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

Anthony L. Rodrigues,
Plaintiff,
v.
Charles L. Ryan, et al.,
Defendants.

No. CV 14-8141-PCT-DGC (ESW)

ORDER

On August 8, 2014, Plaintiff Anthony L. Rodrigues, who is confined in the Arizona State Prison Complex-Kingman in Kingman, Arizona, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. In a November 17, 2014 Order, the Court granted the Application to Proceed and dismissed the Complaint because Plaintiff had failed to state a claim. The Court gave Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the Order.

On December 12, 2014, Plaintiff filed his First Amended Complaint. In a March 18, 2015 Order, the Court dismissed the First Amended Complaint because Plaintiff had failed to state a claim. The Court gave Plaintiff 30 days to file a second amended complaint that cured the deficiencies identified in the Order.

On April 20, 2015, Plaintiff filed a Second Amended Complaint (Doc. 15). The

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1 Court will order all Defendants to answer Count Two of the Second Amended Complaint,
2 and will dismiss the remaining claims without prejudice.

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.

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

4 **II. Second Amended Complaint**

5 In his two-count Second Amended Complaint, Plaintiff names as Defendants:
6 Charles L. Ryan, Director of the Arizona Department of Corrections (“ADOC”); R. Scott
7 Marquardt, President and CEO of Management Training Corporation; Tara R. Diaz,
8 ADOC Contract Beds Bureau Director; and Pamela Rider, Warden at ASPC-Kingman’s
9 Hualapai Unit. Plaintiff seeks monetary, injunctive, and declaratory relief, and punitive
10 damages.

11 Plaintiff’s counts are largely intertwined, and are each brought under the Fifth,
12 Eighth, and Fourteenth Amendments, and the Americans with Disabilities Act (“ADA”).
13 Plaintiff styles Count One as relating to his “state created liberty interest[s],” and, in
14 brief, alleges the following: On November 26, 2013, Plaintiff was informed that he was
15 being disciplined for two unexcused absences from a life skills class. As a result,
16 Plaintiff claims that he lost “preferred housing, modification [of] custody and
17 classification score, ability . . . to participate in subsidized volunteer education and
18 program activities, [and] potential loss of earned and temporary release credits.” Plaintiff
19 further alleges that these sanctions implicated “state created liberty interests” that could
20 not be taken away without due process. Plaintiff claims, however, that he did not receive
21 notice of the disciplinary violation or an opportunity to be heard prior to the imposition of
22 the above-described sanctions.

23 Plaintiff styles Count Two as related to a request for “reasonable accommodation.”
24 Put briefly, Plaintiff alleges that he has a documented cardiac condition — for which he
25 is receiving treatment — that qualifies as a “disability” under the ADA. However, after
26 the November 26, 2013 disciplinary sanctions were imposed, Plaintiff was, among other
27 things, reassigned to a 2-man bunk near where inmates smoked. Plaintiff further alleges
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1 that the Defendants are all on notice that — despite ADOC policies and notices
2 prohibiting indoor smoking — inmates often smoke near Plaintiff’s new bunk. As a
3 result, Plaintiff has been hospitalized at least twice due to second hand smoke. Plaintiff
4 further alleges that he has sought a “reasonable accommodation” — specifically, that he
5 be reassigned to a new bunk away from the smoking — from Defendants since at least
6 January 2, 2014, but that he was not moved to a new bunk — apparently away from the
7 smoking — until June 2014.

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

9 To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants
10 (2) under color of state law (3) deprived him of federal rights, privileges or immunities
11 and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th
12 Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm’n*, 42 F.3d
13 1278, 1284 (9th Cir. 1994)). In addition, a plaintiff must allege that he suffered a specific
14 injury as a result of the conduct of a particular defendant and he must allege an
15 affirmative link between the injury and the conduct of that defendant. *Rizzo v. Goode*,
16 423 U.S. 362, 371-72, 377 (1976).

17 Although styled as related to “state created liberty interests,” Plaintiff’s principal
18 allegation is that he did not receive the process he believed he was due prior to the
19 imposition of sanctions. Plaintiff’s claim is, therefore, more properly styled as a violation
20 of his due process rights under the Fourteenth Amendment. Accordingly, to the extent
21 Plaintiff seeks relief under the Fifth and Eighth Amendments, as well as under the ADA,
22 his claim will be dismissed.

23 In analyzing a due process claim, the Court must first decide whether Plaintiff was
24 entitled to any process, and if so, whether he was denied any constitutionally required
25 procedural safeguard. Liberty interests which entitle an inmate to due process are
26 “generally limited to freedom from restraint which, while not exceeding the sentence in
27 such an unexpected manner as to give rise to protection by the Due Process Clause of its
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1 own force, nonetheless imposes atypical and significant hardship on the inmate in
2 relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484
3 (1995) (internal citations omitted).

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

15 Plaintiff was not entitled to any due process procedural protections because he has
16 failed to demonstrate that any of the sanctions imposed were “atypical and significant
17 hardships.” Plaintiff alleges that he lost “preferred housing, modification [of] custody
18 and classification score, ability . . . to participate in subsidized volunteer education and
19 program activities, potential loss of earned and temporary release credits,” and that he
20 was moved to a new bunk (from which he was subsequently reassigned to a new bunk
21 approximately six months later). None of these sanctions, however, are atypical and
22 significant hardships. *See Sandin*, 515 U.S. at 475-76, 487 (30 days’ disciplinary
23 segregation is not atypical and significant); *Smith v. Mensinger*, 293 F.3d 641, 654 (3rd
24 Cir. 2002) (seven months of disciplinary confinement “does not, on its own, violate a
25 protected liberty interest”); *Jones v. Baker*, 155 F.3d 810 (6th Cir. 1998) (two and one-
26 half years’ administrative segregation is not atypical and significant); *Rizzo v. Dawson*,
27 778 F.2d 527, 530 (9th Cir. 1985) (prison authorities may change a prisoner’s “place of
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1 confinement even though the degree of confinement may be different and prison life may
2 be more disagreeable in one institution than in another” without violating a prisoner’s due
3 process rights); *Lucero v. Russell*, 741 F.2d 1129 (9th Cir. 1984) (administrative transfer
4 to maximum security without a hearing does not infringe on any protected liberty
5 interest).

6 Furthermore, to the extent Plaintiff complains that he lost any earned or temporary
7 release credits, such a claim is foreclosed in a § 1983 suit because judgment in favor of
8 Plaintiff regarding the denial of due process in a prison disciplinary proceeding would
9 invalidate the deprivation of good time credits. *Heck v. Humphrey*, 512 U.S. 477 (1994);
10 *Edwards v. Balisok*, 520 U.S. 641 (1997). “[A] state prisoner seeking injunctive relief
11 against the denial or revocation of good-time credits must proceed in habeas corpus, and
12 not under § 1983.” *Nonnette v. Small*, 316 F.3d 872, 875 (9th Cir. 2002). Because
13 Plaintiff has not demonstrated that his prison disciplinary proceeding has been reversed,
14 expunged, declared invalid, or called into question by a federal court’s issuance of a writ
15 of habeas corpus, this claim is barred by *Heck*.

16 Accordingly, Plaintiff has failed to state a claim against any named Defendant in
17 Count One.

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

19 Liberally construed, Plaintiff has sufficiently alleged both an Eighth Amendment
20 and an ADA claim against all Defendants in Count Two, and the Court will require an
21 Answer to that Count. However, Count Two will be dismissed to the extent Plaintiff
22 seeks relief under the Fifth and Fourteenth Amendments, for the reasons set forth in part
23 Part III, *supra*.

24 **V. Warnings**

25 **A. Release**

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

4 **B. Address Changes**

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

9 **C. Copies**

10 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a
11 copy of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a
12 certificate stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also,
13 Plaintiff must submit an additional copy of every filing for use by the Court. *See* LRCiv
14 5.4. Failure to comply may result in the filing being stricken without further notice to
15 Plaintiff.

16 **D. Possible Dismissal**

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

21 **IT IS ORDERED:**

- 22 (1) Count One is **dismissed** without prejudice.
23 (2) All Defendants must answer Count Two, as set forth above.
24 (3) The Clerk of Court must send Plaintiff a service packet including the
25 Second Amended Complaint (Doc. 15), this Order, and both summons and request for
26 waiver forms for Defendants.
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1 (4) Plaintiff must complete¹ and return the service packet to the Clerk of Court
2 within 21 days of the date of filing of this Order. The United States Marshal will not
3 provide service of process if Plaintiff fails to comply with this Order.

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

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

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

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

21 (b) within 10 days after personal service is effected, file the return of
22 service for Defendant, along with evidence of the attempt to secure a waiver of
23 service of the summons and of the costs subsequently incurred in effecting service
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25 ¹If a Defendant is an officer or employee of the Arizona Department of
26 Corrections, Plaintiff must list the address of the specific institution where the officer or
27 employee works. Service cannot be effected on an officer or employee at the Central
28 Office of the Arizona Department of Corrections unless the officer or employee works
there.

1 upon Defendant. The costs of service must be enumerated on the return of service
2 form (USM-285) and must include the costs incurred by the Marshal for
3 photocopying additional copies of the Summons, Second Amended Complaint, or
4 this Order and for preparing new process receipt and return forms (USM-285), if
5 required. Costs of service will be taxed against the personally served Defendant
6 pursuant to Rule 4(d)(2) of the Federal Rules of Civil Procedure, unless otherwise
7 ordered by the Court.

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

11 (9) Defendants must answer the Second Amended Complaint or otherwise
12 respond by appropriate motion within the time provided by the applicable provisions of
13 Rule 12(a) of the Federal Rules of Civil Procedure.

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

17 (11) This matter is referred to Magistrate Judge Eileen S. Willett pursuant to
18 Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as
19 authorized under 28 U.S.C. § 636(b)(1).

20 Dated this 20th day of July, 2015.

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David G. Campbell
United States District Judge