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

JAMES EVANS,

Plaintiff,

No. 2:09-cv-0292 WBS JFM (PC)

vs.

FELKER, et al.,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. On January 3, 2011, plaintiff filed a motion for temporary restraining order. Plaintiff asserts that his present custody in the California Department of Corrections and Rehabilitation (CDCR) is unlawful and he seeks court-ordered removal from CDCR custody.

The purpose in issuing a temporary restraining order is to preserve the status quo pending a fuller hearing. The cases contain limited discussion of the standards for issuing a temporary restraining order due to the fact that very few such orders can be appealed prior to the hearing on a preliminary injunction. It is apparent however, that requests for temporary restraining orders which are not ex parte and without notice are governed by the same general standards that govern the issuance of a preliminary injunction. See New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1347 n.2 (1977) (Rehnquist, J.); Los Angeles Unified Sch.

1 Dist. v. United States Dist. Court, 650 F.2d 1004, 1008 (9th Cir. 1981) (Ferguson, J. dissenting);  
2 Century Time Ltd. v. Interchron Ltd., 729 F. Supp. 366, 368 (S.D.N.Y. 1990). In many cases the  
3 emphasis of the court is directed to irreparable harm and the balance of hardships because the  
4 merits of a controversy are often difficult to ascertain and adjudicate on short notice.

5           The legal principles applicable to a request for injunctive relief are well  
6 established. To prevail, the moving party must show either a likelihood of success on the merits  
7 and the possibility of irreparable injury, or that serious questions are raised and the balance of  
8 hardships tips sharply in the movant's favor. See Coalition for Economic Equity v. Wilson, 122  
9 F.3d 692, 700 (9th Cir. 1997); Oakland Tribune, Inc. v. Chronicle Publ'g Co., 762 F.2d 1374,  
10 1376 (9th Cir. 1985). The two formulations represent two points on a sliding scale with the focal  
11 point being the degree of irreparable injury shown. Oakland Tribune, 762 F.2d at 1376. "Under  
12 any formulation of the test, plaintiff must demonstrate that there exists a significant threat of  
13 irreparable injury." Id. In the absence of a significant showing of possible irreparable harm, the  
14 court need not reach the issue of likelihood of success on the merits. Id.

15           In cases brought by prisoners involving conditions of confinement, any  
16 preliminary injunction "must be narrowly drawn, extend no further than necessary to correct the  
17 harm the court finds requires preliminary relief, and be the least intrusive means necessary to  
18 correct the harm." 18 U.S.C. § 3626(a)(2).

19           Plaintiff's present motion for temporary restraining order is based on a claim that  
20 has been dismissed from this action. See Findings and Recommendations filed March 30, 2010;  
21 Order filed May 5, 2010. A fortiori, plaintiff cannot seek any form of relief on that claim in this  
22 action. For that reason, plaintiff's motion for temporary restraining order should be denied.

23           On January 3, 2011, plaintiff filed another motion for the appointment of counsel.<sup>1</sup>  
24 As the court has previously noted, the United States Supreme Court has ruled that district courts

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26 <sup>1</sup> Plaintiff's last motion for appointment of counsel was filed on September 3, 2010 and  
denied by order filed September 14, 2010.

1 lack authority to require counsel to represent indigent prisoners in § 1983 cases. Mallard v.  
2 United States Dist. Court, 490 U.S. 296, 298 (1989). In certain exceptional circumstances, the  
3 court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell  
4 v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36  
5 (9th Cir. 1990). In the present case, the court does not find the required exceptional  
6 circumstances. Plaintiff's motion for the appointment of counsel will therefore be denied.

7 In accordance with the above, IT IS HEREBY ORDERED that:

8 1. Plaintiff's January 3, 2011 motion for the appointment of counsel is denied;  
9 and

10 IT IS HEREBY RECOMMENDED that plaintiff's January 3, 2011 motion for  
11 temporary restraining order be denied.

12 These findings and recommendations are submitted to the United States District  
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
14 days after being served with these findings and recommendations, any party may file written  
15 objections with the court and serve a copy on all parties. Such a document should be captioned  
16 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
17 objections shall be filed and served within fourteen days after service of the objections. The  
18 parties are advised that failure to file objections within the specified time may waive the right to  
19 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 DATED: January 13, 2011.

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23 UNITED STATES MAGISTRATE JUDGE

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