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

ALTON E. DEAN,

Plaintiff,

No. CIV S-10-1265 DAD P

vs.

ERIK MANESS,

Defendant.

ORDER

_____ /

Plaintiff is a county jail inmate proceeding pro se and seeking relief pursuant to 42 U.S.C. § 1983. Plaintiff has two motions pending before the court.

PLAINTIFF’S APPLICATION TO PROCEED IN FORMA PAUPERIS

First, on June 18, 2010, plaintiff filed an application to proceed in forma pauperis. The federal in forma pauperis statute includes a limitation on the number of times a prisoner may proceed in forma pauperis. See 28 U.S.C. § 1915(g). Also known as the “three strikes” rule, 28 U.S.C. § 1915(g) provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under [§ 1915] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may

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1 be granted, unless the prisoner is under imminent danger of serious
2 physical injury.

3 In this case, the court has reviewed its own records and has determined that plaintiff has had at
4 least three previous actions dismissed for failure to state a claim: (1) Dean v. Sullivan, 2:98-0717
5 LKK DAD P; (2) Dean v. Melching, et al., 1:00-5522 AWI DLB P; and (3) Dean v. Cavagnaro,
6 et al., 1:09-0852 SMS P.¹ Moreover, and most recently, in Dean v. Street, et al., No. CIV S-10-
7 0672 MCE GGH P plaintiff was specifically barred from proceeding in forma pauperis under the
8 three-strikes provision of 28 U.S.C. § 1915(g). (See Case No. CIV S-10-0672 MCE GGH P,
9 Doc. No. 15.) Thus, pursuant to § 1915(g), plaintiff is precluded from proceeding in forma
10 pauperis in this case unless he demonstrates that he is under “imminent danger of serious
11 physical harm.”

12 After a careful review of plaintiff’s pleadings, the court concludes that plaintiff
13 has not established that he is under imminent danger of serious physical harm. See e.g., Andrews
14 v. King, 398 F.3d 1113, 1120 (9th Cir. 2005). In his original complaint, plaintiff appears to
15 allege an Eighth Amendment inadequate medical care claim that arose from events occurring
16 between December 20, 2007 and April 19, 2009. (Compl. at 2.) There is no indication in the
17 complaint that plaintiff suffered any physical harm thereafter. Also, in his amended complaint,
18 plaintiff merely appears to allege that prison officials are delaying the processing of his
19 paperwork. (Am. Compl. at 11.) Accordingly, because plaintiff has not established that he is
20 under imminent danger of serious physical harm, he is barred under § 1915(g) from proceeding
21 in forma pauperis in this case.

22 **PLAINTIFF’S MOTION FOR THE APPOINTMENT OF COUNSEL**

23 Second, on July 8, 2010, plaintiff filed a motion for the appointment of counsel.
24 The United States Supreme Court has ruled that district courts lack authority to require counsel

25 ¹ A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman,
26 803 F.2d 500, 505 (9 th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

1 to represent indigent prisoners in § 1983 cases. See Mallard v. United States Dist. Court, 490
2 U.S. 296, 298 (1989). In certain exceptional circumstances, however, the district court may
3 request voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer,
4 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir.
5 1990).

6 The test for exceptional circumstances requires the court to evaluate the plaintiff's
7 likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in
8 light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328,
9 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances that
10 are common to most prisoners, such as lack of legal education and limited law library access, do
11 not establish exceptional circumstances that would warrant a request for voluntary assistance of
12 counsel. In the present case, the court does not find the required exceptional circumstances and
13 will therefore deny plaintiff's request for the appointment of counsel.

14 CONCLUSION

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

16 1. Plaintiff's June 18, 2010 application to proceed in forma pauperis (Doc. No. 7)
17 is denied as barred by 28 U.S.C. § 1915(g). Within thirty days of the date of this order, plaintiff
18 shall pay the \$350.00 filing fee for this action. Failure to do so will result in the dismissal of this
19 case.

20 2. Plaintiff's July 8, 2010 motion for the appointment of counsel (Doc. No. 8) is
21 denied.

22 DATED: July 29, 2010.

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25 _____
26 DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

25 DAD:sj
26 dean1265.3B+31