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

Keith Preston Nance,
Plaintiff,
vs.
Allen Miser, et al.,
Defendants.

No. CV 14-0500-PHX-SMM (DKD)

ORDER

Plaintiff Keith Preston Nance, who is confined in the Arizona State Prison Complex, South Unit, in Florence, Arizona, filed a *pro se* civil rights Complaint under 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. (Doc. 1, 3) On March 25, 2014, the case was referred to the Court’s Early Mediation Program. (Doc. 5.) The parties were unable to resolve this case at a mediation held on April 17, 2014. Accordingly, the Court will withdraw this case from the Early Mediation Program and grant Plaintiff’s *in forma pauperis* application. Most recently, Plaintiff has filed a motion for appointment of counsel. (Doc. 9.) The Court will order Defendants to answer the Complaint and deny Plaintiff’s motion for appointment of counsel.

/ / /

1 **I. Application to Proceed *In Forma Pauperis* and Filing Fee**

2 Plaintiff’s Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C.
3 § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1).
4 The Court will not assess an initial partial filing fee. *Id.* The statutory filing fee will be
5 collected monthly in payments of 20% of the previous month’s income credited to
6 Plaintiff’s trust account each time the amount in the account exceeds \$10.00. 28 U.S.C.
7 § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government
8 agency to collect and forward the fees according to the statutory formula.

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

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

16 A pleading must contain a “short and plain statement of the claim *showing* that the
17 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8
18 does not demand detailed factual allegations, “it demands more than an unadorned, the-
19 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
20 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
21 conclusory statements, do not suffice.” *Id.*

22 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
23 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
24 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual
25 content that allows the court to draw the reasonable inference that the defendant is liable
26 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible
27 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw
28 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s

1 specific factual allegations may be consistent with a constitutional claim, a court must
2 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*
3 at 681.

4 But as the United States Court of Appeals for the Ninth Circuit has instructed,
5 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,
6 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less
7 stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v.*
8 *Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

9 **III. Complaint**

10 Plaintiff alleges one count for violation of his religious exercise rights.¹ Plaintiff
11 sues the following current or former employees of the Arizona Department of Corrections
12 (ADC): Director Charles Ryan; Pastoral Administrator Mike Linderman; and Florence
13 Complex Senior Chaplain Allen Miser. Plaintiff seeks injunctive, compensatory, and
14 punitive relief.

15 Except as otherwise indicated, Plaintiff alleges the following in his Complaint:
16 Plaintiff is Muslim. As Pastoral Administrator, Linderman directly supervises chaplains
17 at all institutions, makes recommendations to the division director considering
18 department-wide religious issues, and provides directives concerning resolution of issues
19 related to religious publications, diets, articles, apparel, practices, observances, and
20 grooming. Defendant Miser reports to Linderman, supervises chaplains at the Florence
21 Complex, attends wardens’ meetings, creates and manages religious programs, and serves
22 as a contact for religious activities.

23 Plaintiff alleges that he has been denied halal religious oils and has been restricted

24
25 ¹ This is the third case filed by Plaintiff asserting violation of his religious
26 exercise rights. On April 6, 2012, Plaintiff filed his first case. *Nance v. Miser*, No.
27 CV12-0734-PHX-SMM, Doc. 1. In that case, the Court denied the defendants’ motion
28 for summary judgment and dismissed Plaintiff’s RLUIPA damages claims on October 31,
2013, but the defendants have filed a motion for leave to file another motion for summary
judgment. *Id.*, doc. 69, 124. On February 12, 2013, Plaintiff filed a second civil rights
case. *Nance v. Miser*, No. CV13-0313-PHX-SMM, Doc. 1. On September 22, 2014, the
Court granted Defendants’ motion for summary judgment, which Plaintiff has appealed
to the Ninth Circuit Court of Appeals. *Id.*, Doc. 38.

1 from growing a beard more than a ¼ inch long. According to Plaintiff, at least one other
2 inmate has been permitted to grow a beard several inches long. Plaintiff contends that
3 policies concerning halal religious oils and beard restrictions substantially burden his
4 religious exercise and the policies are not the least restrictive means to further any
5 legitimate, compelling penological interest. He also contends that the beard length policy
6 has not been equally enforced as to similarly situated inmates and thereby violates his
7 equal protection rights.²

8 In September 2010, Plaintiff sought leave from Miser to grow a beard more than ¼
9 inch long in accordance with his sincerely held belief in Islam. Miser denied Plaintiff's
10 request as well as his request for a religious diet. Plaintiff submitted a grievance. On
11 May 25, 2011, Director Ryan approved a religious diet and a shaving waiver. On June
12 16, 2011, Miser signed Plaintiff's religious shaving waiver, which allowed Plaintiff to
13 grow a beard up to ¼ inch long.

14 On October 12, 2013, Plaintiff delivered two Inmate Letters to South Unit
15 Chaplain Lee to be given to Miser. One Inmate Letter addressed the policy limiting
16 beards to ¼ inch, A02-110-013, and the second addressed the denial of halal scented oils
17 for religious use. On October 23, 2013, Plaintiff's Inmate Letter concerning the beard
18 policy was returned to Plaintiff by Miser because it contained more than one page and
19 was accompanied by attachments, neither of which was allowed to be submitted with
20 Form 916.1 (Inmate Letter). The next day, Plaintiff resubmitted his Inmate Letter to
21 Miser but omitted attachments. On November 4, 2013, Plaintiff received a response from
22 Miser denying his request to grow his beard more than ¼ inch long as inconsistent with
23 then prison policies. On November 26, 2013, Plaintiff submitted an informal resolution.
24 On December 3, 2013, Plaintiff received a response from Corrections Officer III Staab in

25 ² Plaintiff asserts that inmate Seymour Abdullah challenged the beard length
26 policy on religious grounds and that ADC settled the claim by paying him \$2,500 and
27 allowing him to grow his beard up to five inches, referring to *Abdullah v. Schriro*, No.
28 CV08-0255-TUC-CKJ. On May 17, 2012, the parties stipulated to dismissal of the
action. The Court subsequently denied the parties' motions to rescind or enforce the
settlement.

1 which Staab stated that he lacked the authority to modify the policy and told Plaintiff that
2 he had to abide by the policy, citing Director's Order (DO) 704.02.

3 On December 9, 2013, Plaintiff submitted a formal grievance concerning the beard
4 policy. On December 11, 2013, Plaintiff received an Inmate Grievance Supplement
5 signed by Assistant Deputy Warden Cottrell for Deputy Warden Heet. In it, Cottrell
6 informed Plaintiff that Miser had responded that he (Miser) could not grant religious
7 privileges that were not consistent with current ADC policies. On December 12, 2013,
8 Plaintiff submitted a grievance appeal to Florence Complex Warden Hetmer, in which
9 Plaintiff asserted that the beard policy burdened his religious exercise and violated equal
10 protection where ADC officials had accommodated another inmate, i.e., Abdullah. On
11 January 14, 2014, Plaintiff forwarded his final grievance appeal to Ryan. Plaintiff states
12 that he did not receive a response from Ryan within the time frame provided.

13 Plaintiff also alleges that his religious exercise and his equal protection rights have
14 been violated where he is restricted from "scented Halal religious oils for religious
15 purposes" but current ADC policy allows Native American and Jewish inmates the
16 opportunity to use religious ceremonial items during religious services and those items
17 are otherwise stored in a secured area. Plaintiff requested an accommodation of the total
18 ban on Halal oils with the opportunity to store such oils in a secured area when not being
19 used for religious purposes.

20 On October 18, 2013, Plaintiff received a response to his Inmate Letter concerning
21 Halal oils stating that his request had been sent to the Central Office for consideration.
22 On October 21, 2013, Plaintiff submitted an informal grievance to Corrections Officer
23 (CO) III Odom after not having received a further response to his informal grievance. On
24 November 4, 2013, Odom responded denying Plaintiff's request for scented oils for
25 religious purposes as not allowed according to Miser and Linderman. On November 5,
26 2013, Plaintiff submitted a formal grievance concerning the denial of scented oils for
27 religious purposes. On November 6, 2013, Plaintiff received a response from Odom on
28 behalf of DW Heet stating that Miser and Linderman had advised that the "policy in

1 regards to scented oils will not be modified to allow purchase of scented oils.” (Doc. 1 at
2 3J.) The same day, Plaintiff submitted a grievance appeal to Complex Warden Hetmer.
3 On November 19, 2013, Plaintiff received a response from Linderman to Plaintiff’s
4 October 12 Inmate Letter, stating that unscented prayer oils were approved for Plaintiff’s
5 religion, but that scented oils were not approved for any religion. Linderman further
6 stated the issue had been litigated by ADC and that it had prevailed in denying scented
7 prayer oils “as the preferred method of ablution is soap and water,” which were readily
8 available to Plaintiff. (*Id.* at 3K.) Linderman further stated that if scented prayer oil was
9 donated for use in group ceremonies, it could be made available in a manner similar to
10 donated ceremonial supplies for other religions. Plaintiff contends that officials failed to
11 cite a compelling governmental interest justifying the denial of Plaintiff’s ability to buy
12 Halal scented oils, which are secured when he is not using it for religious purposes, while
13 allowing the use of donated scented oils in religious ceremonies by groups, which is
14 secured when not in use of group ceremonies.

15 On December 10, 2013, Plaintiff received a response to his inmate grievance from
16 Complex Warden Hetmer affirming the DW denial of Plaintiff’s grievance. Hetmer
17 stated that “the scented oils previously authorized were removed due to inmates misuse
18 of them” and that Plaintiff failed to identify how use of unscented oils burdened his
19 religious exercise. (*Id.*) On December 11, 2013, Plaintiff appealed to Director Ryan
20 stating that he had not received Hetmer’s response within the policy time frame. In doing
21 so, Plaintiff cited a case filed by another inmate, *see Sprouse v. Ryan*, in which Judge
22 Sedwick noted that a policy change allowed the plaintiff to order and receive donated
23 religious items from an approved vender and mooted the plaintiff’s remaining claims.
24 *Sprouse v. Ryan*, No. CV11-0462-PHX-JWS (JFM) (D. Ariz. Apr. 26, 2013), doc. 64.

25 On February 11, 2014, Plaintiff was summoned to Chaplain Lee’s office. Lee
26 informed Plaintiff that Linderman had asked Lee to get Plaintiff’s answers to two
27 questions concerning the beard length issue. First, Linderman wanted to know how
28 Plaintiff’s religious exercise was substantially burdened by the beard limit policy.

1 Second, Linderman wanted to know how long Plaintiff wished to grow his beard.
2 Plaintiff responded that his faith required him to grow a beard longer than ¼ inch and that
3 Halal scented oils were also part of Sunnah practice of Prophet Muhammad. were
4 alsopolicy he South Unit office of the chaplain. On February 18, 2014, Plaintiff received
5 a response from Ryan stating that the issue of scented oils had been litigated and upheld
6 by courts and that Plaintiff was only allowed to purchase unscented oils.

7 Plaintiff contends that ADC previously allowed him to have Halal scented oils and
8 have acknowledged Muslim ceremonies in which such oils are used. Plaintiff contends
9 that restrictions on using such oils substantially burdens his religious practice. Plaintiff
10 further contends that Defendants are intentionally discriminating against him based on his
11 membership in a “protected class,” apparently referring to his religion.

12 Plaintiff sufficiently alleges a violation of his First Amendment religious exercise
13 rights, his Fourteenth Amendment equal protection rights, and RLUIPA. Defendants will
14 be required to respond to the Complaint.

15 **IV. Motion for Appointment of Counsel**

16 Plaintiff seeks the appointment of counsel due to his indigence, incarceration, lack
17 of access to legal resources, complexity of the case and applicable law, limited legal
18 experience, legal representation of Defendants, efficiency, and constraints on Plaintiff’s
19 ability to conduct discovery. There is no constitutional right to the appointment of
20 counsel in a civil case. *See Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266,
21 269 (9th Cir. 1982). In proceedings *in forma pauperis*, the court may request an attorney
22 to represent any person unable to afford one. 28 U.S.C. § 1915(e)(1). Appointment of
23 counsel under 28 U.S.C. § 1915(e)(1) is required only when “exceptional circumstances”
24 are present. *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). A determination
25 with respect to exceptional circumstances requires an evaluation of the likelihood of
26 success on the merits as well as the ability of Plaintiff to articulate his claims *pro se* in
27 light of the complexity of the legal issue involved. *Id.* “Neither of these factors is
28 dispositive and both must be viewed together before reaching a decision.” *Id.* (quoting

1 *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

2 Having considered both elements, it does not appear at this time that exceptional
3 circumstances are present that require the appointment of counsel in this case. Plaintiff is
4 in no different position than many *pro se* prisoner litigants. Thus, the Court will deny
5 without prejudice Plaintiff's motion for appointment of counsel.

6 **V. Warnings**

7 **A. Release**

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

12 **B. Address Changes**

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

17 **C. Copies**

18 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a
19 copy of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a
20 certificate stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also,
21 Plaintiff must submit an additional copy of every filing for use by the Court. *See* LRCiv
22 5.4. Failure to comply may result in the filing being stricken without further notice to
23 Plaintiff.

24 **D. Possible Dismissal**

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

1 **IT IS ORDERED:**

2 (1) This case is withdrawn from the Court's Prisoner Early Mediation Pilot
3 Program and the stay is vacated.

4 (2) Plaintiff's Application to Proceed *In Forma Pauperis* (Doc. 3) is **granted**.

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

8 (4) The Clerk of Court must send Plaintiff a service packet including the
9 Complaint (Doc. 1), this Order, and both summons and request for waiver forms for
10 Defendants Ryan, Linderman, and Miser.

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

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

19 (7) The United States Marshal must retain the Summons, a copy of the
20 Complaint, and a copy of this Order for future use.

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

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

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

17 (9) **A Defendant who agrees to waive service of the Summons and**
18 **Complaint must return the signed waiver forms to the United States Marshal, not**
19 **the Plaintiff.**

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

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

26 (12) Plaintiff's motion for appointment of counsel is **denied**. (Doc. 9.)

27 (13) This matter is referred to Magistrate Judge David K. Duncan pursuant to
28 Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as

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authorized under 28 U.S.C. § 636(b)(1).

DATED this 21st day of October, 2014.



Stephen M. McNamee
Senior United States District Judge