

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 17 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

<p>CARY VANDERMEULEN,</p> <p>Plaintiff-Appellant,</p> <p>v.</p> <p>CHARLES L. RYAN; et al.,</p> <p>Defendants-Appellees.</p>
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No. 18-17198

D.C. No. 2:17-cv-03828-JAT-DMF

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Submitted July 15, 2019**

Before: SCHROEDER, SILVERMAN, and CLIFTON, Circuit Judges.

Cary VanDerMeulen appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging a variety of constitutional claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B)(ii). *Barren v. Harrington*,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix A

152 F.3d 1193, 1194 (9th Cir. 1998) (order). We affirm.

The district court properly dismissed VanDerMeulen's action because VanDerMeulen failed to allege facts sufficient to state any plausible claim. *See Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (although pro se pleadings are to be construed liberally, a plaintiff must present factual allegations sufficient to state a plausible claim for relief); *see also Christopher v. Harbury*, 536 U.S. 403, 413-15 (2002) (requirements for denial of access-to-courts claim); *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994) (to challenge his conditions of confinement, a prisoner must show both that he was subjected to a sufficiently serious deprivation and that defendants knew of and disregarded an excessive risk to his health or safety); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1073-76 (9th Cir. 2016) (en banc) (requirements for establishing municipal liability claim); *Jones v. Williams*, 791 F.3d 1023, 1031-32 (9th Cir. 2015) (elements of a § 1983 free exercise claim); *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (elements of retaliation claim in prison context); *Toguchi v. Chung*, 391 F.3d 1051, 1057-60 (9th Cir. 2004) (elements of deliberate indifference to serious medical needs claim).

The district court did not abuse its discretion in declining to grant

VanDerMeulen leave to amend, or in denying his motion for an extension of time, because amendment would have been futile. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725-26 (9th Cir. 2000) (setting forth standard of review and explaining that “[a] district court acts within its discretion to deny leave to amend when amendment would be futile”); *see also Chodos v. West Publ’g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002) (a district court’s discretion to deny leave to amend is particularly broad when it has already granted leave to amend); *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 826 (9th Cir. 2002) (“District court judges . . . have ample discretion to control their dockets.” (citation and internal quotation marks omitted)).

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

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

Cary VanDerMeulen,
Plaintiff,
v.
Charles L. Ryan, et al.,
Defendants.

No. CV 17-03828-PHX-JAT (DMF)

ORDER

On October 19, 2017, Plaintiff Cary VanDerMeulen, who is not in custody, filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed In Forma Pauperis. In a January 25, 2018 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 February 23, 2018, Plaintiff filed his First Amended Complaint. In a May 30, 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.

On June 29, 2018, Plaintiff filed a Second Amended Complaint (Doc. 8). Plaintiff has also filed a "Motion for Extension of Time to Obtain Counsel" (Doc. 9). The Court will dismiss the Second Amended Complaint and this action, and deny the Motion as

1 moot.

2 **I. Statutory Screening of Prisoner Complaints**

3 Pursuant to 28 U.S.C. § 1915(e)(2), in a case in which a plaintiff has been granted
4 in forma pauperis status, the Court

5 shall dismiss the case at any time if the court determines that (A) the
6 allegation of poverty is untrue; or (B) the action or appeal (i) is frivolous or
7 malicious; (ii) fails to state a claim on which relief may be granted; or
8 (iii) seeks monetary relief against a defendant who is immune from such
relief.

9 28 U.S.C. § 1915(e)(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,
28 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less

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

3 **II. Second Amended Complaint**

4 As with his previous Complaint, Plaintiff names as Defendants: Arizona
5 Department of Corrections (ADC) Director Charles L. Ryan; ADC Facility Health
6 Administrator (FHA) Deborah Kinder; ADC Chaplain Herman; ADC Captain Paul
7 Martell; ADC Food Services Coordinator Alex Ruiz; Warden Meegan Muse; Corizon
8 Health Services (Corizon); FHA William Brunhofer; and Correctional Officer III Lomeli.
9 Plaintiff seeks monetary relief, and punitive damages.

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

11 Despite the Court’s prior Order dismissing Plaintiff’s First Amended Complaint
12 and providing Plaintiff with the opportunity to amend his filing to correct the deficiencies
13 in that complaint, Plaintiff has, essentially, resubmitted his First Amended Complaint.
14 Large portions of the Second Amended Complaint are restated verbatim from his First
15 Amended Complaint, and the only changes Plaintiff has made are minor stylistic and
16 formatting changes. Plaintiff has alleged no new facts to support how any of the named
17 Defendants have violated his rights; what new allegations he has made are either not
18 directed at any particular Defendant, or take issue only with a Defendant’s “attitude.” As
19 such, for the same reasons as those set forth in the Court’s May 30 Order, the Second
20 Amended Complaint will be dismissed.

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

22 “Leave to amend need not be given if a complaint, as amended, is subject to
23 dismissal.” *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).
24 The Court’s discretion to deny leave to amend is particularly broad where Plaintiff has
25 previously been permitted to amend his complaint. *Sisseton-Wahpeton Sioux Tribe v.*
26 *United States*, 90 F.3d 351, 355 (9th Cir. 1996). Repeated failure to cure deficiencies is
27 one of the factors to be considered in deciding whether justice requires granting leave to
28 amend. *Moore*, 885 F.2d at 538.

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

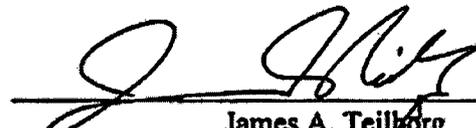
5 **IT IS ORDERED:**

6 (1) Plaintiff's Second Amended Complaint (Doc. 8) and this action are
7 **dismissed** for failure to state a claim, and the Clerk of Court must enter judgment
8 accordingly.

9 (2) Plaintiff's "Motion for Extension of Time to Obtain Counsel" (Doc. 9) is
10 **denied as moot.**

11 (3) The docket shall reflect that the Court, pursuant to 28 U.S.C. § 1915(a)(3)
12 and Federal Rules of Appellate Procedure 24(a)(3)(A), has considered whether an appeal
13 of this decision would be taken in good faith and finds Plaintiff may appeal in forma
14 pauperis.

15 Dated this 12th day of October, 2018.

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20 James A. Teilborg
21 Senior United States District Judge
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**IN THE UNITED STATES DISTRICT COURT
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Cary VanDerMeulen,
Plaintiff,

v.

Charles L Ryan, et al.,
Defendants.

NO. CV-17-03828-PHX-JAT (DMF)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed October 12, 2018, Plaintiff to take nothing, and the complaint and action are dismissed with prejudice for failure to state a claim. This dismissal may count as a "strike" under 28 U.S.C. § 1915(g).

Brian D. Karth
District Court Executive/Clerk of Court

October 12, 2018

By s/ Ginelle Puraty
Deputy Clerk

**Additional material
from this filing is
available in the
Clerk's Office.**