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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**8
9 Douglas Wayne Derello, Jr.,
10 Plaintiff,

No. CV 21-00129-PHX-MTL (JFM)

11 v.

ORDER12 Christopher Romero, et al.,
13 Defendants.
1415 Plaintiff Douglas Wayne Derello, Jr., is confined in the Arizona State Prison
16 Complex-Eyman (ASPC-Eyman), is proceeding pro se, and has been granted permission
17 to proceed in forma pauperis. Pending before the Court is Plaintiff's Second Amended
18 Complaint (Doc. 25).¹ The Court will order Defendant Romero to answer the threat-to-
19 safety claim in Count One and the retaliation claims regarding Defendant Romero's alleged
20 incitement of inmates in Counts One and Two, and will dismiss the remaining claims and
21 Defendants.22 **I. Statutory Screening of Prisoner Complaints**23 The Court is required to screen complaints brought by prisoners seeking relief
24 against a governmental entity or an officer or an employee of a governmental entity. 28
25 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
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28 ¹ The Court dismissed Plaintiff's original Complaint because it did not comply with
Rule 8 of the Federal Rules of Civil Procedure and Rule 3.4 of the Local Rules of Civil
Procedure, and dismissed Plaintiff's First Amended Complaint because he had failed to
state a claim.

1 has raised claims that are legally frivolous or malicious, that fail to state a claim upon which
2 relief may be granted, or that seek monetary relief from a defendant who is immune from
3 such relief. 28 U.S.C. § 1915A(b)(1)–(2).

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

10 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
11 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
12 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
13 that allows the court to draw the reasonable inference that the defendant is liable for the
14 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
15 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
16 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual
17 allegations may be consistent with a constitutional claim, a court must assess whether there
18 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

19 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
20 must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342
21 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent
22 standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551
23 U.S. 89, 94 (2007) (per curiam)).

24 **II. Second Amended Complaint**

25 In his two-count Second Amended Complaint, Plaintiff alleges his Eighth
26 Amendment rights were violated and seeks monetary damages from Defendants Lieutenant
27 Duron, Special Security Unit (SSU) Sergeant Christopher Romero, Sergeant Griggs,
28 Disciplinary Coordinator Hiatt, and Officers Bustillos, Diaz, Ortiz, and Maydon.

1 In **Count One**, Plaintiff alleges that on June 9, 2020, Defendant Romero tried to
2 solicit Plaintiff to become an informant, but Plaintiff declined and subsequently informed
3 a correctional officer. The correctional officer wrote an incident report and attempted to
4 get Plaintiff moved to a yard where Defendant Romero did not work, but the correctional
5 officer's attempt failed. Plaintiff then filed a grievance against Defendant Romero.

6 Plaintiff claims that on July 20, 2020, he was moved to ASPC-Eyman's Cook Unit.
7 When he arrived, other prisoners told him that he could not stay on the unit because SSU
8 had revealed that Plaintiff was "telling" and "filing grievances against [Defendant]
9 Romero." Plaintiff asserts that several prisoners on the Cook Unit have provided
10 declarations stating that before Plaintiff arrived, Defendant Romero had called inmates to
11 the SSU, told them about Plaintiff's grievance, and instructed them to "provide [Defendant
12 Romero] with a reason for [Plaintiff] not to be placed on the yard." In addition, Defendant
13 Romero allegedly admitted to Plaintiff in August 2020 that he knew the prisoners had
14 approached Plaintiff, claimed "SSU put out[] that [Plaintiff] was a snitch," and stated that
15 "he put in place that Plaintiff would not be jumped by a group of [p]risoners all at once."

16 Plaintiff contends Defendant Romero incited a threat to Plaintiff's safety as
17 retaliation for Plaintiff filing a grievance, did nothing to protect Plaintiff, and allowed
18 Plaintiff to be "set[]up with a knife by prisoner to get [Plaintiff] off [the] Cook Unit yard."
19 He alleges this resulted in "long[-]term segregation placement."

20 Plaintiff also claims Defendant Romero knew of Plaintiff's medical condition and
21 knew Plaintiff was in a vulnerable, high-risk group to contract COVID-19, yet placed
22 Plaintiff in a housing unit he knew was infected with COVID-19. Plaintiff claims he
23 contracted the virus, became ill, and suffered unnecessarily.

24 In **Count Two**, Plaintiff alleges Defendant Romero "told[] prisoners to come[]up
25 with a reason to get [P]laintiff off of [the] Cook Unit," knew prisoners were "going to plant
26 a knife to frame [P]laintiff," but did not inform Plaintiff, did not stop the prisoners, and
27 allowed the prisoners to plant a knife near Plaintiff because Plaintiff had filed a grievance
28 against him. He claims Defendants Romero and Hiatt purposely failed to secure the

1 videotape that would have proved Plaintiff “did not know that [the] knife was there,”
2 denied Plaintiff the protection of the disciplinary policy, and violated the disciplinary
3 policy “out of retaliation.” Plaintiff alleges he did not receive a hearing to prove his
4 innocence; Defendant Hiatt did not provide him with “all the eviden[ce]”; Defendant Hiatt
5 deliberately violated the disciplinary policy to prevent Plaintiff from proving his
6 innocence; Defendants Romero and Hiatt “falsified documents to conceal their malicious
7 acts”; and Defendant Hiatt destroyed Plaintiff’s appeal.

8 **III. Discussion of Second Amended Complaint**

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

14 **A. Defendants Duron, Griggs, Bustillos, Diaz, Ortiz, and Maydon**

15 To state a valid claim under § 1983, plaintiffs must allege that they suffered a
16 specific injury as a result of specific conduct of a defendant and show an affirmative link
17 between the injury and the conduct of that defendant. *See Rizzo v. Goode*, 423 U.S. 362,
18 371-72, 377 (1976). There is no respondeat superior liability under § 1983, and therefore,
19 a defendant’s position as the supervisor of persons who allegedly violated Plaintiff’s
20 constitutional rights does not impose liability. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658
21 (1978); *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992); *Taylor v. List*, 880 F.2d
22 1040, 1045 (9th Cir. 1989). “Because vicarious liability is inapplicable to *Bivens* and
23 § 1983 suits, a plaintiff must plead that each Government-official defendant, through the
24 official’s own individual actions, has violated the Constitution.” *Iqbal*, 556 U.S. at 676.

25 Plaintiff has not alleged that Defendants Duron, Griggs, Bustillos, Diaz, Ortiz, and
26 Maydon personally participated in a deprivation of Plaintiff’s constitutional rights, were
27 aware of a deprivation and failed to act, or formed policies that resulted in Plaintiff’s
28 injuries. Plaintiff has made no allegations at all against these Defendants. Thus, the Court

1 will dismiss without prejudice Defendants Duron, Griggs, Bustillos, Diaz, Ortiz, and
2 Maydon.

3 **B. Defendants Romero and Hiatt**

4 **1. Threat to Safety**

5 Liberally construed, Plaintiff has stated an Eighth Amendment threat-to-safety
6 claim against Defendant Romero for placing Plaintiff in a COVID-19 unit despite being
7 aware Plaintiff was in a vulnerable, high-risk group to contract COVID-19. Thus, the Court
8 will require Defendant Romero to answer this portion of Count One.

9 **2. Retaliation**

10 A viable claim of First Amendment retaliation contains five basic elements: (1) an
11 assertion that a state actor took some adverse action against an inmate (2) because of
12 (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise
13 of his First Amendment rights (or that the inmate suffered more than minimal harm) and
14 (5) did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408
15 F.3d 559, 567-68 (9th Cir. 2005); *see also Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir.
16 1997) (retaliation claim requires an inmate to show (1) that the prison official acted in
17 retaliation for the exercise of a constitutionally protected right, and (2) that the action
18 "advanced no legitimate penological interest"). The plaintiff has the burden of
19 demonstrating that his exercise of his First Amendment rights was a substantial or
20 motivating factor behind the defendants' conduct. *Mt. Healthy City Sch. Dist. Bd. of Educ.*
21 *v. Doyle*, 429 U.S. 274, 287 (1977); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314
22 (9th Cir. 1989).

23 Liberally construed, Plaintiff has stated a retaliation claim against Defendant
24 Romero in Counts One and Two based on his allegations that Defendant Romero incited
25 the inmates to get Plaintiff off the Cook Unit. The Court will require Defendant Romero
26 to answer this claim.

27 Plaintiff's allegations regarding Defendants' Romero and Hiatt's alleged violations
28 of the disciplinary process are vague and conclusory and insufficient to state a retaliation

1 claim against either Defendant. Thus, the Court will dismiss without prejudice this
2 retaliation claim against Defendants Romero and Hiatt.

3 3. Due Process

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

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

22 Plaintiff has failed to identify what sanctions, if any, were imposed as a result of the
23 disciplinary violation and, therefore, it is unclear whether Plaintiff was subjected to
24 atypical and significant hardships that would give rise to any due process procedural
25 protections. Thus, the Court will dismiss without prejudice the due process claim against
26 Defendants Romero and Hiatt.

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1 **IV. Warnings**

2 **A. Release**

3 If Plaintiff is released while this case remains pending, and the filing fee has not
4 been paid in full, Plaintiff must, within 30 days of his release, either (1) notify the Court
5 that he intends to pay the unpaid balance of his filing fee within 120 days of his release or
6 (2) file a non-prisoner application to proceed in forma pauperis. Failure to comply may
7 result in dismissal of this action.

8 **B. Address Changes**

9 Plaintiff must file and serve a notice of a change of address in accordance with Rule
10 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
11 relief with a notice of change of address. Failure to comply may result in dismissal of this
12 action.

13 **C. Copies**

14 Because Plaintiff is currently confined in an Arizona Department of Corrections unit
15 subject to General Order 14-17, Plaintiff is not required to serve Defendant with a copy of
16 every document he files or to submit an additional copy of every filing for use by the Court,
17 as would ordinarily be required by Federal Rule of Civil Procedure 5 and Local Rule of
18 Civil Procedure 5.4. Plaintiff may comply with Federal Rule of Civil Procedure 5(d) by
19 including, with every document he files, a certificate of service stating that this case is
20 subject to General Order 14-17 and indicating the date the document was delivered to
21 prison officials for filing with the Court.

22 **If** Plaintiff is transferred to a unit other than one subject to General Order 14-17, he
23 will be required to: (a) serve Defendant, or counsel if an appearance has been entered, a
24 copy of every document that he files, and include a certificate stating that a copy of the
25 filing was served; and (b) submit an additional copy of every filing for use by the Court.
26 *See* Fed. R. Civ. P. 5(a) and (d); LRCiv 5.4. Failure to comply may result in the filing
27 being stricken without further notice to Plaintiff.

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1 **D. Possible Dismissal**

2 If Plaintiff fails to timely comply with every provision of this Order, including these
3 warnings, the Court may dismiss this action without further notice. *See Ferdik v. Bonzelet*,
4 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure
5 to comply with any order of the Court).

6 **IT IS ORDERED:**

7 (1) Defendants Duron, Griggs, Diaz, Maydon, Ortiz, Hiatt, and Bustillos are
8 **dismissed** without prejudice.

9 (2) Defendant Romero must answer the retaliation claim regarding Defendant
10 Romero’s incitement of inmates and the threat-to-safety claim in Second Amended
11 Complaint.

12 (3) The Clerk of Court must send Plaintiff this Order, and a copy of the
13 Marshal’s Process Receipt & Return form (USM-285) and Notice of Lawsuit & Request
14 for Waiver of Service of Summons form for Defendant Romero.

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

18 (5) If Plaintiff does not either obtain a waiver of service of the summons or
19 complete service of the Summons and Second Amended Complaint on Defendant within
20 90 days of the filing of the Complaint or within 60 days of the filing of this Order,
21 whichever is later, the action may be dismissed. Fed. R. Civ. P. 4(m); LRCiv
22 16.2(b)(2)(B)(ii).

23 (6) The United States Marshal must retain the Summons, a copy of the Second
24 Amended Complaint, and a copy of this Order for future use.

25 _____
26 ¹ If a Defendant is an officer or employee of the Arizona Department of Corrections,
27 Plaintiff must list the address of the specific institution where the officer or employee
28 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 (7) The United States Marshal must notify Defendant of the commencement of
2 this action and request waiver of service of the summons pursuant to Rule 4(d) of the
3 Federal Rules of Civil Procedure. The notice to Defendant must include a copy of this
4 Order.

5 (8) If Defendant agrees to waive service of the Summons and Second Amended
6 Complaint, he must return the signed waiver forms to the United States Marshal, not the
7 Plaintiff, **within 30 days of the date of the notice and request for waiver of service**
8 pursuant to Federal Rule of Civil Procedure 4(d)(1)(F) to avoid being charged the cost of
9 personal service.

10 (9) The Marshal must immediately file signed waivers of service of the
11 summons. If a waiver of service of summons is returned as undeliverable or is not returned
12 by Defendant within 30 days from the date the request for waiver was sent by the Marshal,
13 the Marshal must:

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

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

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(10) Defendant must answer the Second 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.

(11) This matter is referred to Magistrate Judge James F. Metcalf 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 17th day of November, 2021.



Michael T. Liburdi
United States District Judge