth
18 Amendment. To state a § 1983 medical claim, a plaintiff must show that the defendants
19 acted with “deliberate indifference to serious medical needs.” Jett v. Penner, 439 F.3d 1091,
20 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). A plaintiff must
21 show (1) a “serious medical need” by demonstrating that failure to treat the condition could
22 result in further significant injury or the unnecessary and wanton infliction of pain and (2) the
23 defendant’s response was deliberately indifferent. Jett, 439 F.3d at 1096 (quotations
24 omitted).

25 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,
26 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must both know
27 of and disregard an excessive risk to inmate health; “the official must both be aware of facts
28 from which the inference could be drawn that a substantial risk of serious harm exists, and

1 he must also draw the inference.” Farmer v. Brennan, 511 U.S. 825, 837 (1994). Deliberate
2 indifference in the medical context may be shown by a purposeful act or failure to respond
3 to a prisoner’s pain or possible medical need and harm caused by the indifference. Jett, 439
4 F.3d at 1096. Deliberate indifference may also be shown when a prison official intentionally
5 denies, delays, or interferes with medical treatment or by the way prison doctors respond to
6 the prisoner’s medical needs. Estelle, 429 U.S. at 104-05; Jett, 439 F.3d at 1096.

7 Deliberate indifference is a higher standard than negligence or lack of ordinary due
8 care for the prisoner’s safety. Farmer, 511 U.S. at 835. “Neither negligence nor gross
9 negligence will constitute deliberate indifference.” Clement v. California Dep’t of Corr., 220
10 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); see also Broughton v. Cutter Labs., 622 F.2d 458,
11 460 (9th Cir. 1980) (mere claims of “indifference,” “negligence,” or “medical malpractice”
12 do not support a claim under § 1983). “A difference of opinion does not amount to deliberate
13 indifference to [a plaintiff’s] serious medical needs.” Sanchez v. Vild, 891 F.2d 240, 242
14 (9th Cir. 1989). A mere delay in medical care, without more, is insufficient to state a claim
15 against prison officials for deliberate indifference. See Shapley v. Nevada Bd. of State
16 Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985). The indifference must be substantial.
17 The action must rise to a level of “unnecessary and wanton infliction of pain.” Estelle, 429
18 U.S. at 105.

19 Plaintiff alleges that his neck, shoulders, right arm, wrists, and lower back were
20 injured in the April 11 incident and that the failure to receive treatment has resulted in “long
21 term complications.” (Doc. 1 at 4.) Plaintiff fails to allege facts to support that the injuries
22 rose to the level of a serious medical need. He also fails to describe any resulting
23 complications.

24 Plaintiff also fails to allege facts to support that Nelson or Morrow acted with
25 deliberate indifference. Plaintiff alleges that he was considered a high risk inmate and that
26 Nelson informed him that she could not assist him without Morrow’s authorization, which
27 Morrow apparently denied. Plaintiff fails to allege facts to support that either Nelson or
28 Morrow knew of facts giving rise to an inference that Plaintiff had a serious medical need

1 – and that they drew such inference – but nevertheless failed to provide medical treatment.
2 For these reasons, Plaintiff fails to state a claim for deliberate indifference to his serious
3 medical needs and this claim will be dismissed.

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

5 In Count I, Plaintiff alleges that Smith used excessive force against him for the
6 purpose of causing him harm and that Morrow, Mueller, and Lague failed to intervene to stop
7 that use of force. Plaintiff sufficiently states a claim for excessive use of force in Count I
8 against Smith, Morrow, Lague, and Mueller, and they will be required to respond to the
9 Complaint.

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

11 As noted above, Plaintiff has filed two motions for appointment of counsel. (Doc. 10,
12 11.) Plaintiff seeks the appointment of counsel because of his imprisonment and limited
13 access to legal resources will make it difficult for him to litigate this case, he is indigent, and
14 he has been unable to retain counsel. Counsel is only appointed in a civil rights action in
15 “exceptional circumstances.” Agyeman v. Corrections Corp. of America, 390 F.3d 1101,
16 1103 (9th Cir. 2004); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986); Terrell
17 v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991). “A finding of exceptional circumstances
18 requires an evaluation of both ‘the likelihood of success on the merits [and] the ability of the
19 [plaintiff] to articulate his claims *pro se* in light of the complexity of the legal issues
20 involved.’” Wilborn, 789 F.2d at 1331; see Agyeman, 390 F.3d at 1103; Terrell, 935 F.2d
21 at 1017. This case does not present exceptional circumstances warranting the appointment
22 of counsel. Accordingly, Plaintiff’s requests for the appointment of counsel will be denied.

23 **VII. Warnings**

24 **A. Release**

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

1 **B. Address Changes**

2 Plaintiff must file and serve a notice of a change of address in accordance with Rule
3 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
4 relief with a notice of change of address. Failure to comply may result in dismissal of this
5 action.

6 **C. Copies**

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

12 **D. Possible Dismissal**

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

17 **IT IS ORDERED:**

18 (1) Plaintiff's Application to Proceed *In Forma Pauperis* is **granted**. (Doc. 8.)

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

21 (3) Count II and Defendants Ryan, Curran, Scott, McClellan, Nelson, Pinson, and
22 the Eyman Complex Facility Health Administrator and Health Services Regional Operations
23 Director are **dismissed** without prejudice.

24 (4) Defendants Smith, Morrow, Lague, and Mueller must answer Count I.

25 (5) The Clerk of Court must send Plaintiff a service packet including the
26 Complaint (Doc. 1), this Order, and both summons and request for waiver forms for
27 Defendants Smith, Morrow, Lague, and Mueller.

1 (6) Plaintiff must complete¹ and return the service packet to the Clerk of Court
2 within 21 days of the date of filing of this Order. The United States Marshal will not provide
3 service of process if Plaintiff fails to comply with this Order.

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

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

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

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

20 (b) within 10 days after personal service is effected, file the return of service
21 for Defendant, along with evidence of the attempt to secure a waiver of service of the
22 summons and of the costs subsequently incurred in effecting service upon Defendant.
23 The costs of service must be enumerated on the return of service form (USM-285) and
24 must include the costs incurred by the Marshal for photocopying additional copies of
25 the Summons, Complaint, or this Order and for preparing new process receipt and

26
27 ¹ If a Defendant is an officer or employee of the Arizona Department of Corrections,
28 Plaintiff must list the address of the specific institution where the officer or employee works.
Service cannot be effected on an officer or employee at the Central Office of the Arizona
Department of Corrections unless the officer or employee works there.

1 return forms (USM-285), if required. Costs of service will be taxed against the
2 personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules of Civil
3 Procedure, unless otherwise ordered by the Court.

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

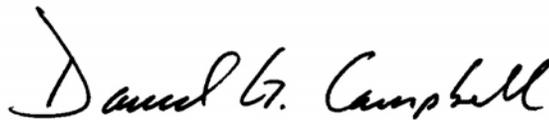
6 (11) Defendant must answer the Complaint or otherwise respond by appropriate
7 motion within the time provided by the applicable provisions of Rule 12(a) of the Federal
8 Rules of Civil Procedure.

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

12 (13) Plaintiff's motions for appointment of counsel are **denied**. (Doc. 10, 11.)

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

16 DATED this 31st day of January, 2012.

17
18 

19
20 _____
21 David G. Campbell
22 United States District Judge
23
24
25
26
27
28