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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN PHILIP MONCRIEF,

No. 2:12-cv-0414 MCE AC P

Plaintiff,

v.

ORDER

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, et al.,

Defendants.

During a closed hearing on November 2, 2016, the court granted counsels' motion to withdraw and plaintiff was given sixty days to retain replacement counsel. ECF No. 100. Plaintiff was cautioned that if replacement counsel did not file a notice of appearance by January 3, 2017, he would have to continue proceeding in pro se. Id. He was further cautioned that the court would only grant an extension of time if he was making concrete progress toward securing counsel. Id.

On December 21, 2016, the court granted plaintiff a thirty-day extension of the time for replacement counsel to make an appearance, based on plaintiff's representation that the attorneys he had contacted were not willing to look at his case until after the holidays. ECF No. 102. Plaintiff was warned that no further extensions would be granted unless he showed that he was close to hiring new counsel. Id. Plaintiff now requests that the court appoint counsel to represent

1 him going forward. ECF No. 103.

2 The United States Supreme Court has ruled that district courts lack authority to require
3 counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490
4 U.S. 296, 298 (1989). In certain exceptional circumstances, the district court may request the
5 voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d
6 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

7 “When determining whether ‘exceptional circumstances’ exist, a court must consider ‘the
8 likelihood of success on the merits as well as the ability of the [plaintiff] to articulate his claims
9 *pro se* in light of the complexity of the legal issues involved.’” Palmer v. Valdez, 560 F.3d 965,
10 970 (9th Cir. 2009) (quoting Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983)). The burden
11 of demonstrating exceptional circumstances is on the plaintiff. Id. Circumstances common to
12 most prisoners, such as lack of legal education and limited law library access, do not establish
13 exceptional circumstances that would warrant a request for voluntary assistance of counsel.

14 In his request, plaintiff alleges mishandling of his case, and once again refers to the
15 court’s previous comment that this case was originally being handled as if plaintiff was
16 proceeding in *pro se*. ECF No. 103. Plaintiff misunderstands the court’s previous comment. In
17 stating that the case was being handled as if plaintiff were proceeding *pro se*, the court was
18 referring to the way in which the case was being handled administratively. The court was not
19 commenting on the quality of counsel’s representation. While plaintiff is correct that his previous
20 counsel was sanctioned, the sanction was for \$250.00 jointly for failing to respond to defendants’
21 motion to dismiss and failing to appear at the hearing on the motion. ECF No. 68. It was not for
22 \$500.00 each for “moving forward as if a *pro per* was running the suit” as plaintiff appears to
23 believe. ECF No. 103. Regardless, retained counsels’ alleged mishandling of the case and the
24 fact that they were sanctioned does not create an exceptional circumstance warranting a request
25 for voluntary assistance of counsel. Nor does it change the potential merit of plaintiff’s claims,
26 and therefore his likelihood of success on those claims, or his ability to articulate those claims on
27 his own. On the current record, the court is unable to assess the likelihood of success on the
28 merits and plaintiff appears able to adequately express himself and his positions.


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Plaintiff has not met his burden of showing that extraordinary circumstances exist in this case and his request for appointment of counsel will be denied.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for appointment of counsel (ECF No. 103) is denied.
2. The deadline for replacement counsel to appear in this case will remain February 2, 2017. If replacement counsel does not appear by that date, plaintiff shall continue to proceed in pro se.

DATED: January 26, 2017



ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE