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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Anthony Delgado,

No. CV 14-00665-PHX-SPL (MHB)

10 Plaintiff,

11 vs.

ORDER

12 Kieth Smith, et al.,

13 Defendants.
14

15 On March 25, 2014,¹ Plaintiff Anthony Delgado, who is confined in the Arizona
16 State Prison Complex-Yuma ("ASPC-Yuma") in San Luis, Arizona, filed a *pro se* civil
17 rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma*
18 *Pauperis*. In a June 19, 2014 Order, the Court granted the Application to Proceed and
19 dismissed the Complaint because Plaintiff had failed to state a claim. The Court gave
20 Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the
21 Order.

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25 _____
26 ¹ Though Plaintiff's Complaint was not docketed by the Clerk of the Court until
27 March 31, 2014, it was signed by Plaintiff on March 25, 2014. Under the Prison Mailbox
28 Rule, the Court will refer to the date Plaintiff signed – and presumably delivered – his
Complaint to jail officials as the date on which it was "filed." See, e.g., **Error! Main Document Only.** *Houston v. Lack*, 487 U.S. 266, 275-76 (1988); see also **Error! Main Document Only.** *Douglas v. Noelle*, 2009 WL 1564235, *4 (9th Cir. Jun. 5, 2009) (**Error! Main Document Only.** "We . . . hold that the *Houston* mailbox rule applies to § 1983 suits filed by *pro se* prisoners.").

1 On June 25, 2014,² Plaintiff filed his First Amended Complaint (Doc. 9). The
2 Court will dismiss the First Amended Complaint with leave to amend.

3 **I. Statutory Screening of Prisoner Complaints**

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

10 A pleading must contain a “short and plain statement of the claim *showing* that the
11 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8
12 does not demand detailed factual allegations, “it demands more than an unadorned, the-
13 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
14 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
15 conclusory statements, do not suffice.” *Id.*

16 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
17 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
18 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual
19 content that allows the court to draw the reasonable inference that the defendant is liable
20 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible
21 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw
22 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s
23 specific factual allegations may be consistent with a constitutional claim, a court must
24 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*
25 at 681.

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27 ² As with his original Complaint, Plaintiff’s First Amended Complaint was not
28 docketed by the Clerk of the Court until July 1, 2014, it was signed by Plaintiff on June
25, 2014. Under the Prison Mailbox Rule, the Court will refer to the date Plaintiff signed
– and presumably delivered – his Complaint to jail officials as the date on which it was
“filed.”

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

6 If the Court determines that a pleading could be cured by the allegation of other
7 facts, a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal
8 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*).
9 Plaintiff’s First Amended Complaint will be dismissed for failure to state a claim, but
10 because it may possibly be amended to state a claim, the Court will dismiss it with leave
11 to amend.

12 **II. First Amended Complaint**

13 In his First Amended Complaint, Plaintiff names as Defendants: Kieth Smith, a
14 Security Operations officer at Arizona State Prison Complex-Phoenix (“ASPC-
15 Phoenix”); Marlene Coffy, a “PCU Administrator” at ASPC-Phoenix; and R. Sanders, the
16 Dakota unit Warden at ASPC-Yuma. Plaintiff seeks to be placed in protective custody.

17 In his three-count Amended Complaint, Plaintiff generally alleges that his safety
18 has been threatened and that Defendants have violated his civil rights by failing to place
19 him in protective custody. In Count One, Plaintiff alleges that he has made requests to
20 Defendant Smith on five occasions to be placed in protective custody, but that Defendant
21 Smith has denied him each time. Plaintiff asserts that he has been assaulted and had
22 threats made against him, and that Defendant Smith is aware, or should be aware, of these
23 facts. Plaintiff further asserts that Defendant Smith “directly” denied Plaintiff’s third
24 request for protective custody, that Plaintiff appealed this decision, and was ultimately
25 placed in a general population yard, where he was assaulted. As a result, Plaintiff
26 alleges that he has been physically injured as a result of the assault, has been placed “in
27 the hole” for an extended period of time, and that Defendant Smith’s actions constitute
28 cruel and unusual punishment.

1 In Count Two, Plaintiff alleges that Defendant Coffy is on a “PCU Committee”
2 that has been responsible for evaluating Plaintiff’s requests for protective custody.
3 Plaintiff asserts that Defendant Coffy knows Plaintiff would not be safe on a general
4 population yard, but that he has repeatedly been placed in danger because Defendant
5 Coffy “can’t do her job.” Plaintiff further asserts that, as a result of Defendant Coffy’s
6 investigations, he has been placed “in [the] hole[]” for two years. As a result, Plaintiff
7 alleges that he suffers from stress and anxiety.

8 In Count Three, Plaintiff alleges that Defendant Sanders “let her personal feelings
9 towards [Plaintiff] affect her job.” Plaintiff asserts that Defendant Sanders has kept
10 Plaintiff “in th[e] hole” since May 2013, even though Plaintiff has done nothing wrong
11 and has not had any disciplinary actions during that time. Plaintiff further alleges that
12 Defendant Sanders has had her staff take away Plaintiff’s television and radio. Plaintiff
13 also alleges that Defendant Sanders or her staff have twice lost Plaintiff’s paperwork and
14 evidence related to his protective custody requests, increasing the amount of time
15 Plaintiff has spent in the hole and making it more difficult for him to demonstrate his
16 need for protective custody. As a result, Plaintiff alleges that he has suffered emotional
17 damage.

18 **III. Failure to State a Claim**

19 To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants
20 (2) under color of state law (3) deprived him of federal rights, privileges or immunities
21 and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th
22 Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm’n*, 42 F.3d
23 1278, 1284 (9th Cir. 1994)). In addition, a plaintiff must allege that he suffered a specific
24 injury as a result of the conduct of a particular defendant and he must allege an
25 affirmative link between the injury and the conduct of that defendant. *Rizzo v. Goode*,
26 423 U.S. 362, 371-72, 377 (1976).

27 Although *pro se* pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519,
28 520-21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey*

1 *v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a
2 liberal interpretation of a civil rights complaint may not supply essential elements of the
3 claim that were not initially pled. *Id.*

4 **A. Kieth Smith**

5 An Eighth Amendment threat to safety claim requires a sufficiently culpable state
6 of mind by defendants, known as “deliberate indifference.” *Farmer v. Brennan*, 511 U.S.
7 825, 834 (1994). Deliberate indifference is a higher standard than negligence or lack of
8 ordinary due care for the prisoner’s safety. *Id.* at 835. To state a claim of deliberate
9 indifference, plaintiffs must meet a two-part test. “First, the alleged constitutional
10 deprivation must be, objectively, sufficiently serious”; and the “official’s act or omission
11 must result in the denial of the minimal civilized measure of life’s necessities.” *Id.* at 834
12 (internal quotations omitted). Second, the prison official must have a “sufficiently
13 culpable state of mind,” i.e., he must act with “deliberate indifference to inmate health or
14 safety.” *Id.* (internal quotations omitted). In defining “deliberate indifference” in this
15 context, the Supreme Court has imposed a subjective test: “the official must both be
16 aware of facts from which the inference could be drawn that a substantial risk of serious
17 harm exists, *and* he must also draw the inference.” *Id.* at 837 (emphasis added).

18 Plaintiff has failed to state facts sufficient to support an Eighth Amendment threat
19 to safety claim against Defendant Smith. Plaintiff has not alleged what specific facts
20 Defendant Smith was aware of that would objectively demonstrate a sufficiently serious
21 threat to Plaintiff’s safety, or when Defendant Smith became aware of these facts. Nor
22 has Plaintiff provided any specific facts regarding why Defendant Smith denied
23 Plaintiff’s requests for protective custody, or, indeed, whether Defendant Smith has any
24 authority to place Plaintiff in protective custody or otherwise address his safety concerns.
25 Accordingly, Plaintiff has failed to sufficiently state facts to support an Eighth
26 Amendment threat to safety claim against Defendant Smith, and Defendant Smith will be
27 dismissed.

28 **B. Marlene Coffy**

1 Similarly, Plaintiff has failed to state facts sufficient to support an Eighth
2 Amendment threat to safety claim against Defendant Coffy.³ Plaintiff has not alleged
3 what specific facts Defendant Coffy was aware of that would objectively demonstrate a
4 sufficiently serious threat to Plaintiff's safety, or when Defendant Coffy became aware of
5 these facts. Nor has Plaintiff provided any specific facts regarding why Defendant Coffy
6 denied Plaintiff's requests for protective custody, or how she has otherwise not "done her
7 job." Accordingly, Plaintiff has failed to sufficiently state facts to support an Eighth
8 Amendment threat to safety claim against Defendant Coffy, and Defendant Coffy will be
9 dismissed.

10 **C. Warden Sanders**

11 Plaintiff appears to raise a First Amendment retaliation claim against Defendant
12 Sanders.⁴ A viable claim of First Amendment retaliation contains five basic elements:
13 (1) an assertion that a state actor took some adverse action against an inmate (2) because
14 of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's
15 exercise of his First Amendment rights (or that the inmate suffered more than minimal
16 harm) and (5) did not reasonably advance a legitimate correctional goal. *Rhodes v.*
17 *Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *see also Hines v. Gomez*, 108 F.3d 265,
18 267 (9th Cir. 1997) (retaliation claims requires an inmate to show (1) that the prison
19 official acted in retaliation for the exercise of a constitutionally protected right, and (2)
20 that the action "advanced no legitimate penological interest"). The plaintiff has the
21 burden of demonstrating that his exercise of his First Amendment rights was a substantial

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23 ³ Though he does not specifically allege that Defendant Coffy has violated
24 Plaintiff's Eighth Amendment rights or otherwise imposed "cruel and unusual
25 punishment," Plaintiff has checked the box on the form for "threat to safety" above his
26 allegations against Defendant Smith. Accordingly, the Court assumes Plaintiff intends to
allege an Eighth Amendment violation against Defendant Coffy, and analyzes his claim
as such.

27 ⁴ Though he does not specifically allege that Defendant Sanders has violated
28 Plaintiff's First Amendment rights, Plaintiff has checked the box on the form for
"retaliation" above his allegations against Defendant Smith. Accordingly, the Court
assumes Plaintiff intends to allege a First Amendment violation against Defendant
Sanders, and analyzes the claim as such.

1 or motivating factor behind the defendants' conduct. *Mt. Healthy City School Dist. Bd. of*
2 *Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d
3 1310, 1314 (9th Cir. 1989).

4 Plaintiff has not alleged facts sufficient to support a First Amendment retaliation
5 claim against Defendant Sanders. Plaintiff has not alleged what "personal feelings"
6 Defendant Sanders has against Plaintiff, why she has these feelings, or, most importantly,
7 what motivates them. Additionally, Plaintiff has not alleged what "evidence" Defendant
8 Sanders or her staff lost—indeed, it is unclear whether from Plaintiff's Amended
9 Complaint whether Defendant Sanders was even aware that Plaintiff's television, radio,
10 and paperwork had been "lost"—or how this evidence would have reduced the time he
11 spent "in the hole." Plaintiff has also not alleged why Defendant Sanders kept him "in
12 the hole," or how this placement did not advance any legitimate penological interest. In
13 short, Plaintiff has not demonstrated that Defendant Sanders' alleged actions were done
14 "because" Plaintiff engaged in constitutionally protected conduct, that those actions
15 resulted in more than minimal harm to Plaintiff, or that they did not advance a legitimate
16 penological interest. Accordingly, Plaintiff has failed to allege facts sufficient to support
17 a First Amendment retaliation claim against Defendant Sanders, and she will thus be
18 dismissed.

19 **IV. Leave to Amend**

20 Because the Court has concluded that Plaintiff has failed to state a claim against
21 any named Defendant upon which relief could be granted, the First Amended Complaint
22 will be dismissed. Within 30 days, however, Plaintiff may submit a second amended
23 complaint to cure the deficiencies outlined above. The Clerk of Court will mail Plaintiff
24 a court-approved form to use for filing a second amended complaint. If Plaintiff fails to
25 use the court-approved form, the Court may strike the second amended complaint and
26 dismiss this action without further notice to Plaintiff.

27 Plaintiff must clearly designate on the face of the document that it is the "Second
28 Amended Complaint." The second amended complaint must be retyped or rewritten in

1 its entirety on the court-approved form and may not incorporate any part of the original
2 Complaint or First Amended Complaint by reference. Plaintiff may include only one
3 claim per count.

4 A second amended complaint supersedes the original Complaint and First
5 Amended Complaint. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal*
6 *Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir. 1990). After
7 amendment, the Court will treat the original Complaint and First Amended Complaint as
8 nonexistent. *Ferdik*, 963 F.2d at 1262. Any cause of action that was raised in the
9 original complaint or first amended complaint and that was voluntarily dismissed or was
10 dismissed without prejudice is waived if it is not alleged in a second amended complaint.
11 *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc).

12 Further, if Plaintiff files a second amended complaint, Plaintiff must write short,
13 plain statements telling the Court: (1) the constitutional right Plaintiff believes was
14 violated; (2) the name of the Defendant who violated the right; (3) exactly what that
15 Defendant did or failed to do; (4) how the action or inaction of the Defendant is
16 connected to the violation of Plaintiff's constitutional right; and (5) what specific injury
17 Plaintiff suffered because of that Defendant's conduct. *See Rizzo*, 423 U.S. at 371-72,
18 377.

19 Plaintiff must repeat this process for each person he names as a Defendant. If
20 Plaintiff fails to explain how the conduct of each named Defendant is connected to the
21 specific injury suffered by Plaintiff, the allegations against that Defendant will be
22 dismissed for failure to state a claim. **Conclusory allegations that a Defendant or**
23 **group of Defendants has violated a constitutional right are not acceptable and will**
24 **be dismissed**

25 **V. Warnings**

26 **A. Release**

27 If released from custody, Plaintiff must pay the unpaid balance of the filing fee
28 within 120 days of his release. Also, within 30 days of his release, he must either (1)

1 notify the Court that he intends to pay the balance or (2) show good cause, in writing,
2 why he cannot. Failure to comply may result in dismissal of this action.

3 **B. Address Changes**

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

8 **C. Copies**

9 Plaintiff must submit an additional copy of every filing for use by the Court. *See*
10 LRCiv 5.4. Failure to comply may result in the filing being stricken without further
11 notice to Plaintiff.

12 **D. Possible "Strike"**

13 Because the First Amended Complaint has been dismissed for failure to state a
14 claim, if Plaintiff fails to file a second amended complaint correcting the deficiencies
15 identified in this Order, the dismissal may count as a "strike" under the "3-strikes"
16 provision of 28 U.S.C. § 1915(g). Under the 3-strikes provision, a prisoner may not bring
17 a civil action or appeal a civil judgment *in forma pauperis* under 28 U.S.C. § 1915 "if the
18 prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility,
19 brought an action or appeal in a court of the United States that was dismissed on the
20 grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be
21 granted, unless the prisoner is under imminent danger of serious physical injury." 28
22 U.S.C. § 1915(g).

23 **E. Possible Dismissal**

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

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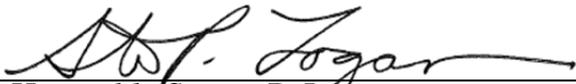
IT IS ORDERED:

(1) The First Amended Complaint (Doc. 9) is **dismissed** for failure to state a claim. Plaintiff has **30 days** from the date this Order is filed to file a second amended complaint in compliance with this Order.

(2) If Plaintiff fails to file a second amended complaint within 30 days, the Clerk of Court must, without further notice, enter a judgment of dismissal of this action with prejudice that states that the dismissal may count as a “strike” under 28 U.S.C. § 1915(g).

(3) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil rights complaint by a prisoner.

Dated this 31st day of July, 2014.


Honorable Steven P. Logan
United States District Judge