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

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Benny G. Rivera,
Plaintiff,

No. CV 20-01255-PHX-JAT (DMF)

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v.

ORDER

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J. Adam Sheppard, et al.,

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Defendants.

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On June 24, 2020, Plaintiff Benny G. Rivera, who is confined in the Gila County Jail, filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed In Forma Pauperis. In a July 1, 2020 Order, the Court denied the deficient Application to Proceed and gave Plaintiff thirty days to either pay the administrative and filing fees or file a complete Application to Proceed In Forma Pauperis.

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On July 16, 2020, Plaintiff filed a second Application to Proceed In Forma Pauperis. In an August 3, 2020 Order, the Court denied the deficient Application to Proceed and gave Plaintiff thirty days to either pay the administrative and filing fees or file a complete Application to Proceed In Forma Pauperis.

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On August 19, 2020, Plaintiff filed a third Application to Proceed In Forma Pauperis. In an August 28, 2020 Order, the Court granted the Application to Proceed and dismissed the Complaint because Plaintiff had failed to state a claim. The Court gave

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1 Plaintiff thirty days to file an amended complaint that cured the deficiencies identified in
2 the Order.

3 On September 24, 2020, Plaintiff filed his First Amended Complaint. In an October
4 9, 2020 Order, the Court dismissed the First Amended Complaint because Plaintiff had
5 failed to state a claim. The Court gave Plaintiff thirty days to file a second amended
6 complaint that cured the deficiencies identified in the Order.

7 On November 4, 2020, Plaintiff filed a Second Amended Complaint (Doc. 13). The
8 Court will dismiss the Second Amended Complaint and this action.

9 **I. 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 which
14 relief may be granted, or that seek monetary relief from a defendant who is immune from
15 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 does
18 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 content
25 that allows the court to draw the reasonable inference that the defendant is liable for the
26 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
27 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
28 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual

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

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

8 **II. Second Amended Complaint**

9 In his three-count Second Amended Complaint, Plaintiff names as Defendants Gila
10 County Sheriff J. Adam Sheppard, Jail Commander Justin Solberg, and Lieutenants Osborn
11 and Kenny. In his Request for Relief, Plaintiff seeks monetary damages, a cell and facilities
12 that are accessible under the Americans with Disabilities Act (ADA), and “to not be
13 excluded from participation in or be denied the benefits of services[,] programs[,] or
14 activities of a public entity or be subjected to discrimination by any such entity.”

15 In **Count One**, Plaintiff alleges Defendant Sheppard violated his rights under the
16 ADA by failing to update the jail and provide handicapped cells. He claims there are no
17 handicapped rails in the showers or near the toilets, which makes moving around nearly
18 impossible. Plaintiff asserts that as a result, he was forced to sleep on the floor; was forced
19 to rely on others to help him up and down, off the toilet, and in and out of the showers; and
20 is in constant fear of falling and not being able to get up. He contends Defendant Sheppard
21 “did not take reasonabl[y] available measures to abate a risk even though a reasonable
22 official in the circumstances would have appreciated the high degree of risk” and caused
23 Plaintiff harm “by not taking such measures.”

24 In **Count Two**, Plaintiff alleges Defendant Sheppard violated his Fourteenth
25 Amendment rights because Defendant Sheppard intentionally failed to update the jail or
26 make it handicapped accessible. He asserts that there are no handicapped cells, access, or
27 facilities, and that Defendant Sheppard, “through a system of ind[if]ference[,] failed to
28 properly add any handicap[ped] facilit[ie]s or equ[i]pment to the jail.” Plaintiff contends

1 that as a result, he was forced to sleep on the floor and rely on others to get up and down,
2 off the toilet, and in and out of the shower.

3 In **Count Three**, Plaintiff contends Defendants Solberg, Osborn, and Kenny, in
4 their official capacities, violated his rights under the ADA by “making him live in unsafe
5 conditions.” He claims Defendants have placed him in danger by failing to update the jail
6 and, therefore, he is forced to sleep on the floor and shower in a non-ADA compliant
7 shower. Plaintiff asserts that prior to being detained in the jail, he was under the care of a
8 doctor and Banner Chiropractic.

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

10 Although pro se pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519,
11 520-21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey*
12 *v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a liberal interpretation of a
13 civil rights complaint may not supply essential elements of the claim that were not initially
14 pled. *Id.*

15 **A. ADA Claims (Counts One and Three)**

16 Under Title II of the ADA, “no qualified individual with a disability shall, by reason
17 of such disability, be excluded from participation in or be denied the benefits of the
18 services, programs, or activities of a public entity, or be subjected to discrimination by any
19 such entity.” 42 U.S.C. § 12132. To state an ADA claim, a plaintiff must demonstrate
20 that:

21 (1) he is an individual with a disability; (2) he is otherwise qualified
22 to participate in or receive the benefit of some public entity’s services,
23 programs, or activities; (3) he was either excluded from participation
24 in or denied the benefits of the public entity’s services, programs, or
25 activities, or was otherwise discriminated against by the public entity;
and (4) such exclusion, denial of benefits, or discrimination was by
reason of [his] disability.

26 *Simmons v. Navajo County, Ariz.*, 609 F.3d 1011, 1021 (9th Cir. 2010) (quoting *McGary*
27 *v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004)).

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1 Plaintiff has failed to identify his disability and does not allege that he has been
2 subjected to discrimination because of it. Thus, the Court will dismiss Plaintiff’s ADA
3 claims.

4 **B. Fourteenth Amendment Due Process Claim (Count Two)**

5 A pretrial detainee has a right under the Due Process Clause of the Fourteenth
6 Amendment to be free from punishment prior to an adjudication of guilt. *Bell v. Wolfish*,
7 441 U.S. 520, 535 (1979). “Pretrial detainees are entitled to ‘adequate food, clothing,
8 shelter, sanitation, medical care, and personal safety.’” *Alvarez-Machain v. United States*,
9 107 F.3d 696, 701 (9th Cir. 1996) (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir.
10 1982)). To state a claim of unconstitutional conditions of confinement against an
11 individual defendant, a pretrial detainee must allege facts that show:

- 12 (i) the defendant made an intentional decision with respect to
13 the conditions under which the plaintiff was confined;
14 (ii) those conditions put the plaintiff at substantial risk of
15 suffering serious harm; (iii) the defendant did not take
16 reasonable available measures to abate that risk, even though a
17 reasonable official in the circumstances would have
18 appreciated the high degree of risk involved—making the
consequences of the defendant’s conduct obvious; and (iv) by
not taking such measures, the defendant caused the plaintiff’s
injuries.

19 *Gordon v. County of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018).

20 Whether the conditions and conduct rise to the level of a constitutional violation is
21 an objective assessment that turns on the facts and circumstances of each particular case.
22 *Id.*; *Hearns v. Terhune*, 413 F.3d 1036, 1042 (9th Cir. 2005). However, “a de minimis
23 level of imposition” is insufficient. *Bell*, 441 U.S. at 539 n.21. In addition, the “‘mere lack
24 of due care by a state official’ does not deprive an individual of life, liberty, or property
25 under the Fourteenth Amendment.” *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071
26 (9th Cir. 2016) (quoting *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986)). Thus, a
27 plaintiff must “prove more than negligence but less than subjective intent—something akin
28 to reckless disregard.” *Id.* A mere delay in medical care, without more, is insufficient to

1 state a claim against prison officials for deliberate indifference. *See Shapley v. Nev. Bd. of*
2 *State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985).

3 Plaintiff has not provided any information as to why he needs handicapped facilities,
4 why he is unable to sleep in the bed that is provided, and why he needs assistance from
5 others. Plaintiff's allegations are simply too vague and conclusory to state a conditions-
6 of-confinement claim. Thus, the Court will dismiss Count Two.

7 **IV. Dismissal without Leave to Amend**

8 Because Plaintiff has failed to state a claim in his Second Amended Complaint, the
9 Court will dismiss his Second Amended Complaint. "Leave to amend need not be given
10 if a complaint, as amended, is subject to dismissal." *Moore v. Kayport Package Express,*
11 *Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). The Court's discretion to deny leave to amend is
12 particularly broad where Plaintiff has previously been permitted to amend his complaint.
13 *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996).
14 Repeated failure to cure deficiencies is one of the factors to be considered in deciding
15 whether justice requires granting leave to amend. *Moore*, 885 F.2d at 538.

16 Plaintiff has made three efforts at crafting a viable complaint and appears unable to
17 do so despite specific instructions from the Court. The Court finds that further
18 opportunities to amend would be futile. Therefore, the Court, in its discretion, will dismiss
19 Plaintiff's Second Amended Complaint without leave to amend.

20 **IT IS ORDERED:**

21 (1) Plaintiff's Second Amended Complaint (Doc. 13) and this action are
22 **dismissed** for failure to state a claim, and the Clerk of Court must enter judgment
23 accordingly.

24 (2) The Clerk of Court must make an entry on the docket stating that the
25 dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).

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