

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
10

11 RICK HAZELTINE,

12 Plaintiff,

13 vs.

14 FRANCES HICKS, et al.,

15 Defendants.
16

1:14-cv-00056-DAD-GSA-PC

ORDER DENYING MOTIONS FOR
APPOINTMENT OF COUNSEL, AND
ADDRESSING PLAINTIFF'S ALLEGATIONS
OF JUDICIAL BIAS
(ECF Nos. 93, 95.)

17 **I. RELEVANT PROCEDURAL HISTORY**

18 Rick Hazeltine ("Plaintiff") is a civil detainee proceeding *pro se* and *in forma pauperis*
19 with this civil rights action filed pursuant to 42 U.S.C. § 1983. This case now proceeds with
20 Plaintiff's First Amended Complaint filed on July 6, 2015, on the following claim: Excessive
21 force in violation of the Fourteenth Amendment against defendants Ian Young, Benjamin
22 Gamez, Rashaun Casper, Julius Oldan, Porfirio Sanchez Negrete, David Avilia, Rickey Smith,
23 and Charles Ho (collectively "Defendants"). (ECF No. 27.)

24 This case is scheduled for trial on July 10, 2018, at 8:30 a.m. before the Honorable Dale
25 A. Drozd. A telephonic trial confirmation hearing is scheduled for May 14, 2018, at 1:30 p.m.
26 before the Honorable Dale A. Drozd.

27 On March 12, 2018, and March 29, 2018, Plaintiff filed motions seeking the
28 appointment of counsel. (ECF Nos. 93, 95.)

1 **II. COURT-APPOINTED COUNSEL**

2 Plaintiff does not have a constitutional right to appointed counsel in this action, Rand v.
3 Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), and the court cannot require an attorney to
4 represent Plaintiff pursuant to 28 U.S.C. § 1915(e)(1). Mallard v. United States District Court
5 for the Southern District of Iowa, 490 U.S. 296, 298 (1989). However, in certain exceptional
6 circumstances the court may request the voluntary assistance of counsel pursuant to section
7 1915(e)(1). Rand, 113 F.3d at 1525.

8 Without a reasonable method of securing and compensating counsel, the court will seek
9 volunteer counsel only in the most serious and exceptional cases. In determining whether
10 “exceptional circumstances exist, the district court must evaluate both the likelihood of success
11 of the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the
12 complexity of the legal issues involved.” Id. (internal quotation marks and citations omitted).

13 In the present case, Plaintiff argues that he is unable to prepare his case for trial because
14 he is being retaliated against at Coalinga State Hospital. Plaintiff asserts that in the past sixty
15 day, he has been subjected to disruptive searches of his bed area, leaving Plaintiff’s legal
16 material in disorder. Plaintiff asserts that some of his legal materials have come up missing
17 during the searches. Plaintiff also asserts that he was recently moved to another unit and has
18 been denied access to all of his legal material, which is now in the control of Departmental
19 Police Services. Plaintiff argues that it will take months to reorganize his thousands of pages of
20 documents to even learn what is missing.

21 Plaintiff also argues that judicial bias by Magistrate Judge Gary S. Austin has prevented
22 him from fully participating in discovery and preparing his case. Plaintiff complains that
23 Magistrate Judge Austin has denied all of Plaintiff’s motions since he was assigned to this case,
24 except for a motion for extension of time.

25 These reasons do not make Plaintiff’s case exceptional under the law. As stated above,
26 the district court must evaluate both the “likelihood of success of the merits” [and] the “ability
27 of the [plaintiff] to articulate his claims *pro se* in light of the complexity of the legal issues
28 involved.” Id. Here, while the court has found that Plaintiff’s “allegations are sufficient to

1 state a claim against Defendants Young, Gamez, Casper, Oldan, Negrete, Avilia, Smith and Ho
2 under the Fourteenth Amendment,” this finding is not a determination that Plaintiff is likely to
3 succeed on the merits, and at this juncture the court does not find a likelihood of success on the
4 merits in this case. (ECF No. 28 at 7:6-9.) Plaintiff’s excessive force claims do not appear
5 complex, and based on a review of the record in this case Plaintiff can adequately articulate his
6 claims. Thus, the court does not find the required exceptional circumstances, and Plaintiff’s
7 motions for appointment of counsel shall be denied, without prejudice.

8 **III. ATTORNEY’S FEES**

9 Plaintiff requests that if his motion for appointment of counsel is denied, he be granted
10 recovery of attorney’s fees from Defendants for all of the legal work he has done on this case.
11 This request must be denied. Under 42 U.S.C. § 1988(b), “In any action or proceeding to
12 enforce a provision of section[] 1983 . . . , the court, in its discretion, may allow the prevailing
13 party . . . reasonable attorney’s fees” 42 U.S.C. § 1988(b). However, Plaintiff is not
14 entitled to attorney’s fees because he representing himself in this action. Because Plaintiff is
15 not represented by an attorney, he is not entitled to recover attorney’s fees if he prevails.
16 Gonzales v. Kangas, 814 F.2d 1411, 1412 (9th Cir. 1987).

17 **IV. JUDICIAL BIAS**

18 Plaintiff claims that Magistrate Judge Gary S. Austin has exhibited judicial bias against
19 Plaintiff in ruling on Plaintiff’s motions. Federal law provides that “[a]ny justice, judge, or
20 magistrate judge of the United States shall disqualify himself in any proceeding in which his
21 impartiality might reasonably be questioned.” 28 U.S.C. § 455(a); see Pesnell v. Arsenault,
22 543 F.3d 1038, 1043 (9th Cir. 2008); U.S. v. Johnson, 610 F.3d 1138, 1147 (9th Cir. 2010). A
23 motion under § 455 is addressed to, and must be decided by, the very judge whose impartiality
24 is being questioned.” Bernard v. Coyne, 31 F.3d 842, 843 (9th Cir. 1994). The bias must arise
25 from an extra-judicial source and cannot be based solely on information gained in the course of
26 the proceedings. Id. (citing Liteky v. United States, 510 U.S. 540, 554-56 (1994)). “Judicial
27 rulings alone almost never constitute a valid basis for a bias or partiality motion.” In re Focus
28 Media, Inc., 378 F.3d 916, 930 (9th Cir. 2004) (quoting Liteky, 510 U.S. at 555). “In and of

1 themselves . . . , they cannot possibly show reliance upon an extrajudicial source; and can only
2 in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when
3 no extrajudicial source is involved.” Id.

4 Under 28 U.S.C. § 144, the standard of recusal based on judicial bias is ““whether a
5 reasonable person with knowledge of all the facts would conclude that the judge’s impartiality
6 might reasonably be questioned.”” Mayes v. Leipziger, 729 F.2d 607, 607 (9th Cir. 1984)
7 (quoting United States v. Nelson, 718 F.2d 315, 321 (9th Cir. 1983)); Pesnell, 543 F.3d at 1043
8 (quoting United States v. Hernandez, 109 F.3d 1450, 1453 (9th Cir. 1997)). To provide
9 adequate grounds for recusal, the prejudice must result from an extrajudicial source, since a
10 judge’s previous adverse ruling alone is not sufficient for recusal. See id. Section 144
11 expressly conditions relief upon the filing of a timely and legally sufficient affidavit. United
12 States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980); (citing *inter alia* United States v. Azhocar,
13 581 F.2d 735, 738-40 (9th Cir. 1978), cert. denied 440 U.S. 907 (1979)). Section 144 provides
14 that “[t]he affidavit shall state the facts and the reasons for the belief that bias and prejudice
15 exists, . . . [and a] party may only file one such affidavit in any case.” Sibla, 624 F.2d at 867.

16 A judge who finds the affidavit legally sufficient must proceed no further under § 144
17 and must assign a different judge to hear the matter. See 28 U.S.C. § 144; Sibla, 624 F.2d at
18 867). Nevertheless, where the affidavit is not legally sufficient, the judge at whom the motion is
19 directed can determine the matter. See United States v. Scholl, 166 F.3d 964, 977 (9th Cir.
20 1999) (citing Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1388 (9th Cir. 1988) (holding
21 that only after determining the legal sufficiency of a § 144 affidavit is a judge obligated to
22 reassign decision on merits to another judge)). If the affidavit is legally insufficient, then
23 recusal can be denied. See United States v. \$292,888.04 in U.S. Currency, 54 F.3d 564, 566
24 (9th Cir. 1995).

25 Here, Plaintiff failed to file an affidavit stating the facts and the reasons he finds judicial
26 bias. Plaintiff only alleges that Judge Austin has “denied every motion and request plaintiff has
27 put before the bench, with the exception of (1) one, which was the only request for an extension
28 of time.” (ECF No. 95 at 1:24-28.) While the court must take Plaintiff’s factual allegations as

1 true, Berger v. United States, 255 U.S. 22, 33 (1925), conclusory allegations do not justify
2 disqualification and are not protected from judicial scrutiny, see \$292,888.04 in U.S. Currency,
3 54 F.3d at 566 (affidavit inadequate when based on mere conclusory allegations); United States
4 v. Goeltz, 513 F.2d 193 (10th Cir. 1975), cert. den., 423 U.S. 830, 96 S.Ct. 51, 46 L.Ed.2d 48
5 (1975); Griffith v. Edwards, 493 F.2d 495 (8th Cir. 1974); Hawaii-Pacific Venture Capital
6 Corp. v. Rothbard, 437 F.Supp. 230 (D.C.Hawaii 1977). Plaintiff states no allegation of fact
7 showing that any of the undersigned's decisions stem from any extrajudicial source.

8 Plaintiff's disagreement with the court's rulings is not a legitimate ground for alleging
9 bias. These rulings are ordinary applications of the law. Plaintiff's allegations fall well short
10 of establishing any basis for a finding of extrajudicial bias by the Magistrate Judge.

11 **V. CONCLUSION**

12 Based on the foregoing, IT IS HEREBY ORDERED that Plaintiff's motions for
13 appointment of counsel, filed on March 12, 2018, and March 29, 2018, are DENIED without
14 prejudice.

15 IT IS SO ORDERED.

16 Dated: May 3, 2018

17 /s/ Gary S. Austin
18 UNITED STATES MAGISTRATE JUDGE