UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IKEMEFULA CHARLES IBEABUCHI, AKA Ibeabuchi Ikemefula Charles, AKA Charles Ikemefula Ibeabuchi, AKA Charles Ibeabuchi Ikemefula,

Plaintiff-Appellant,

v.

PAUL PENZONE, Sheriff,

Defendant-Appellee.

No. 18-15981

D.C. No. 2:17-cv-03621-JAT-JZB
District of Arizona,
Phoenix

ORDER

Before: LEAVY, HAWKINS, and TALLMAN, Circuit Judges.

The district court certified that this appeal is not taken in good faith. *See* 28 U.S.C. § 1915(a). On June 1, 2018, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, responses to the court's order to show cause, and opening brief received on June 25, 2018, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 8) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

DISMISSED.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IKEMEFULA CHARLES IBEABUCHI, AKA Ibeabuchi Ikemefula Charles, AKA Charles Ikemefula Ibeabuchi, AKA Charles Ibeabuchi Ikemefula, Plaintiff-Appellant, v. PAUL PENZONE, Sheriff, Defendant-Appellee.	No. 18-15981 D.C. No. 2:17-cv-03621-JAT-JZB District of Arizona, Phoenix ORDER

A review of the district court's docket reflects that the district court has certified that this appeal is not taken in good faith and has revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). This court may dismiss a case at any time, if the court determines the case is frivolous. *See* 28 U.S.C. § 1915(e)(2).

Within 35 days after the date of this order, appellant must:

(1) file a motion to dismiss this appeal, *see* Fed. R. App. P. 42(b), or

(2) file a statement explaining why the appeal is not frivolous and should go forward.

If appellant files a statement that the appeal should go forward, appellant also must:

(1) file in this court a motion to proceed in forma pauperis, OR

(2) pay to the district court $505.00 for the filing and docketing fees for this appeal AND file in this court proof that the $505.00 was paid.

If appellant does not respond to this order, the Clerk will dismiss this appeal for failure to prosecute, without further notice. *See* 9th Cir. R. 42-1. If appellant files a motion to dismiss the appeal, the Clerk will dismiss this appeal, pursuant to Federal Rule of Appellate Procedure 42(b). If appellant submits any response to this order other than a motion to dismiss the appeal, the court may dismiss this appeal as frivolous, without further notice. If the court dismisses the appeal as frivolous, this appeal may be counted as a strike under 28 U.S.C. § 1915(g).

If appellant files a statement that the appeal should go forward, appellee may file a response within 10 days after service of appellant's statement.

The briefing schedule for this appeal is stayed.

The Clerk shall serve on appellant: (1) a form motion to voluntarily dismiss the appeal, (2) a form statement that the appeal should go forward, and (3) a Form 4 financial affidavit. Appellant may use the enclosed forms for any motion to dismiss the appeal, statement that the appeal should go forward, and/or motion to proceed in forma pauperis.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Joseph Williams
Deputy Clerk
Ninth Circuit Rule 27-7

JL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ikemefula Charles Ibeabuchi,

Plaintiff,

v.

Paul Penzone, et al.,

Defendants.

No. CV 17-03621-PHX-JAT (JZB)

ORDER

On September 25, 2017, Plaintiff Ikemefula Charles Ibeabuchi, who is confined in the Arizona State Prison Complex-Florence, filed a pro se civil rights Complaint in Maricopa County Superior Court. On October 9, 2017, Defendant filed a Notice of Removal and removed the case to this Court. In a January 22, 2018 Order, the Court found that the Complaint facially supported the existence of federal subject matter jurisdiction and that the case was timely removed. The Court dismissed the Complaint and gave Plaintiff 30 days to file an amended complaint on the Court's approved form complaint.

On February 1, 2018, Plaintiff filed his First Amended Complaint. In a May 3, 2018 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.

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APPENDIX B

On May 11, 2018, Plaintiff filed a Second Amended Complaint (Doc. 14). The Court will dismiss the Second Amended Complaint and this action.

I. Statutory Screening of Prisoner Complaints

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

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

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

But as the United States Court of Appeals for the Ninth Circuit has instructed, courts must "continue to construe *pro se* filings liberally." *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). A "complaint [filed by a pro se prisoner] 'must be held to less

stringent standards than formal pleadings drafted by lawyers.'" *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)).

II. Second Amended Complaint

In his one-count Second Amended Complaint, Plaintiff sues Maricopa County Sheriff Paul Penzone. He seeks monetary damages. As in his First Amended Complaint, Plaintiff alleges that on August 22, 2017, August 28, 2017, August 29, 2017, and August 30, 2017, Defendant Penzone served Plaintiff cold meals that did not include milk, and this constituted a denial of basic necessities. Plaintiff asserts that Defendant Penzone's food policy is to serve a cold meal in the morning and a hot meal in the evening, and cold meals must be served with milk. Plaintiff contends that Defendant Penzone "constructively and fraudulently served Plaintiff a cold meal in the evening, without the functioning Milk component, which caused damage to the Plaintiff." Plaintiff claims that the cold meals did not meet the dietician-approved food policy, and the omission of milk "denied the Meal, [']Answer[*'*] to the equation, and Adequate Feeding, which the law require [sic]." Plaintiff alleges that his "emaciation" was recorded in an October 2017 annual evaluation conducted by the Medical Unit for pretrial detainees who had been incarcerated for a year in a county jail. Plaintiff asserts that he has lost 26 pounds since October 5, 2017, when he weighed 264 pounds, and began receiving "substituted supplement, as a measure to his noticeable weight loss (weekly Vitamin D, as general, Practice)." Plaintiff claims that his grievances were "ambushed and denied Merit of review by Bureau Hearing Unit Commander," except one grievance that was allowed to proceed to an external referee. As his injury, Plaintiff alleges that he suffered "emaciation of the subjected malnutrition, and self-respect lost due to starvation," and that Defendant Penzone "ineffectively transferred Plaintiff to Prison, instead of a neighbouring County Jail, as his option to remedy Custody in this issue."

III. Failure to State a Claim

To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants (2) under color of state law (3) deprived him of federal rights, privileges or immunities

and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm'n*, 42 F.3d 1278, 1284 (9th Cir. 1994)). In addition, a plaintiff must allege that he suffered a specific injury as a result of the conduct of a particular defendant and he must allege an affirmative link between the injury and the conduct of that defendant. *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976).

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

As Plaintiff was informed in the Court's May 3, 2018 Order, "to state a conditions-of-confinement claim, plaintiffs must meet a two-part test. "First, the alleged constitutional deprivation must be, objectively, sufficiently serious" such that the "official's act or omission must result in the denial of the minimal civilized measure of life's necessities." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotations omitted). Second, the prison official must have a "sufficiently culpable state of mind," i.e., he must act with "deliberate indifference to inmate health or safety." *Id.* (internal quotations omitted). Deliberate indifference is a higher standard than negligence or lack of ordinary due care for the prisoner's safety. *Id.* at 835. In defining "deliberate indifference" in this context, the Supreme Court has imposed a subjective test: "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, *and* he must also draw the inference." *Id.* at 837 (emphasis added).

The specific inquiry with respect to pretrial detainees is whether the prison conditions amount to "punishment" without due process in violation of the Fourteenth Amendment. *Bell*, 441 U.S. at 535. A jail or prison must provide prisoners with "adequate food, clothing, shelter, sanitation, medical care, and personal safety."

Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982). However, this does not mean that federal courts can, or should, interfere whenever prisoners are inconvenienced or suffer de minimis injuries. *See Bell*, 441 U.S. at 539 n.21 (noting that a de minimis level of imposition does not rise to a constitutional violation). Whether a condition of confinement rises to the level of a constitutional violation may depend, in part, on the duration of an inmate's exposure to that condition. *See Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) (citing *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978)).

The Fourteenth Amendment requires "only that prisoners receive food that is adequate to maintain health; it need not be tasty or aesthetically pleasing." *LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993). However, an inmate may state a claim where he alleges that he is served meals with insufficient calories for long periods of time. *Id.*

Here, Plaintiff has not alleged that he was served meals with insufficient calories for long periods of time. Rather, he has alleged only that on four occasions, he was served a cold meal without milk. That allegation is insufficient to support that Defendant Penzone denied Plaintiff "the minimal civilized measure of life's necessities" or was aware that serving four cold meals without milk created a substantial risk of serious harm to Plaintiff. In addition, although Plaintiff alleges that he has lost 26 pounds since October 5, 2017, the Court finds implausible Plaintiff's contention that he lost that weight because he was denied milk on four occasions. To the extent Plaintiff's claim is premised on Defendant Penzone's purported violation of the jail food policy, this allegation is insufficient to state a claim under § 1983. *See Cousins v. Lockyer*, 568 F.3d 1063, 1070-71 (9th Cir. 2009) (violation of a prison policy does not amount to a constitutional violation).

Plaintiff again appears to challenge Defendant Penzone's handling of Plaintiff's grievances. Under Ninth Circuit law, a defendant can be liable for failure to act. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Generally, whether a defendant's denial of administrative grievances is sufficient to state a claim depends on several facts, including whether the alleged constitutional violation was ongoing, *see e.g.*, *Flanory v. Bonn*, 604

F.3d 249, 256 (6th Cir. 2010), and whether the defendant who responded to the grievance had authority to take action to remedy the alleged violation, *see Bonner v. Outlaw*, 552 F.3d 673, 679 (8th Cir. 2009). As in his First Amended Complaint, Plaintiff does not allege an ongoing constitutional violation. Rather, Plaintiff alleges only that on four occasions, he was served cold meals without milk. Moreover, Plaintiff alleges that his grievances were "ambushed" by the Bureau Hearing Unit Commander, except one that proceeded to an external referee. Plaintiff does not allege that he ever submitted a grievance to Defendant Penzone or that Defendant Penzone was aware of his grievances and failed to act, nor does Plaintiff identify what actions he asked Defendant Penzone to take, what response, if any, Penzone gave, and how the response (or lack thereof) constituted deliberate indifference. Accordingly, Plaintiff has failed to state a claim based on Defendant Penzone's handling of Plaintiff's grievances.

IV. Dismissal without Leave to Amend

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

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

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IT IS ORDERED:

(1) Plaintiff's Second Amended Complaint (Doc. 14) and this action are **dismissed** for failure to state a claim, and the Clerk of Court must enter judgment accordingly.

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

(3) The docket shall reflect that the Court, pursuant to 28 U.S.C. § 1915(a)(3) and Federal Rules of Appellate Procedure 24(a)(3)(A), has considered whether an appeal of this decision would be taken in good faith and certifies that an appeal would not be taken in good faith for the reasons stated in the Order and because there is no arguable factual or legal basis for an appeal.

Dated this 22nd day of May, 2018.

James A. Teilborg
Senior United States District Judge