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

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10 Christian Dale Lowery,	)	No. CV 12-1625-PHX-RCB (LOA)
11 Plaintiff,	)	<b>ORDER</b>
12 vs.	)	
13 Unknown Barcklay, et al.,	)	
14 Defendants.	)	
15	)	
16	)	

17 Plaintiff Christian Dale Lowery, who is confined in the Arizona State Prison Complex  
18 (ASPC)-Yuma, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and  
19 28 U.S.C. § 1367. The Court will order Defendant Barcklay to answer Count I of the  
20 Complaint and will dismiss the remaining claim and Defendants without prejudice.

21 **I. Filing Fee**

22 Plaintiff has paid the \$350.00 statutory filing fee. (Doc. 1.)

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

24 The Court is required to screen complaints brought by prisoners seeking relief against  
25 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.  
26 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised  
27 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may

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1 be granted, or that seek monetary relief from a defendant who is immune from such relief.  
2 28 U.S.C. § 1915A(b)(1), (2).

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

9 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a  
10 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,  
11 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content  
12 that allows the court to draw the reasonable inference that the defendant is liable for the  
13 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for  
14 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial  
15 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual  
16 allegations may be consistent with a constitutional claim, a court must assess whether there  
17 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

18 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts  
19 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th  
20 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards  
21 than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89,  
22 94 (2007) (*per curiam*)).

### 23 **III. Complaint**

24 Plaintiff asserts two claims arising from an injury to his hand sustained while working  
25 as a plumber for the Arizona Department of Corrections (ADC). (Doc. 1.) He names as  
26 Defendants Dr. Barcklay, Correctional Officer (CO) III Hayden, and CO IV Zaragosa. (Id.)

27 In Count I, Plaintiff alleges an Eighth Amendment claim of deliberate indifference by  
28 Barcklay. Plaintiff asserts that he was injured on March 14, 2011, and that Dr. Milazzo

1 sutured the wound, prescribed anti-biotics, and placed Plaintiff on limited-duty status, which  
2 did not exclude Plaintiff's work assignment. From then on, Plaintiff was dependent on  
3 Barcklay for medical care. Plaintiff made nine contacts with Health Services seeking  
4 medical attention, complaining that he had twice re-injured his hand and was experiencing  
5 pain, swelling, and an inability to extend his finger. On April 19, Barcklay notified Plaintiff  
6 that she had made a request for an "ortho" evaluation. Plaintiff was seen on May 5 by an  
7 orthopedic surgeon who concluded that Plaintiff had severed a tendon and that because so  
8 much time had elapsed, the chance for successful surgery and recovery was greatly  
9 diminished. Plaintiff had the surgery on June 6. His hand capacity has been diminished, and  
10 he has suffered pain. (Doc. 1 at 3-3a.)

11 In Count II, Plaintiff asserts a state claim for negligence by Hayden and Zaragosa for  
12 their allegedly improper processing of Plaintiff's grievance regarding his medical care. (Id.  
13 at 4.) Plaintiff asserts that he submitted an informal resolution per the ADC grievance policy  
14 but he did not receive an answer. Thereafter he submitted a formal grievance, which should  
15 have been immediately forwarded to the Facility Health Administrator (FHA) by Zaragosa.  
16 Instead, Zaragosa sent the grievance to Hayden, asking about the informal resolution. When  
17 Plaintiff finally met with the FHA after filing an emergency grievance, the FHA said that he  
18 never received the original informal resolution or grievance.

19 Plaintiff then filed grievances seeking compensation for the negligence of Hayden and  
20 Zaragosa. Plaintiff met with the Assistant Deputy Warden and others. Plaintiff accepted the  
21 apology and compensation offered by the Deputy Warden as settlement, but the  
22 compensation was later rescinded as not within the scope of policy.

23 Plaintiff asserts that Defendants' conduct caused a delay in his medical care and that  
24 the FHA had Plaintiff in the hospital in fewer than 48 hours after meeting with Plaintiff.  
25 (Doc. 4-4a.)

#### 26 **IV. Failure to State a Claim**

27 Under Arizona law, "[a]ny and all causes of action which may arise out of tort caused  
28 by the director, prison officers or employees of the department [of corrections], within the

1 scope of their legal duties, shall run only against the state.” Ariz. Rev. Stat. § 31-201.01 (F).

2 In addition, under Arizona law

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

11 Ariz. Rev. Stat. §31-201.01 (L). “Serious physical injury” is defined as an “impairment of  
12 physical condition that creates a substantial risk of death or that causes serious disfigurement,  
13 prolonged impairment of health or prolonged loss or impairment of the function of any bodily  
14 organ.” Ariz. Rev. Stat. § 31-201.01 (N)(2).

15 Plaintiff is incarcerated, and the Complaint alleges that any injuries were sustained  
16 while in the custody of the state by employees acting within the scope of their duties. Even  
17 if negligent failure to follow the grievance procedure states a claim and even if Plaintiff  
18 asserts sufficient facts “from which the court may conclude that [he] suffered serious  
19 physical injury,” Hayden and Zaragosa are not proper Defendants in a state law claim and  
20 will be dismissed.

## 21 **V. Claims for Which an Answer Will be Required**

22 Plaintiff adequately states a claim against Barcklay in Count I, and the Court will  
23 direct Barcklay to answer the allegations.

## 24 **VI. Warnings**

### 25 **A. Address Changes**

26 Plaintiff must file and serve a notice of a change of address in accordance with Rule  
27 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other  
28 relief with a notice of change of address. Failure to comply may result in dismissal of this  
action.

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**B. Copies**

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

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

**IT IS ORDERED:**

(1) Count II and Defendants Hayden and Zaragosa are **dismissed** without prejudice.

(2) Defendant Barcklay must answer Count I.

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

(4) Plaintiff must complete<sup>1</sup> and return the service packet to the Clerk of Court within 21 days of the date of filing of this Order. The United States Marshal will not provide service of process if Plaintiff fails to comply with this Order.

(5) If Plaintiff does not either obtain a waiver of service of the summons or complete service of the Summons and Complaint on Defendant within 120 days of the filing

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<sup>1</sup>If a Defendant is an officer or employee of the Arizona Department of Corrections, 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 of the Complaint or within 60 days of the filing of this Order, whichever is later, the action  
2 may be dismissed. Fed. R. Civ. P. 4(m); LRCiv 16.2(b)(2)(B)(i).

3 (6) The United States Marshal must retain the Summons, a copy of the Complaint,  
4 and a copy of this Order for future use.

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

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

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

23 (8) **If Defendant agrees to waive service of the Summons and Complaint,  
24 Defendant must return the signed waiver forms to the United States Marshal, not the  
25 Plaintiff.**

26 (9) Defendant must answer the Complaint or otherwise respond by appropriate  
27 motion within the time provided by the applicable provisions of Rule 12(a) of the Federal  
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1 Rules of Civil Procedure.

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

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

8 DATED this 5th day of September, 2012.  
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Robert C. Broomfield  
Senior United States District Judge