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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVON E. MCCOY,
Plaintiff,

v.
R. SPIDLE, et al.,
Defendants.

Case No. 1:07-cv-00198-DCB

ORDER

On January 5, 2010, Defendants filed a request for a 31-day extension of time to file an opposition to Plaintiff's Motion for Reconsideration. The Court will not grant Plaintiff's Motion for Reconsideration, therefore, there is no reason for a Response, and Defendant's Motion for an extension of time to file an opposition to Plaintiff's motion is denied as moot.

Motions for reconsideration are generally treated as motions to alter or amend the judgment under Federal Rules of Civil Procedure ("Rule") 59(e). *See In re Agric. Research & Tech. Group, Inc.*, 916 F.2d 528, 542 (9th Cir. 1990); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 505 (9th Cir. 1986).

Generally, there are four basic grounds for a Rule 59(e) motion: 1) the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the

1 judgment is based; 2) the motion may be granted so that the moving party may present newly
2 discovered or previously unavailable evidence; 3) the motion will be granted if necessary to
3 prevent manifest injustice, such as serious misconduct by counsel, and 4) a motion may be
4 justified by an intervening change in controlling law. 11 Wright, Miller & Kane, Federal Practice
5 and Procedure: Civil 2nd § 2810.1 (citations omitted).
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7 Alternatively, a court can construe a motion to reconsider as a Rule 60 motion for relief
8 from a judgment or order. Under Rule 60, a party can obtain relief from a court order for the
9 following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered
10 evidence which by due diligence could not have been discovered in time to move for a new trial
11 under Rule 59(b); (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied; and (6)
12 any other reason justifying relief from the operation of the judgment. Fed. R. Civ. P. 60(b).
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14 Consequently, motions to reconsider are appropriate only in rare circumstances to correct
15 manifest errors of law or fact or to present newly discovered evidence. *Harsco Corp. v. Zlotnicki*,
16 779 F.2d 906, 909 (3d Cir. 1985) (1986). A motion for reconsideration should not be used to ask
17 a court "to rethink what the court had already thought through--rightly or wrongly." *Above the*
18 *Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983); *cf.*, *Agric. Research*
19 *& Tech. Group*, 916 F.2d at 542. Arguments that a court was in error on the issues it considered
20 should be directed to the court of appeals. *See Refrigeration Sales Co. v. Mitchell-Jackson, Inc.*,
21 605 F. Supp. 6, 7 (N.D. Ill. 1983).
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23 Plaintiff argues that the Court should reconsider its decision to grant summary judgment
24 for Defendants, pursuant to *Edwards v. Balisok*, 502 U.S. 641 (1997). As this Court has
25 previously explained, *Balisok* prohibits challenging a rule violation pursuant to 42 U.S.C. Sec.
26 1983, where a favorable termination of the case would necessarily reduce the length of the
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1 sentence being served by the prisoner. *See* Order issued 5/6/2009 (doc. 123) (granting summary
2 judgment under *Balisok*); Order issued 10/1/2009 (doc 142) (allowing Plaintiff to file Sur-Reply
3 for reconsideration of question); Order issued 12/7/2009 (doc. 162) (reaffirming summary
4 judgment under *Balisok*). As *Balisok* can not be considered a change in law, the motion to
5 reconsider is appropriate only to correct a manifest error of law. This Court has considered
6 *Balisok* three times. Plaintiff's argument that the Court has erred on this question should be
7 directed to the court of appeals.
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9 On December 7, 2009, the Court denied in part the Plaintiff's Motion for Injunction
10 and/or Temporary Restraining Order as to Plaintiff's claims of continued retaliation because his
11 allegations in large part involved new rule violations, new grievances, and new defendants, which
12 may give rise to new claims but are not related to this case. The Court denied the Motion for
13 Injunction/Temporary Restraining Order for failure to administratively exhaust these new claims.
14 The Court held in abeyance its ruling in respect to charges by the Plaintiff that his access to the
15 Court was being impeded by Defendants, such as mis-routing his settlement brief to the Court
16 instead of to the settlement judge and the loss of his legal materials. The Court ordered the
17 Defendants to respond to these allegation. On December 23, 2009, the Defendants responded that
18 Sujean Younger, the settlement coordinator had received the copy of the settlement brief mailed
19 by the Plaintiff to her. How the settlement brief also came to be filed in the Court's record
20 remains a mystery, but the copy mailed by the Plaintiff to Ms. Younger was not mis-routed. She
21 received it. (Response (doc. 163)).
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24 Defendants also filed affidavits attesting that the Plaintiff's legal materials were not "lost".
25 He has three boxes of legal property stored in the Receiving and Release Department since
26 October 6, 2009. He has access to this property upon request and reviewed its contents on
27 November 13, 2009. Currently he has one box stored in his cell, one stored in Facility E,
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1 Building 1 storage space, and one stored in Receiving and Release Department. *Id.* at 2-3. As
2 well, Plaintiff has had access to the law library during his confinement in Administrative
3 Segregation. *Id.* at 3-4, 6.

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5 The Court finds no basis for issuing a temporary restraining order or preliminary
6 injunction. “A plaintiff seeking a preliminary injunction must establish that he is likely to
7 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary
8 relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”
9 *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *American Trucking*
10 *Associations, Inc. v. City of Los Angeles*, 2009 WL 723993 (9th Cir. 2009). Injunctive relief is an
11 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled
12 to such relief. *American Trucking*, at * 4 (citing *Winter*, 129 S.Ct. at 375-76). Plaintiff has not
13 argued nor shown his access to this Court has been denied by the alleged mis-routing of his
14 settlement brief or the storage of his legal materials.

15
16 As to Plaintiff’s other charges of retaliation, as the Court previously noted they involve
17 claims beyond the scope of the issues raised in this case and must be administratively exhausted
18 before they can be addressed by this or any other Court. (Order issued 12/7/2009 (doc. 162)).
19 This is especially true, here, where the case is ready for trial.

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21 The Court will appoint counsel for the purpose of assisting the Plaintiff in trying this case.
22 There is no constitutional right to the appointment of counsel in a civil case. *See, Ivey v. Board of*
23 *Regents of University of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982); *Randall v. Wyrick*, 642 F.2d
24 304, 307 n. 6 (8th Cir. 1981). The appointment of counsel in a civil rights case is required only
25 when exceptional circumstances are present. *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir.
26 1980); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). A determination with
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1 respect to exceptional circumstances requires an evaluation of the likelihood of success on the
2 merits as well as the ability of a plaintiff to articulate his claims *pro se* in light of the complexity
3 of the legal issues involved. *Wilborn*, 789 F.2d at 1331 (9th Cir. 1986). Having considered both
4 elements, the procedural and substantive legal issues involved at the trial stage of a case make it
5 beneficial to appoint counsel. Plaintiff has survived summary judgment which increases the
6 likelihood of success on the merits. While the Plaintiff has a good track record for adequately
7 representing himself, the Court will appointment counsel for him.

9 **Accordingly,**

10 **IT IS ORDERED** that the Motion for Reconsideration (document 165) is DENIED.

11 **IT IS FURTHER ORDERED** that the Request for Extension of Time to File Opposition
12 to Plaintiff's Motion for Reconsideration (document 166) is DENIED AS MOOT.

13 **IT IS FURTHER ORDERED** that the "Motion Requesting Leave of Court, to File the
14 attached Motion, Objecting to the defendants' response to the courts order, regarding plaintiffs
15 claim of retaliation: . . ." (document 164) shall be treated as a Reply to Defendants' Response to
16 Plaintiff's Motion for Injunction/Temporary Restraining Order and docketed accordingly.

17 **IT IS FURTHER ORDERED** that the Motion for Injunction/Temporary Restraining
18 Order (document 155) is DENIED.


19 **IT IS FURTHER ORDERED** that Plaintiff shall be appointed counsel. A copy of this
20 Order will be sent to Suejean Younger for her assistance in securing *pro bono* counsel to
21 represent the Plaintiff. Upon appointment of counsel, the Court will set a status hearing and
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1 adopt a schedule for preparing and filing the Pretrial Order. Upon the filing of the Pretrial Order,
2 a Pretrial Conference will be set and held, and a trial date will be set, thereafter.

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4 Dated this 11th day of January, 2010.

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8 David C. Bury
9 United States District Judge
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