

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

DONALD RICHARD CHILDS II,  <p style="text-align: right;">Plaintiff(s),</p> <p style="text-align: center;">v.</p> LAS VEGAS METROPOLITAN POLICE DEPARTMENT,  <p style="text-align: right;">Defendant(s).</p>		Case No. 2:14-CV-1748 JCM (NJK)  <p style="text-align: center;">ORDER</p>
--	--	---

Presently before the court is defendant Las Vegas Metropolitan Police Department’s (hereinafter “defendant”) motion to dismiss. (Doc. # 6). Plaintiff Donald Richard Childs, II (hereinafter “plaintiff”) filed a response, (doc. # 10), and defendant filed a reply, (doc. # 12).

Also before the court is plaintiff’s motion to amend complaint. (Doc. # 10). Defendant filed a response. (Doc. # 12). Plaintiff did not file a reply, and the time to reply has now passed.

Also before the court is plaintiff’s request for judicial notice. (Doc. # 10).

Finally before the court is plaintiff’s motion to recuse. (Doc. # 16). Defendant did not file a response, and the time to respond has now passed.

**I. Background**

On June 30, 2014, plaintiff was involved in an incident with two Las Vegas Metropolitan Police Department (“LVMPD”) officers on the Fremont Street Experience. (Doc. # 1). On July 10, 2014, plaintiff filed a formal complaint and affidavit with LVMPD internal affairs. (Doc. # 1).

1 On September 19, 2014, plaintiff was involved in a similar incident with two different  
2 LVMPD officers. (Doc. # 1). Plaintiff was standing in a crowd at a red light on Fourth and  
3 Fremont Streets. (Doc. # 1). He observed four LVMPD officers and two squad cars nearby.  
4 Two of the officers then drove off in their squad car, while the other two remained at the  
5 intersection. (Doc. # 1).

6 When the light turned green, plaintiff and the other pedestrians began to cross the street.  
7 (Doc. # 1). At that time, one of the officers ran toward the crowd, grabbed plaintiff by the arm,  
8 and pulled him toward the parked squad car. (Doc. # 1). When plaintiff asked what the problem  
9 was, the officer told plaintiff that they were taking him to jail. (Doc. # 1).

10 Plaintiff was immediately handcuffed. (Doc. # 1). Plaintiff asked for the names and  
11 badge numbers of the officers. (Doc. # 1). The first officer then began removing all of the items  
12 from plaintiff's pockets. (Doc. # 1).

13 Plaintiff stated that the officers were violating his Fourth Amendment rights with an  
14 unconstitutional search. (Doc. # 1). The second officer responded that the Fourth Amendment  
15 did not apply because plaintiff was being arrested. (Doc. # 1).

16 Plaintiff was arrested and taken to the City of Las Vegas Detention Center. (Doc. # 1).  
17 He was told that he had violated Nevada Revised Statute 484B.283 for failure of a pedestrian to  
18 obey traffic signals. Plaintiff was held in jail for hours with no idea of his release date. Plaintiff  
19 was eventually released. On September 23, 2014, he filed a second LVMPD internal affairs  
20 complaint and affidavit. (Doc. # 1).

21 On October 22, 2014, plaintiff filed a complaint in Nevada state court asserting claims for  
22 harassment, deprivation of rights under color of law in violation of 18 U.S.C. § 242, false arrest,  
23 fabrication of evidence, discrimination, unreasonable search and seizure, and due process  
24 violations. (Doc. # 1).

25 Defendant then removed the case to this court, and the parties filed the instant motions.  
26 (Doc. # 1).

27 ...

28 ...

1       **II. Legal Standard**

2           i.       Judicial notice

3           Federal Rule of Evidence 201 provides for judicial notice of adjudicative facts. Under  
4 Rule 201(b)(2), the court may “judicially notice a fact that is not subject to reasonable dispute  
5 because it . . . can be accurately and readily determined from sources whose accuracy cannot  
6 reasonably be questioned. Fed. R. Evid. 201(b)(2). Rule 201(c)(2) states that the court “must  
7 take judicial notice if a party requests it and the court is supplied with the necessary  
8 information.” Fed. R. Evid. 201(c)(2).

9           ii.       Motion to dismiss

10          A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief  
11 can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short  
12 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.  
13 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not  
14 require detailed factual allegations, it demands “more than labels and conclusions” or a  
15 “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
16 (2009) (citation omitted).

17          “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550  
18 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual  
19 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation  
20 omitted).

21          In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply  
22 when considering motions to dismiss. First, the court must accept as true all well-pled factual  
23 allegations in the complaint; however, legal conclusions are not entitled to the assumption of  
24 truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by  
25 conclusory statements, do not suffice. *Id.*

26          Second, the court must consider whether the factual allegations in the complaint allege a  
27 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint  
28 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for

1 the alleged misconduct. *Id.* at 678.

2 Where the complaint does not permit the court to infer more than the mere possibility of  
3 misconduct, the complaint has “alleged – but it has not shown – that the pleader is entitled to  
4 relief.” *Id.* at 679 (internal quotations omitted). When the allegations in a complaint have not  
5 crossed the line from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*,  
6 550 U.S. at 570.

7 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d  
8 1202, 1216 (9th Cir. 2011). The *Starr* court held,

9 First, to be entitled to the presumption of truth, allegations in a complaint or  
10 counterclaim may not simply recite the elements of a cause of action, but must  
11 contain sufficient allegations of underlying facts to give fair notice and to enable  
12 the opposing party to defend itself effectively. Second, the factual allegations that  
are taken as true must plausibly suggest an entitlement to relief, such that it is not  
unfair to require the opposing party to be subjected to the expense of discovery  
and continued litigation.

13 *Id.*

14 iii. Motion to amend

15 Federal Rule of Civil Procedure 15(a) provides that “[t]he court should freely give leave  
16 [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Supreme Court has  
17 interpreted Rule 15(a) and confirmed the liberal standard district courts must apply when  
18 granting such leave.

19 In *Foman v. Davis*, 371 U.S. 178 (1962), the Court explained: “In the absence of any  
20 apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the  
21 movant, repeated failure to cure deficiencies by amendments previously allowed, undue  
22 prejudice to the opposing party by virtue of allowance of the amendment, futility of the  
23 amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’” *Id.* at 182.

24 Federal Rule of Civil Procedure 15(a)(1)(B) provides: “A party may amend its pleading  
25 once as a matter of course within . . . 21 days after service of a motion under Rule 12(b) . . . .”  
26 Fed. R. Civ. P. 15(a)(1)(B). Local Rule 15-1(a) states that “the moving party shall attach the  
27 proposed amended pleading to any motion to amend . . . .” LR 15-1(a).

1     **III. Discussion**

2             As an initial matter, the court acknowledges that the complaint was filed pro se and is  
3 therefore held to less stringent standards. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (“A  
4 document filed pro se is to be liberally construed, and a pro se complaint, however inartfully  
5 pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”)  
6 (internal quotations and citations omitted). However, “pro se litigants in the ordinary civil case  
7 should not be treated more favorably than parties with attorneys of record.” *Jacobsen v. Filler*,  
8 790 F.2d 1362, 1364 (9th Cir. 1986).

9             i. Motion to recuse

10            On December 19, 2014, plaintiff filed a motion to recuse District Judge Andrew P.  
11 Gordon from this case. (Doc. # 16). On December 22, 2014, Judge Gordon recused himself  
12 from the case and it was reassigned to this court. Accordingly, the motion to recuse will be  
13 denied as moot.

14            ii. Request for judicial notice

15            In his motion for leave to amend and opposition to defendant’s motion to dismiss,  
16 plaintiff asks the court to take judicial notice of LSR 2-1. (Doc. # 10). This local rule provides  
17 that “[a] civil rights complaint filed by a person who is not represented by counsel shall be on the  
18 form provided by this Court.” LSR 2-1.

19            Local rules are not adjudicative facts. Accordingly, the court will deny plaintiff’s request  
20 and will not take judicial notice of LSR 2-1. Any local rule will be applied as appropriate.

21            iii. Motion to dismiss

22            Plaintiff filed a joint response and motion to amend in opposition to defendant’s motion to  
23 dismiss. Plaintiff argues that his complaint contains sufficient factual matter to state a plausible  
24 claim for relief. (Doc. # 10).

25            In its reply, defendant argues that plaintiff has failed to challenge the legal assertions in  
26 defendant’s motion or substantively oppose it by showing how his claims may survive dismissal.  
27 (Doc. # 12). Defendant states that it is not liable for any federal claim based upon respondeat  
28 superior liability. (Doc. # 6).

1 Defendant also notes that plaintiff lacks standing to assert private causes of action  
2 pursuant to federal criminal statutes. Defendant finally suggests that plaintiff fails to identify  
3 any facts stating a plausible claim for violation of his federal rights. (Doc. # 6).

4 The court agrees. Plaintiff does not “state a claim to relief that is plausible on its  
5 face.” *Iqbal*, 556 U.S. at 678. In his response to defendant’s motion to dismiss, plaintiff simply  
6 cites the standard for a Rule 12(b)(6) motion and claims that he meets it. However, he does not  
7 provide any compelling argument in support of this contention. Plaintiff’s allegations are simply  
8 legal conclusions, and do not cite sufficient facts to bring them above the speculative level.

9 Plaintiff’s response to defendant’s motion to dismiss indicates his intention to bring a  
10 claim under 42 U.S.C. § 1983. (Doc. # 10). However, municipalities are liable only for  
11 constitutional violations resulting from an official policy or custom. *Monell v. Dep’t of Soc.*  
12 *Servs.*, 436 U.S. 658, 694 (1978). To survive dismissal, a claim under section 1983 must  
13 sufficiently allege that the officers were acting under color of state law and that their conduct  
14 amounted to a deprivation of plaintiff’s constitutional rights. See *Jones v. Cmty. Redev. Agency*,  
15 733 F.2d 646, 649 (9th Cir. 1984).

16 Plaintiff fails to plausibly allege any custom or policy leading to a purported  
17 constitutional violation. While plaintiff alleges that certain of his constitutional rights were  
18 violated, these allegations are conclusory and without factual support.

19 Plaintiff’s statutory claims are also mere legal conclusions and do not rise to the level  
20 sufficient to survive dismissal. Plaintiff attempts to allege multiple violations of 18 U.S.C. §  
21 242. This is a criminal statute and plaintiff lacks standing to assert any claim under it.

22 Finally, plaintiff cites no legal authority in support of his harassment or discrimination  
23 claims. Plaintiff simply alleges that he was harassed and discriminated against based on the  
24 officers’ “misuse of ‘discretionary citations.’” (Doc. # 1). Plaintiff references the Equal  
25 Protection Clause with no factual support. These allegations do not state any plausible claim for  
26 relief.

27 For the foregoing reasons, plaintiff’s complaint will be dismissed in its entirety.  
28

1           iv.       Motion to amend

2           Plaintiff contends that he should instead be granted leave to amend his complaint based  
3 on Federal Rule of Civil Procedure 15(a)(1)(B). Plaintiff moves for leave to amend his  
4 complaint to a 42 U.S.C. § 1983 civil rights complaint. (Doc. # 10).

5           Defendant responds that plaintiff's motion should be denied because plaintiff fails to  
6 attach a copy of his proposed amended complaint pursuant to Local Rule 15-1(a). Defendant  
7 also argues that plaintiff fails to specify how any proposed amendment would cure the  
8 deficiencies in his complaint. (Doc. # 12).

9           The court again agrees. First, plaintiff fails to comply with the requirement of Local Rule  
10 15-1(a). Second, the court finds that amendment would be futile. As noted above, plaintiff's  
11 factual allegations fail to give rise to a plausible claim for relief under 42 U.S.C. § 1983.  
12 Plaintiff also does not cite any facts in his motion to amend indicating a plausible claim for relief  
13 under this statute.

14           For the foregoing reasons, the court will deny the motion to amend.

15       **IV.    Conclusion**

16           Accordingly,

17           IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant's motion to  
18 dismiss, (doc. # 6), be, and the same hereby is, GRANTED without prejudice.

19           IT IS FURTHER ORDERED that plaintiff's motion to amend complaint, (doc. # 10), be,  
20 and the same hereby is, DENIED.

21           IT IS FURTHER ORDERED that plaintiff's motion to recuse, (doc. # 16), be, and the  
22 same hereby is, DENIED as moot.

23           DATED December 30, 2014.


24

25

26

27

28

  
UNITED STATES DISTRICT JUDGE