UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Alfredo Bruce Martinez, Plaintiff -vs- Charles L. Ryan, et al., Defendants.	CV-19-4449-PHX-DLR (JFM) **Report and Recommendation Re Screening First Amended Complaint and Motion to Dismiss**

A. REPORT AND RECOMMENDATION

This matter is before the undersigned magistrate judge on referral for pretrial proceedings pursuant to 28 U.S.C. § 636(b)(1). Because the appropriate resolution of screening of the amended pleading and the motion to dismiss is dispositive of some of Plaintiff's claims, the undersigned proceeds by way of a Report & Recommendation to the referring district judge, pursuant to 28 U.S.C. § 636(b)(1)(B).

B. BACKGROUND

1. Original Complaint

On June 11, 2019, *pro se* Plaintiff Martinez, who is confined in the Arizona State Prison in Buckeye, Arizona, filed his **original Complaint** pursuant to 42 U.S.C. § 1983 and an Application to Proceed In Forma Pauperis. Plaintiff named as Defendants: Arizona Department of Corrections (ADC) Director Charles L. Ryan, ADC Sergeant Hawley, and Correctional Officers Gomez, Evans, and De La Santos. Plaintiff asserted eight claims, including: (1) Count 1 (threat to safety); (2) Count 2 (excessive force); (3) Count 3 (retaliation - Gomez); (4) Count 4 (retaliation – Hawley); (5) Count 5 (deliberate indifference and retaliation re chemical spray); (6) Count 6 (Hawley supervision); (7)

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Count 7 (harassment); and (8) Count 8 (sexual harassment misconduct).

Plaintiff alleged he is an LGBTQ inmate who was raped in 2016, refused a transfer in 2016 and sexually harassed and assaulted by ADC officers in 2018. He contends Defendant Ryan did not properly train, supervise and discipline officers. He alleged an altercation with Defendant Gomez on May 11, 2018 in which Gomez used excessive force, sprayed him with chemical spray and Gomez, DeLaSantos and Hawley refused him water and medical aid, he was retaliated against because of his complaints about Gomez, was subjected to harassment. Finally, he alleged that from August 2017 to November 2017 he was sexually assaulted by Defendant Evans.

In an Order filed September 17, 2019 (Doc. 6), the Court granted Plaintiff's IFP application, screened the original Complaint, dismissed Counts 1, 3, 4, 6 and 7, and Defendants Hawley and Ryan. Answers were directed from Defendants Gomez, Evans and DeLaSantos to Counts 2, 5 and 8.

Defendants Gomez and Evans have been served and answered. Defendant De La Santos was dismissed for failure to timely serve on April 27, 2020 (Doc. 85).

2. First Amended Complaint

On May 19, 2020, Plaintiff moved (Doc. 91) for leave to amend. No response was filed and the Court granted the motion, directing Plaintiff to file his amended pleading. (Order 6/10/20, Doc. 94.) On July 7, 2020, Plaintiff filed his First Amended Complaint (Doc. 100).

Plaintiff continues to name the existing Defendants Gomez and Evans. He names again the dismissed Defendants Ryan and Hawley. He adds new Defendants CIU Investigator Harkey, COIII Bernal, and Lt. Atwood.

Plaintiff again asserted eight claims, including: Count 1 (threat to safety – supervisory liability), Count 2 (excessive force), Count 3 (cruel and unusual punishment – sexual conduct), Count 4 (Hawley supervision), Count 5 (Atwood supervision), 6 (Harkey Due Process in Investigation), Count 7 (Bernal Due Process in Grievances), and

Count 8 (retaliation).

3. Motion to Dismiss

On August 27, 2020, after filing his First Amended Complaint (Doc. 100), Plaintiff filed a "Voluntary Dismissal of Defendants Bryan Evans and Ray Harkey" (Doc. 116.) Plaintiff requests the dismissal of Defendants Evans and Harkey. Although counsel has since appeared, and been alerted to the pendency of the motion (*see* Order 10/21/20, Doc. 120), Plaintiff has not withdrawn this motion. No response to the motion has been filed.

C. MOTION TO DISMISS

First under consideration is Plaintiff's purported dismissal of Evans and Harkey (Doc. 100).

Rule 41(a) permits a Plaintiff to file a notice of dismissal. However, a dismissal under Rule 41(a) applies only to dismissal of an entire action. *See Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1392 (9th Cir. 1988) ("a plaintiff may not use Rule 41(a)(1)(i) to dismiss, unilaterally, a single claim from a multi-claim complaint"). Rather, Federal Rule of Civil Procedure 15(a) is the appropriate mechanism. *Id.*

Accordingly, the undersigned construes this filing (as has the Clerk) as a Motion to Dismiss Evans and Harkey. The Court finds no reason to deny the dismissal.

Plaintiff does not indicate whether the dismissal is to be with or without prejudice.

"When ruling on a motion to dismiss without prejudice, the district court must determine whether the defendant will suffer some plain legal prejudice as a result of the dismissal." *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996). "Legal prejudice is just that—prejudice to some legal interest, some legal claim, some legal argument." *Id*. at 97. "[T]he mere inconvenience of defending another lawsuit does not constitute plain legal prejudice." *Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982). Thus, the existence of a statute of limitations defense may not give rise to legal prejudice, only the loss of such a defense (e.g. by refiling in a

jurisdiction in which the statute of limitations would not apply). *See* Wright & Miller, *Voluntary Dismissal—Dismissal in the Discretion of the Court*, 9 Fed. Prac. & Proc. Civ. § 2364 (3d ed.). It is the loss of a defense, not the creation of one, which would mandate a dismissal with prejudice.

The Defendants have asserted, and the undersigned discerns, no prejudice to Defendants Evans and Harkey from a dismissal without prejudice.

Accordingly, it will be recommended that these defendants be dismissed with prejudice.

D. SCREENING OF AMENDED COMPLAINT

1. Screening Required

In cases filed by persons appearing *in forma pauperis* the court is required by 28 U.S.C. § 1915(e)(2) to dismiss cases that are frivolous, malicious, fail to adequately state a claim, or seek monetary relief from a defendant who is immune. Further, 28 U.S.C. § 1915A requires the Court to actively screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. The Court must dismiss a complaint or portion thereof if the 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). 42 U.S.C. § 1997e(c) applies the same standard to such complaints by prisoners/detainees even if the defendants are not governmental entities, or officers or employees of a governmental entity.

2. Pleading Standards

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.

"The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678.

Reasonable inferences can be drawn from the facts. "*Iqbal* demands more of plaintiffs than bare notice pleading, but it does not require us to flyspeck complaints looking for any gap in the facts." *Lacey v. Maricopa County*, 693 F.3d 896, 924 (9th Cir. 2012).

And, 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*)).

3. Application to Amended Complaint

a. Count 1 - Supervisory Liability

In Count 1, Plaintiff alleges that Defendant Ryan failed to adequately train and supervise unnamed subordinates, having notice that "constitutional injury and

deprivation" would result, and that Plaintiff being LGBTQ provided such notice of the risk.

This is essentially the same claim as asserted in the original Complaint's Count 1, although stripped of any particular details. The Court dismissed that claim for failure to state a claim because "Plaintiff does not allege any facts to support that Ryan was aware of any specific facts that would give rise to an inference that Plaintiff, as opposed to inmates generally, was at a substantial risk of harm," and "Plaintiff's generalized allegation that Ryan has 'shown negligence' do not identify any particular training or supervision, explain why it was inadequate, or allege that such actions were a 'conscious choice' made by Ryan. (Order, Doc. 6 at 5-6.)

Plaintiff's new Count 1 suffers from similar deficits. Although Plaintiff now alleges that his LGBTQ status provided notice of a risk of harm, Plaintiff proffers nothing to show that Ryan was aware of such status, or of any particular harm to Plaintiff. Nor does he offer any specific in the failures of training or supervision. In effect, this claim simply seeks to impose on Defendant Ryan a form of respondeat superior liability for any harm suffered by Plaintiff related to his LGBTQ status. But, as the Court explained, "[t]here is no respondeat superior liability under § 1983." (Order, Doc. 6 at 5.)

Accordingly, Plaintiff has failed to state a claim in Count One, and it should be dismissed

b. Count 2 – Excessive Force

Count 2 again asserts an excessive force claim against Defendant Gomez. It continues to adequately assert such a claim.

c. Count 3 – Sexual Misconduct

Count 3 asserts an Eighth Amendment claim of unlawful sexual conduct against Defendant Evans. It is the same claim as previously made against Defendant Evans in Count 8 of the original Complaint. However, Plaintiff has moved to dismiss Defendant

Evans. Accordingly Count 3 should be dismissed as well.

d. Count 4 – Hawley Supervision of Gomez and De Los Santos

Count 4 asserts a supervisory liability claim against Defendant Hawley based on his failures in supervising Defendant Gomez with regard to the claims in Count 2 and now-dismissed defendant De Los Santos with regard to failure to decontaminate Plaintiff from pepper spray.

The latter part of this claim is functionally the same claim as made against Defendant Hawley in Ground 6 of the original Complaint. The Court dismissed that claim because: "Plaintiff does not…allege that Hawley was even aware that De La Santos was not providing Plaintiff with water or medical attention." (Order, Doc. 6 at 6.)

Plaintiff now alleges that Defendant Hawley, as shift supervisor, "should have been present" at the time of the incident, and makes the unsupported allegation that Hawley had "knowledge that Plaintiff was in danger because of culpable acts of his subordinates."

Plaintiff's conclusory assertion of knowledge is not an allegation of sufficient facts to state a claim for deliberate indifference. Plaintiff's allegations show that Hawley was not present at the time of the incident. Plaintiff's assertion that Hawley "should have been there" does not, without more, establish a basis for supervisory liability.

Accordingly, Plaintiff has failed to state a claim in Count 4, even with the expanded allegations and the addition of the allegations regarding Gomez, and it should be dismissed.

e. Count 5 – Atwood Do Not House and Supervision

In Count 5, Plaintiff alleges that Defendant Atwood was deliberately indifferent to Plaintiff's safety needs by refusing to relocate Plaintiff away from inmate Olvera, a "known violent sexual predator," and to put him on Plaintiff's "do not house with" list. As a result, Plaintiff refused to return to his cell, and was placed in a "refuse to house" pod, was given disciplinary sanctions and lost early release credits. Plaintiff further alleges

that as a result the excessive force incident with Defendant Gomez ensued.

Given the lack of proximate cause between the denial of the DNHW request and the disciplinary loss of release credits, relief on this claim does not appear to necessarily imply the invalidity of the sanctions, and thus it does not appear to be barred by *Edwards v. Balisok*, 520 U.S. 641, 648 (1997).

By the same token, however, Plaintiff fails to show that risks of disciplinary sanctions and the ensuing use of excessive force by an officer were known to and appreciated by Atwood in denying the DNHW order. To state a claim for failure to protect or threats to safety, an inmate must allege facts to support that he was incarcerated under conditions posing a substantial risk of harm and that prison officials were "deliberately indifferent" to those risks. *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994). To adequately allege deliberate indifference, a plaintiff must allege facts to support that a defendant knew of, but disregarded, an excessive risk to inmate safety. *Id*. at 837. While a risk of attack might be a foreseeable risk to refusal of a DNHW order, Plaintiff proffers no reason to believe that the excessive force by Gomez was. Nor does he show that Plaintiff's refusal to house was a risk known to Atwood.

Further, Plaintiff proffers no facts to show that Atwood was responsible for supervising Gomez or that Atwood was deficient in such supervision.

Count 5 fails to state a claim and should be dismissed.

f. Count 6 – Harkey Due Process in Investigative Proceedings

In Count 6, Plaintiff alleges that Defendant Harkey denied him due process by failing to conduct an adequate investigation into Plaintiff's allegations against Defendant Evans in Count 3, resulting in no criminal prosecution against Evans. While victims have been granted (by state law) various rights in a state of Arizona criminal proceeding, a victim does not have a due process right to a successful criminal investigation or prosecution. *See Martin-Costa v. Kiger*, 225 Ariz. 157, 235 P.3d 1040, 1045 (Ct. App. 2010), *withdrawn from bound volume, review denied and ordered depublished* (Nov. 30,

2010). Moreover, Plaintiff seeks to dismiss Harkey, and thus Count 6 should be dismissed.

g. Count 7 – Bernal Due Process in Grievance

In Count 7, Plaintiff alleges Defendant Bernal violated his due process rights in the processing of Plaintiff's grievances and appeals therefrom related to Plaintiff's complaints against Gomez, De Los Santos and Hawley, by discarding Plaintiff's grievance documents. Although prisoners do not have a "claim of entitlement to a grievance procedure," *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir.1988) (order), "[t]he right of meaningful access to the courts extends to established prison grievance procedures," *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir.1995). The Supreme Court has concluded that an inability to file a claim can establish a violation of the right of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 348 (1996). Discarding Plaintiff's grievances would deny Plaintiff's ability to file a claim and thus his right of access to the courts. Plaintiff adequately states a First Amendment claim against Defendant Bernal.

h. Count 8 – Gomez Retaliation

In Count 8 Plaintiff asserts a new claim of First Amendment retaliation against Defendant Gomez, alleging that Gomez threatened Plaintiff with harm (won't "get away with [the grievances] because he has brothers all over Lewis Complex") in retaliation for filing grievances against Defendant Gomez.

A viable claim of First Amendment retaliation contains five basic elements: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights (or that the inmate suffered more than minimal harm) and (5) did not reasonably advance a legitimate correctional goal. *Entler v. Gregoire*, 872 F.3d 1031, 1040 (9th Cir. 2017). "[T]he mere threat of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect."

Brodheim v. Cry, 584 F.3d 1262, 1270 (9th Cir. 2009).

Count 8 adequately states a claim of retaliation against Defendant Gomez.

4. Conclusions

Plaintiff fails to adequately state claims in Counts 1, 4, 5, and 6. In addition, Plaintiff seeks to dismiss Defendant Harkey, the only Defendant named in Count 6. Count 3 adequately states an Eight Amendment sexual misconduct claim against Evans, but Plaintiff seeks dismiss Evans, and thus Count 3 should be dismissed as well.

Count 2 adequately states a claim of a claim of excessive force against Gomez. Count 7 adequately states a First Amendment access claim against Defendant Bernal. Count 8 adequately states a First Amendment retaliation claim against Gomez.

E. SERVICE

The undersigned will recommend answers as to Grounds 2, 7 and 8. The undersigned notes, however, that Plaintiff's recently retained counsel is seeking an extension of time to again amend. (*See* Motion, Doc. 123.) In the interests of efficient administration, the undersigned will not recommend an order for service, but will instead defer such orders, which may be issued by the magistrate judge, until after a ruling on this Report & Recommendation.

F. EFFECT OF RECOMMENDATION

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment.

However, pursuant to Rule 72, Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file

objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the issues, see United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003)(en banc), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, Robbins v. Carey, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

In addition, the parties are cautioned Local Civil Rule 7.2(e)(3) provides that "[u]nless otherwise permitted by the Court, an objection to a Report and Recommendation issued by a Magistrate Judge shall not exceed ten (10) pages."

G. RECOMMENDATIONS

IT IS THEREFORE RECOMMENDED:

(A) Plaintiff's Motion to Dismiss (Doc. 116) be **GRANTED**.

(B) Defendants Evans, Ryan, Hawley, Harkey, and Atwood be **DISMISSED WITHOUT PREJUDICE**.

(C) Counts 1, 3, 4, 5, and 6 of the First Amended Complaint (Doc. 100) be **DISMISSED WITHOUT PREJUDICE**

(D) Defendant Gomez be required to respond to the Eighth Amendment excessive force claim in Count 2 and the First Amendment retaliation claim in Count 8 of the First Amended Complaint.

(E) Defendant Bernal be required to respond to the First Amendment access claim in Count 7 of the First Amended Complaint.

Dated: November 3, 2020

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James F. Metcalf
United States Magistrate Judge