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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Donimic T. Brooks,

No. CV 13-485-PHC-RCB (BSB)

10 Plaintiff,

11 vs.

**ORDER**

12 State of Hawaii, et al.,

13 Defendants.  
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15 **I. Procedural History**

16 On January 10, 2013, Plaintiff Donimic T. Brooks, a State of Hawaii inmate who  
17 is confined in the Corrections Corporation of America's Saguaro Correctional Center,  
18 filed a document entitled "HRPP Rule 40(c)(2)(3) Form and content, (2) Nonconforming  
19 Petition, (3) Separate Cause of Action" ("Complaint") and a Motion for Summary  
20 Judgment in the Circuit Court of the First Circuit of the State of Hawaii. On January 18,  
21 2013, the Hawaii Circuit Court ordered all documents in the case to be reassigned as a  
22 civil proceeding and served on Defendant State of Hawaii Department of Public Safety.  
23 On March 4, 2013, Defendant State of Hawaii filed a Notice of Removal, removing the  
24 case to the United States District Court for the District of Hawaii.

25 In a March 7, 2013 Order, United States District Court Judge Leslie E. Kobayashi  
26 concluded that removal was appropriate because Plaintiff was alleging that Defendants  
27 had violated the United States Constitution and laws. Judge Kobayashi transferred the  
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1 case to the United States District Court for the District of Arizona pursuant to 28 U.S.C.  
2 § 1404(a). The case was assigned to the undersigned.

3 On March 20, 2013, Plaintiff filed a Motion for Default Judgment. Defendant  
4 State of Hawaii filed a Response and Plaintiff filed a Reply. On April 18, 2013, Plaintiff  
5 filed a “Motion to Show Cause for Preliminary Injunction and or a Temporary  
6 Restraining Order.” Defendant State of Hawaii filed a Response and Plaintiff filed a  
7 Reply.

8 In a May 13, 2013 Order, the Court dismissed the Complaint because it was not  
9 filed on a court-approved form and denied the Motion for Summary Judgment, Motion  
10 for Default Judgment, and Motion to Show Cause. The Court gave Plaintiff 30 days to  
11 file an amended complaint on a court-approved form.

12 On May 24, 2013, Plaintiff filed a First Amended Complaint (Doc. 15). On June  
13 13, 2013, he filed a Motion for Summary Judgment (Doc. 16) and a Memorandum of  
14 Law.

## 15 **II. Statutory Screening of Prisoner Complaints**

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

22 A pleading must contain a “short and plain statement of the claim *showing* that the  
23 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8  
24 does not demand detailed factual allegations, “it demands more than an unadorned, the-  
25 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
26 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere  
27 conclusory statements, do not suffice.” *Id.*

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1            “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a  
2 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,  
3 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual  
4 content that allows the court to draw the reasonable inference that the defendant is liable  
5 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible  
6 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw  
7 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s  
8 specific factual allegations may be consistent with a constitutional claim, a court must  
9 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*  
10 at 681.

11            But as the United States Court of Appeals for the Ninth Circuit has instructed,  
12 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,  
13 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less  
14 stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v.*  
15 *Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

### 16 **III. First Amended Complaint**

17            In his First Amended Complaint, Plaintiff names as Defendants Warden Todd  
18 Thomas, Assistant Warden Benjamin Griego, Administrator/Contract Monitor Shari  
19 Kimoto, and Segregation Unit Contract Monitor Scott Jinbo.

20            In **Count One**, Plaintiff alleges violations of his First Amendment rights to free  
21 speech and the free exercise of religion. He claims that he studies both the Christian and  
22 Muslim religions and voluntarily participated in the “life principle/faith pod program,”  
23 which he knew at the outset was Christian-based but accepted inmates of all faiths.  
24 Plaintiff contends that he asked the program leader why the prison only offered a  
25 Christian-based program, but did not offer programs based on other faiths. Plaintiff  
26 states that the program leader did not know, but said that he would ask “the higher ups.”  
27 Plaintiff asserts that Defendant Griego told him that the curriculum came from the  
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1 Corrections Corporation of America, the program was voluntary, and Plaintiff could  
2 leave the program if he did not like it. Plaintiff did not leave the program.

3 Plaintiff contends that the following day, Defendant Thomas told Plaintiff that he  
4 had better stop asking questions or he would be kicked out of the program or thrown into  
5 segregation. Plaintiff alleges that he perceived this to be a personal threat to prevent  
6 Plaintiff from exercising his First Amendment rights, documented the incident, and then  
7 filed an inmate request, again inquiring as to why there were no faith-based programs for  
8 a myriad of other religions.

9 Plaintiff asserts that his unit manager responded to the inmate request, but the  
10 response was actually delivered by Defendant Griego, who handed Plaintiff the response  
11 and told Plaintiff that he was being kicked out of the faith pod and that Plaintiff was  
12 lucky he was not being placed into segregation. Plaintiff perceived this to be a personal  
13 threat and documented it. He then submitted an informal resolution form, claiming that  
14 his right to practice and study Islam was being hindered in the faith pod, that Defendant  
15 Griego had kicked him out of the pod, and that Defendants Griego and Thomas had  
16 threatened him. Unhappy with the grievance officer's response, Plaintiff proceeded to  
17 the next step of the grievance process by filing a grievance.

18 Plaintiff states that while waiting for the response to his grievance, he met with  
19 Defendant Griego for an "interview." At that time, Defendant Griego placed Plaintiff  
20 into segregation and charged him with hindering and "failure to follow" for attempting to  
21 provide false information and hindering the staff by lying. Plaintiff asserts that the  
22 charges stem from the contents of his grievance.

23 Plaintiff claims he was found guilty of the charges and, as a result, lost pay for six  
24 months and was placed in segregation for 60 days. Plaintiff appealed and the hearing  
25 officer upheld the findings and penalty. Plaintiff submitted to Defendant Thomas an  
26 appeal and a request that explained some the inconsistencies he believed were in the  
27 reports. Plaintiff claims that Defendant Thomas denied the request, stating that he had  
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1 spoken to Plaintiff and that Plaintiff had lied to him, and denied Plaintiff’s appeal.  
2 Plaintiff submitted a “second request,” which Defendant Thomas also denied.

3 Plaintiff claims he next wrote a letter to Defendant Kimoto about the situation, but  
4 Defendant Kimoto did not respond. Plaintiff asserts he subsequently requested that  
5 Defendant Kimoto answer his letter, but she has not responded to that request.

6 Plaintiff asserts that Defendant Griego violated Plaintiff’s rights to free speech and  
7 his right to “participate and or practice – exercise – a religious program.”

8 In **Count Two**, Plaintiff alleges a violation of his Fifth and Fourteenth  
9 Amendment rights regarding disciplinary proceedings. Plaintiff contends that Defendant  
10 Griego violated the grievance policy by placing Plaintiff in punitive segregation for 60  
11 days for submitting a grievance. Plaintiff claims that this was an “atypical environment.”  
12 Plaintiff asserts that Defendant Thomas violated his rights by failing to grant Plaintiff’s  
13 disciplinary appeal and that Defendants Kimoto and Jinbo are liable because of their  
14 “inaction.” In addition, Plaintiff contends that Defendants violated his “right to grievance  
15 the government for redress” and violated the prison’s disciplinary procedures.

16 In **Count Three**, Plaintiff alleges that Defendants Griego and Thomas retaliated  
17 against him, in violation of his Eighth Amendment rights, “[d]ue to the actions stated in  
18 [Counts] (1) and (2).” Plaintiff appears to be asserting that Defendants Griego and  
19 Thomas retaliated against him for filing a grievance claiming they had threatened him.

20 In his Request for Relief, Plaintiff seeks monetary damages and injunctive relief.

#### 21 **IV. Discussion of the First Amended Complaint**

22 Although *pro se* pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519,  
23 520-21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey*  
24 *v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a  
25 liberal interpretation of a civil rights complaint may not supply essential elements of the  
26 claim that were not initially pled. *Id.*

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**A. Count One**

It appears Plaintiff is alleging in Count One that he was denied his First Amendment right to free exercise and was retaliated against for the content of his grievance.

**1. Free Exercise**

To state a First Amendment, free-exercise-of-religion claim, a plaintiff must allege that a defendant substantially burdened the practice of the plaintiff’s religion by preventing him from engaging in a sincerely held religious belief and that the defendant did so without any justification reasonably related to legitimate penological interests. *Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008).

Plaintiff does not allege that the practice of his religion was burdened or that he was prevented from engaging in a sincerely held religious belief. Nor do his allegations support such a claim. At best, it appears that Plaintiff, who studied both Christianity and Islam, was removed from a voluntary, faith-based housing unit or a rehabilitation program that was Christian-based, yet accepted all faiths. Thus, the Court will dismiss without prejudice Plaintiff’s free exercise claim.

**2. Free Speech/Retaliation**

Liberally construed, Plaintiff has stated a First Amendment retaliation claim against Defendants Griego and Thomas. The Court will require Defendants Griego and Thomas to answer the free speech/retaliation claim in Count One.

**3. Defendant Kimoto**

Plaintiff’s reference to Defendant Kimoto in Count One does not state a First Amendment claim against her. *See Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (defendants did not commit constitutional violations when they denied administrative grievances, failed to intervene on plaintiff’s behalf, and failed to remedy allegedly unconstitutional behavior). Thus, the Court will dismiss without prejudice Plaintiff’s claim in Count One against Defendant Kimoto.

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1           **B.     Count Two**

2           In analyzing a due process claim, the Court must first decide whether Plaintiff was  
3 entitled to any process, and if so, whether he was denied any constitutionally required  
4 procedural safeguard. Liberty interests that entitle an inmate to due process are  
5 “generally limited to freedom from restraint which, while not exceeding the sentence in  
6 such an unexpected manner as to give rise to protection by the Due Process Clause of its  
7 own force, nonetheless imposes atypical and significant hardship on the inmate in  
8 relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484  
9 (1995) (internal citations omitted).

10          To determine whether an inmate is entitled to the procedural protections afforded  
11 by the Due Process Clause, the Court must look to the particular restrictions imposed and  
12 ask whether they “present the type of atypical, significant deprivation in which a state  
13 might conceivably create a liberty interest.” *Mujahid v. Meyer*, 59 F.3d 931, 932 (9th  
14 Cir. 1995) (quoting *Sandin*, 515 U.S. at 486). “Atypicality” requires not merely an  
15 empirical comparison, but turns on the importance of the right taken away from the  
16 prisoner. *See Carlo v. City of Chino*, 105 F.3d 493, 499 (9th Cir. 1997). To determine  
17 whether the sanctions are atypical and a significant hardship, courts look to the prisoner’s  
18 conditions of confinement, the duration of the sanction, and whether the sanction will  
19 affect the duration of the prisoner’s sentence. *See Keenan v. Hall*, 83 F.3d 1083, 1088-89  
20 (9th Cir. 1996).

21          Plaintiff has not described the conditions of his confinement in punitive  
22 segregation or discussed whether being placed in punitive segregation affected the  
23 duration of his confinement. Simply being placed in punitive segregation for 60 days, in  
24 itself, is not an atypical and significant hardship and does not entitle Plaintiff to any due  
25 process procedural protections. *See Sandin*, 515 U.S. at 475-76, 487 (30 days’  
26 disciplinary segregation is not atypical and significant); *Smith v. Mensinger*, 293 F.3d  
27 641, 654 (3rd Cir. 2002) (seven months of disciplinary confinement “does not, on its  
28 own, violate a protected liberty interest”); *Jones v. Baker*, 155 F.3d 810 (6th Cir. 1998)

1 (two and one-half years' administrative segregation is not atypical and significant); *Rizzo*  
2 *v. Dawson*, 778 F.2d 527, 530 (9th Cir. 1985) (prison authorities may change a prisoner's  
3 "place of confinement even though the degree of confinement may be different and  
4 prison life may be more disagreeable in one institution than in another" without violating  
5 a prisoner's due process rights); *Lucero v. Russell*, 741 F.2d 1129 (9th Cir. 1984)  
6 (administrative transfer to maximum security without a hearing does not infringe on any  
7 protected liberty interest).

8 Even if Plaintiff had been subjected to an atypical and significant hardship,  
9 procedural due process safeguards in a prison disciplinary hearing require that the  
10 defendant receive: (1) written notice of the charges, no less than twenty-four hours prior  
11 to the hearing; (2) a written statement by the factfinders as to the evidence relied on and  
12 reasons for the disciplinary action and (3) a limited right to call witnesses and present  
13 documentary evidence when it would not be unduly hazardous to institutional safety or  
14 correctional goals to allow the defendant to do so. *Wolff v. McDonnell*, 418 U.S. 539,  
15 565-66 (1974). Plaintiff does not claim that was denied any of these procedural  
16 safeguards.

17 In addition, "[t]here is no legitimate claim of entitlement to a grievance  
18 procedure," *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988), and the failure to follow  
19 grievance procedures does not give rise to a due process claim. *See Flournoy v. Fairman*,  
20 897 F. Supp. 350, 354 (N.D. Ill. 1995) (jail grievance procedures did not create a  
21 substantive right enforceable under § 1983); *Spencer v. Moore*, 638 F. Supp. 315, 316  
22 (E.D. Mo. 1986) (violations of grievance system procedures do not deprive inmates of  
23 constitutional rights). "[N]o constitutional right was violated by the defendants' failure,  
24 if any, to process all of the grievances [plaintiff] submitted for consideration." *Buckley v.*  
25 *Barlow*, 997 F.2d 494, 495 (8th Cir. 1993). Moreover, "[t]he right to petition the  
26 government for redress of grievances . . . does not guarantee a favorable response, or  
27 indeed any response, from state officials. Moreover, the First Amendment's right to  
28 redress of grievances is satisfied by the availability of a judicial remedy." *Baltoski v.*

1 *Pretorius*, 291 F. Supp. 2d 807, 811 (N.D. Ind. 2003); *see also Ashann-Ra v. Virginia*,  
2 112 F. Supp. 2d 559, 569 (W.D. Va. 2000) (failure to comply with state’s grievance  
3 procedure is not actionable under § 1983 and does not compromise an inmate’s right of  
4 access to the courts).

5 Finally, Plaintiff’s allegations based on Defendant Thomas’s failure to grant  
6 Plaintiff’s disciplinary appeal and Defendants Kimoto and Jinbo’s “inaction,” do not state  
7 a claim. *See Shehee*, 199 F.3d at 300.

8 Thus, the Court will dismiss without prejudice Count Two.

9 **C. Count Three**

10 The Court will dismiss Count Three because it is duplicative of his more clearly  
11 pled allegations in Count One.

12 **V. Motion for Summary Judgment**

13 Plaintiff has submitted a Motion for Summary Judgment and a Memorandum of  
14 Law, but has failed to file a statement of facts as required by Local Rule of Civil  
15 Procedure 56.1(a). Local Rule 56.1(a) provides:

16 Any party filing a motion for summary judgment must file a  
17 statement, separate from the motion and memorandum of law,  
18 setting forth each material fact on which the party relies in  
19 support of the motion. The separate statement should include  
20 only those facts that the Court needs to decide the motion.  
21 Other undisputed facts (such as those providing background  
22 about the action or the parties) may be included in the  
23 memorandum of law, but should not be included in the  
24 separate statement of facts. Each material fact in the separate  
25 statement must be set forth in a separately numbered  
26 paragraph and must refer to a specific admissible portion of  
27 the record where the fact finds support (for example,  
28 affidavit, deposition, discovery response, etc.). **A failure to  
submit a separate statement of facts in this form may  
constitute grounds for the denial of the motion.**

(Emphasis added.)

Because Plaintiff has failed to comply with Local Rule 56.1(a), the Court will  
deny without prejudice his Motion for Summary Judgment.

1 **VI. Warnings**

2 **A. Address Changes**

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

7 **B. Copies**

8 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a  
9 copy of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a  
10 certificate stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also,  
11 Plaintiff must submit an additional copy of every filing for use by the Court. *See* LRCiv  
12 5.4. Failure to comply may result in the filing being stricken without further notice to  
13 Plaintiff.

14 **C. Possible Dismissal**

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

19 **IT IS ORDERED:**

20 (1) Counts Two and Three and the Free Exercise claim in Count One of the  
21 First Amended Complaint are **dismissed** without prejudice.

22 (2) Defendants Kimoto and Jinbo are **dismissed** without prejudice.

23 (3) Defendants Griego and Thomas must answer the free speech/retaliation  
24 claim in Count One of the First Amended Complaint.

25 (4) Plaintiff's Motion for Summary Judgment (Doc. 16) is **denied without**  
26 **prejudice.**

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1 (5) The Clerk of Court must send Plaintiff a service packet including the First  
2 Amended Complaint (Doc. 15), this Order, and both summons and request for waiver  
3 forms for Defendants Griego and Thomas.

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

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

12 (8) The United States Marshal must retain the Summons, a copy of the First  
13 Amended Complaint, and a copy of this Order for future use.

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

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

24 (b) within 10 days after personal service is effected, file the return of  
25 service for Defendant, along with evidence of the attempt to secure a waiver of  
26 service of the summons and of the costs subsequently incurred in effecting service  
27 upon Defendant. The costs of service must be enumerated on the return of service  
28 form (USM-285) and must include the costs incurred by the Marshal for

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photocopying additional copies of the Summons, First Amended Complaint, or this Order and for preparing new process receipt and return forms (USM-285), if required. Costs of service will be taxed against the personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules of Civil Procedure, unless otherwise ordered by the Court.

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

(11) Defendants Griego and Thomas must answer the free speech/retaliation claim in Count One of the First Amended Complaint or otherwise respond by appropriate motion within the time provided by the applicable provisions of Rule 12(a) of the Federal Rules of Civil Procedure.

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

(13) This matter is referred to Magistrate Judge Bridget S. Bade pursuant to Rules 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 8th day of September, 2013.

  
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Robert C. Broomfield  
Senior United States District Judge