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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERTO HERRERA,
Plaintiff,
v.
P. STATTI, et al.,
Defendants.

No. 2:10-cv-1154 MCE DAD P

ORDER

Plaintiff is a state prisoner proceeding pro se with a civil rights action. Pending before the Court are three separate filings from Plaintiff in which he seeks reconsideration of the Court’s order that denied his requests for appointment of counsel and granted Defendants’ motion to dismiss his excessive use of force claims due to his failure to exhaust his administrative remedies prior to filing suit as required.

“[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.” Kona Enterprises v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000). Using a motion for reconsideration to reargue the points the court rejected in the original order is improper. American Ironworks & Erectors v. North American Construction Corporation, 248 F.3d 892, 899 (9th Cir. 2001).

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1 A party cannot have relief merely because he or she is unhappy with the judgment. See Khan v.
2 Fasano, 194 F. Supp. 2d 1134, 1136 (S.D. Cal. 2001).

3 The Court has considered Plaintiff's motions for reconsideration and will deny them. As
4 to Plaintiff's request for reconsideration of the Court's Order denying his appointment of counsel,
5 as the Court previously advised plaintiff, district courts do not have authority to require counsel to
6 represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296,
7 298 (1989). In certain exceptional circumstances, the district court may request the voluntary
8 assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017
9 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). The test for
10 exceptional circumstances requires the court to evaluate the Plaintiff's likelihood of success on
11 the merits and the ability of the Plaintiff to articulate his claims pro se in light of the complexity
12 of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986);
13 Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983).

14 In this case, the Court does not find the required exceptional circumstances that warrant
15 solicitation and appointment of counsel. The instant case does not present extraordinary legal or
16 factual complexity, and Plaintiff has shown he is capable of articulating his claims without
17 counsel. Moreover, at this juncture of the case, Plaintiff is proceeding solely on a straightforward
18 medical deliberate indifference claim against one defendant. If this case proceeds to trial in the
19 future, Plaintiff may renew his request for appointment of counsel.

20 The Court now turns to Plaintiff's request for reconsideration of the Court's Order
21 granting Defendants' Motion to Dismiss Plaintiff's excessive use of force claims for failure to
22 exhaust administrative remedies. Therein Plaintiff argues that exhaustion of administrative
23 remedies would have been futile, and in any event, excessive use of force is not a "prison
24 condition" that requires exhaustion. Plaintiff is advised that he is relying on outdated case law in
25 making these arguments and that the United States Supreme Court has rejected both. See Porter
26 v. Nussle, 534 U.S. 516, 532 (2002) (the exhaustion requirement "applies to all inmate suits about
27 prison life, whether they involve general circumstances or particular episodes, and whether they
28 allege excessive force or some other wrong."); Booth v. Churner, 532 U.S. 731, 741 n.6 (2001)

1 (“we stress the point . . . that we will not read futility or other exceptions into statutory exhaustion
2 requirements where Congress has provided otherwise.”). Plaintiff’s remaining contentions are
3 also without merit.

4 Accordingly, for the reasons discussed herein, Plaintiff’s Motions for Reconsideration
5 (Doc. Nos. 81, 116 & 125) are DENIED.

6 IT IS SO ORDERD.

7 Dated: September 3, 2014

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10 MORRISON C. ENGLAND, JR., CHIEF JUDGE
11 UNITED STATES DISTRICT COURT
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