

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

DAVID JOHN BERG,

Plaintiff,

No. 2:09-cv-1492 MCE KJN P

vs.

KAZALEC, et al.,

Defendants.

ORDER

\_\_\_\_\_ /

Plaintiff is a state prisoner proceeding without counsel and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. Presently pending is defendants’ motion to dismiss, filed February 22, 2011, and plaintiff’s motion for appointment of counsel. Plaintiff has not yet filed an opposition to defendants’ motion.

The United States Supreme Court has ruled that district courts lack authority to require counsel to represent indigent prisoners in Section 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). Rather, “[i]n proceedings in forma pauperis, the district court may request an attorney to [voluntarily] represent any person unable to afford counsel. 28 U.S.C. § 1915(e)(1). The decision to appoint such counsel is within the sound discretion of the trial court and is granted only in exceptional circumstances. A finding of the exceptional circumstances of the plaintiff seeking assistance requires at least an evaluation of the likelihood

1 of the plaintiff's success on the merits and an evaluation of the plaintiff's ability to articulate his  
2 claims in light of the complexity of the legal issues involved." Agyeman v. Corrections Corp. of  
3 America, 390 F.3d 1101, 1103 (9th Cir. 2004) (citations and internal quotations omitted).  
4 "Neither of these factors is dispositive and both must be viewed together before reaching a  
5 decision on request of counsel under section 1915(d)." Wilborn v. Escalderon, 789 F.2d 1328,  
6 1331 (9th Cir. 1986) (fn. omitted); see also, Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir.  
7 1991).

8           The instant action meets these criteria. The case is moderately complex, both as  
9 framed in the complaint, and as demonstrated by defendants' arguments in support of their  
10 motion to dismiss. As the court found in screening the complaint pursuant to Section 1915A,  
11 plaintiff alleges potentially cognizable claims against nine defendants. In addition, plaintiff  
12 requires discovery to identify at least one currently named "Doe" defendant. Plaintiff's claims  
13 include alleged violations of his rights under the First and Eighth Amendments to the United  
14 States Constitution, and include allegations that plaintiff suffers permanent injury as a result of  
15 challenged conduct. These allegations, if proven, implicate significant constitutional issues and  
16 demonstrate some likelihood that plaintiff could succeed on the merits of his claims. The  
17 challenged conduct took place at Sacramento County Jail, and plaintiff is now incarcerated in  
18 administrative segregation in Calipatria State Prison. Plaintiff asserts that he has limited access  
19 to the law library and legal materials, that he is precluded from engaging in inmate-to-inmate  
20 communications and thus is unable to contact most of his witnesses who are now incarcerated at  
21 other facilities, and that his case will require expert medical evidence that he is unable to obtain.  
22 Plaintiff asserts that his case is factually and legally complex, and that he is further disadvantaged  
23 by having only a ninth grade education.

24           For these several reasons, and because it would be helpful to the court to have  
25 the assistance of counsel in responding to the instant motion to dismiss, the court finds that  
26 appointment of counsel is warranted pursuant to this court's General Order No. 230 (setting forth

1 the criteria and procedure for appointment of counsel in Section 1983 cases).

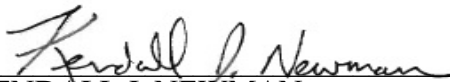
2 Accordingly, IT IS HEREBY ORDERED that:

3 1. Plaintiff's motion for appointment of counsel (Dkt. No. 14) is granted;

4 2. The Clerk of Court is directed to locate forthwith an attorney admitted to  
5 practice in this court who is willing to accept the appointment; and

6 3. The deadline for filing an opposition to defendants' motion to dismiss is  
7 suspended pending further order of this court.

8 DATED: March 31, 2011

9  
10   
11 KENDALL J. NEWMAN  
12 UNITED STATES MAGISTRATE JUDGE

12 berg1492.appt.cns1