

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

JAMES M. MILLIKEN,

Plaintiff,

No. 2:10-cv-1412-JFM (PC)

vs.

MR. LIGHTFIELD, et al.,

Defendants.

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. § 1983. On October 8, 2010, plaintiff filed a motion for leave to amend his complaint together with a proposed first amended complaint. Plaintiff is entitled to amend his complaint once as of right prior to service of a responsive pleading. See Fed. R. Civ. P. 15(a). On September 22, 2010, signed waivers of service were returned from defendants Lewis, Lightfield and Taylor. Defendants have not yet filed a responsive pleading.<sup>1</sup> Accordingly, plaintiff is entitled to amend his complaint and his motion will therefore be granted.

The first amended complaint states a cognizable claim for relief against defendants Lewis, Lightfield and Taylor pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1915A(b). If the allegations of the complaint are proven, plaintiff has a reasonable opportunity to prevail on the merits of this action. Accordingly, said defendants will be directed to respond to the first amended complaint.

<sup>1</sup> Defendants’ responsive pleading is not due until sixty days after August 20, 2010.

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

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

10 1. Plaintiff's October 8, 2010 motion to amend is granted.

11 2. Plaintiff's first amended complaint states a cognizable claim for relief against  
12 defendants Lightfield, Lewis, Taylor.

13 3. The Clerk of the Court is directed to send a copy of plaintiff's first amended  
14 complaint and a copy of this order to Deputy Attorney General Richard B. Price, Office of the  
15 Attorney General, P.O. Box 944255, Sacramento, CA 94244-2550.

16 4. Within twenty days from the date of this order defendants Lightfield, Lewis,  
17 and Taylor shall file and serve a response to plaintiff's first amended complaint.

18 5. Plaintiff's October 8, 2010 motion for appointment of counsel is denied.

19 DATED: October 18, 2010.

20  
21   
22 UNITED STATES MAGISTRATE JUDGE

23 12  
24 mill1412.1am

25 \_\_\_\_\_  
26 <sup>2</sup> Plaintiff's first motion for appointment of counsel was denied by order filed July 21,  
2010.