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

Arron Eugene Mowry,
Plaintiff,

vs.

Sergeant Knight, et al.,
Defendants.

No. CV 13-2053-PHX-RCB (SPL)

ORDER

Plaintiff Arron Eugene Mowry, who is confined in the Arizona State Prison Complex-Eyman in Florence, Arizona, filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1) and an Application to Proceed *In Forma Pauperis* (Doc. 2). The Court will order Defendants Knight and Evans to answer Counts One and Two of the Complaint and will dismiss Counts Three, Four, Five, and Six without prejudice.

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 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 *in forma pauperis*. 28 U.S.C.
3 § 1915(e)(2). The Court must dismiss a complaint or portion thereof if a plaintiff has
4 raised claims that are legally frivolous or malicious, that fail to state a claim upon which
5 relief may be granted, or that seek monetary relief from a defendant who is immune from
6 such relief. *Id.*

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

13 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
14 claim to relief that is plausible on its face.’” *Id.* (citation omitted). A claim is plausible
15 “when the plaintiff pleads factual content that allows the court to draw the reasonable
16 inference that the defendant is liable for the misconduct alleged.” *Id.* (citation omitted).
17 “Determining whether a complaint states a plausible claim for relief [is] . . . a context-
18 specific task that requires the reviewing court to draw on its judicial experience and
19 common sense.” *Id.* at 679 (citation omitted). Thus, although a plaintiff’s specific
20 factual allegations may be consistent with a constitutional claim, a court must assess
21 whether there are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

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

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1 **III. Complaint**

2 In his Complaint, Plaintiff names three defendants: (1) Sergeant Knight, badge
3 number 8783, (2) Lieutenant Evans, badge number 2345, and (3) “Health Services
4 Medical Staff (Head Nurse),” a male nurse on duty on October 4, 2012 at ASPC-
5 Florence, Central Unit. Plaintiff alleges seven counts of violations of his Eighth
6 Amendment rights: (1) that Sergeant Knight used excessive force against Plaintiff; (2)
7 that Defendant Lieutenant Evans failed to act to prevent Sergeant Knight’s use of
8 excessive force against Plaintiff; (3) that Sergeant Knight lied and falsified
9 documentation; (4) that Lieutenant Evans lied and falsified documentation; (5) that
10 Sergeant Knight manipulated disciplinary proceedings; (6) that Lieutenant Evans
11 manipulated disciplinary proceedings; and (7) that the unnamed head nurse at the time
12 refused to provide Plaintiff with constitutionally adequate medical care.

13 Plaintiff seeks compensatory and punitive damages, costs, and injunctive relief.

14 **IV. Claims for Which an Answer Will be Required**

15 **A. Count One**

16 In Count One, Plaintiff alleges as follows: On October 4, 2012, Sergeant Knight
17 was escorting Plaintiff to the shower when, unprovoked, Sergeant Knight kicked
18 Plaintiff’s feet out from under him. At the time of the incident, Plaintiff was handcuffed
19 with his hands behind his back. As Plaintiff lay on the ground on his stomach, Sergeant
20 Knight got on top of him, grabbed his right wrist and started bending and twisting it.
21 When Plaintiff complained that he was being hurt and that he had an old wrist injury,
22 Sergeant Knight threatened to break the wrist.

23 After the incident, Sergeant Knight wrote Plaintiff a “falsified ticket” for “Assault
24 on Staff” to cover up and justify the use of physical force on Plaintiff. The “Assault on
25 Staff ticket” was later dismissed. Plaintiff alleges that, as a result of the attack, he
26 sustained injuries to his mid-back, lower back, right elbow, right shoulder, nerve damage
27 to his legs and feet, has a scar on the right side of his back, exacerbated injuries to his
28 right wrist, and psychological, mental, and emotional trauma.

1 The Eighth Amendment applies to excessive force claims of convicted inmates.
2 *See Hudson v. McMillian*, 503 U.S. 1, 7 (1992). Officials acting under color of state law
3 may not maliciously and sadistically use force for the purpose of causing harm. *Id.*;
4 *Watts v. McKinney*, 394 F.3d 710, 711 (9th Cir. 2005). To state a claim for excessive
5 force, an inmate must allege facts to support that an official used or caused to be used
6 objectively unreasonable force against the inmate. *See Brosseau v. Haugen*, 543 U.S.
7 194, 197 (2004). However, not every use of physical force violates the Eighth
8 Amendment. *See Hudson*, 503 U.S. at 7 (not . . . every malevolent touch by a prison
9 guard gives rise to a federal cause of action.”).

10 Construing Count One liberally, Plaintiff has sufficiently stated an Eighth
11 Amendment claim for excessive force and Sergeant Knight will be required to respond to
12 Count One.

13 **B. Count Two**

14 In Count Two, Plaintiff alleges as follows: On October 4, 2012, Lieutenant Evans,
15 Sergeant Knight’s supervisor, was present and witnessed Sergeant Knight attacking
16 Plaintiff. Lieutenant Evans did not intervene to stop the attack and ignored Plaintiff’s
17 screams of pain. After the incident, Lieutenant Evans gave a false incident report
18 corroborating Sergeant Knight’s false incident report.

19 Prison officials have a duty to take reasonable steps to protect inmates from
20 physical abuse. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994). In other words, “a
21 prison official can violate a prisoner’s Eighth Amendment rights by failing to intervene.”
22 *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995) (citation omitted). To state a
23 claim for failure to intervene, Plaintiff must allege that Defendant Evans knew that
24 Defendant Knight was using excessive force and that he had a reasonable opportunity to
25 prevent the harm. *See Yang v. Hardin*, 37 F.3d 282, 285-86 (7th Cir. 1994).

26 Construing Count Two liberally, Plaintiff has sufficiently stated an Eighth
27 Amendment claim for failure to intervene and Lieutenant Evans will be required to
28 respond to Count Two.

1 **C. Count Seven**

2 In Count Seven, Plaintiff alleges that the head nurse at the time, a male, violated
3 Plaintiff's Eighth Amendment rights as follows: On October 4, 2012, after Defendant
4 Knight used excessive force on Plaintiff, Plaintiff was taken to "medical" on a gurney
5 with his hands cuffed behind his back. The head nurse "started jerking [Plaintiff's] arm
6 around to show off to the other officers that he is not going to treat [Plaintiff] with any
7 respect either." Plaintiff told the nurse that if he would not treat Plaintiff like a human
8 being, he would have an outside doctor look at him. The nurse responded, "fine, have an
9 outside doctor look at you then" and made it seem like Plaintiff refused treatment.
10 Plaintiff then began screaming that he did not refuse treatment and he was being treated
11 with "deliberate indifference." Plaintiff was then taken back to his cell untreated.
12 Plaintiff was told to fill out an HNR. Later that evening, a different nurse giving Plaintiff
13 his medication said she thought Plaintiff's arm could be broken. Plaintiff was not given
14 medical attention "for days." Plaintiff alleges that he suffered pain and emotional and
15 mental trauma based on the male head nurse's failure to treat him.

16 Not every claim by a prisoner relating to inadequate medical treatment states a
17 violation of the Eighth or Fourteenth Amendment. To state a § 1983 medical claim, a
18 plaintiff must show that the defendants acted with "deliberate indifference to serious
19 medical needs." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting *Estelle v.*
20 *Gamble*, 429 U.S. 97, 104 (1976)). A plaintiff must show (1) a "serious medical need"
21 by demonstrating that failure to treat the condition could result in further significant
22 injury or the unnecessary and wanton infliction of pain and (2) the defendant's response
23 was deliberately indifferent. *Id.* at 1096 (quotations omitted).

24 "Deliberate indifference in the medical context may be shown by a purposeful act
25 or failure to respond to a prisoner's pain or possible medical need and harm caused by the
26 indifference. *Id.* at 1096. Deliberate indifference may also be shown when a prison
27 official intentionally denies, delays, or interferes with medical treatment or by the way
28 prison doctors respond to the prisoner's medical needs. *Id.* at 1096 (quoting *Estelle*, 429

1 U.S. at 104-05).

2 Construing Count Seven liberally, Plaintiff sufficiently stated an Eighth
3 Amendment claim against the unnamed head nurse for deliberate indifference to medical
4 needs. Because Plaintiff was unable to identify the head nurse that he alleged Count
5 Seven against, Plaintiff named “Health Services Medical Staff (Head Nurse)” as a
6 Defendant in this case. Generally, the use of anonymous appellations to identify
7 defendants is not favored, and as a practical matter, it is in most instances impossible for
8 the United States Marshal to serve a summons and complaint upon an anonymous
9 defendant.

10 However, the Court will not, sua sponte, dismiss the claim against the anonymous
11 Defendant at this time. *See Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999)
12 (where identity of alleged defendants will not be known prior to filing of complaint,
13 plaintiff should be given an opportunity through discovery to identify the unknown
14 defendants, unless it is clear that discovery would not uncover the identities, or that the
15 complaint would be dismissed on other grounds) (citing *Gillespie v. Civiletti*, 629 F.2d
16 637, 642 (9th Cir. 1980)).

17 If Plaintiff discovers the identity of this anonymous Defendant, Plaintiff should
18 promptly file a motion to amend his Complaint. Plaintiff must file a motion for leave to
19 amend to name the anonymous Defendant and submit a proposed second amended
20 complaint. *See* Fed. R. Civ. P. 15(a)(2); LRCiv. 15.1. Further, Plaintiff should note that
21 any claim included in his First Amended Complaint that is not re-alleged in a second
22 amended complaint will be waived. After amendment, the Court will treat every prior
23 complaint as nonexistent. *Ferdik*, 963 F.2d at 1262 (citation omitted). Any cause of
24 action that was raised in a prior complaint and that was voluntarily dismissed or was
25 dismissed without prejudice is waived if it is not re-pled in a second amended complaint.
26 *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012).

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1 **V. Failure to State a Claim**

2 To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants
3 (2) under color of state law (3) deprived him of federal rights, privileges or immunities
4 and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th
5 Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm’n*, 42 F.3d
6 1278, 1284 (9th Cir. 1994)).

7 **A. Counts Three and Four**

8 In Counts Three and Four, Plaintiff alleges that Defendants Knight and Evans
9 violated his Eighth Amendment rights by “lying and falsifying information.” Plaintiff
10 alleges that Defendants Knight and Evans fabricated a lie about why excessive force was
11 used on Plaintiff and then put it in documentation. Plaintiff alleges that these lies led to
12 him not receiving proper medical care because “everyone” believed that Plaintiff tried to
13 assault the prison staff.

14 Plaintiff’s allegations against Defendants Knight and Evans in Counts Three and
15 Four are conclusory. Although pro se pleadings are liberally construed, *Haines v.*
16 *Kerner*, 404 U.S. 519, 520–21 (1972), conclusory and vague allegations will not support
17 a cause of action. *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th
18 Cir.1982). Further, a liberal interpretation of a civil rights complaint may not supply
19 essential elements of the claim that were not initially pled. *Id.* Plaintiff fails to allege
20 how Defendants’ alleged falsification of documents led to a constitutional violation.
21 Although Plaintiff alleges that he was denied medical care because Defendants lied and
22 falsified documents, Plaintiff fails to allege specific facts to support that either Knight or
23 Evans were directly involved in any denial of Plaintiff’s medical care. Moreover,
24 Plaintiff fails to allege facts supporting a causal connection between the alleged
25 falsification of documents and the denial of medical care. Accordingly, Plaintiff fails to
26 state a claim in Counts Two and Three and those Counts will be dismissed.

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1 **B. Counts Five and Six**

2 In Counts Five and Six, Plaintiff alleges that Defendants Knight and Evans
3 violated his Eighth Amendment rights by manipulating the disciplinary process by giving
4 Plaintiff a “fictitious ticket” stating that Plaintiff tried to assault Defendant Knight to
5 cover-up Defendant Knight’s use of excessive force on Plaintiff. Plaintiff alleges that
6 this fictitious ticket led to him not receiving proper medical care because “officers and
7 medical staff” denied him proper medical attention because they thought that Plaintiff
8 “assaulted one of their fellow officers.”

9 As with Counts Three and Four, Plaintiff fails to allege specific facts to support
10 that either Knight or Evans were directly involved in any denial of Plaintiff’s medical
11 care. Moreover, Plaintiff fails to allege facts supporting a causal connection between the
12 alleged “fictitious ticket” and the denial of medical care. Accordingly, Plaintiff fails to
13 state a claim in Counts Five and Six and those Counts will be dismissed.

14 **VI. Warnings**

15 **A. Release**

16 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his
17 release. Also, within 30 days of his release, he must either (1) notify the Court that he
18 intends to pay the balance or (2) show good cause, in writing, why he cannot. Failure to
19 comply may result 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
22 Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion
23 for other relief with a notice of change of address. Failure to comply may result in
24 dismissal of this action.

25 **C. Copies**

26 Because Plaintiff is currently confined in ASPC-Eyman and this case is subject to
27 General Order 13-11, Plaintiff is not required to serve Defendants with a copy of every
28 document he files or to submit an additional copy of every filing for use by the Court, as

1 would ordinarily be required by Federal Rule of Civil Procedure 5 and Local Rule of
2 Civil Procedure 5.4. If Plaintiff is transferred to a prison other than ASPC-Eyman, he
3 will be notified of the requirements for service and copies for the Court that are required
4 for inmates whose cases are not subject to General Order 13-11.

5 **D. Possible Dismissal**

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

10 **IT IS ORDERED:**

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

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

15 (3) Counts Three, Four, Five, and Six are **dismissed** without prejudice.

16 (4) Defendants Knight and Evans must answer Counts One and Two.

17 (5) The Clerk of Court must send Plaintiff this Order, and a copy of the
18 Marshal's Process Receipt & Return form (USM-285) and Notice of Lawsuit & Request
19 for Waiver of Service of Summons form for Defendants Knight and Evans.

20 (6) Plaintiff must complete¹ and return the service packets to the Clerk of Court
21 within 21 days of the date of filing of this Order. The United States Marshal will not
22 provide 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 _____
26 ¹If a Defendant is an officer or employee of the Arizona Department of
27 Corrections, Plaintiff must list the address of the specific institution where the officer or
28 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 filing of the Complaint or within 60 days of the filing of this Order, whichever is later,
2 the action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m);
3 LRCiv 16.2(b)(2)(B)(i).

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

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

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

16 (b) within 10 days after personal service is effected, file the return of
17 service for Defendant, along with evidence of the attempt to secure a waiver of
18 service of the summons and of the costs subsequently incurred in effecting service
19 upon Defendant. The costs of service must be enumerated on the return of service
20 form (USM-285) and must include the costs incurred by the Marshal for
21 photocopying additional copies of the Summons, Complaint, or this Order and for
22 preparing new process receipt and return forms (USM-285), if required. Costs of
23 service will be taxed against the personally served Defendant pursuant to Rule
24 4(d)(2) of the Federal Rules of Civil Procedure, unless otherwise ordered by the
25 Court.

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


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(11) Defendant must answer the 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 Steven P. Logan 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 6th day of November, 2013.



Robert C. Broomfield
Senior United States District Judge