

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
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANNY R. GARCIA,
Plaintiff,
v.
C/O HEATH, et al.,
Defendants.

No. 2:13-cv-1952 JAM AC P

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action filed pursuant to 42 U.S.C. § 1983. This action proceeds on plaintiff’s First Amended Complaint, ECF No. 17, against six defendants, on plaintiff’s First Amendment retaliation claims. A Discovery and Scheduling Order issued March 24, 2015, setting a discovery deadline of July 10, 2015 and a dispositive motion deadline of October 2, 2015. See ECF No. 24.

Presently pending is plaintiff’s fourth request for appointment of counsel. Plaintiff’s prior requests were denied without prejudice. The court then found that plaintiff had not met his burden of demonstrating exceptional circumstances warranting appointment of counsel but, in each instance, extended time for filing an amended complaint. See ECF Nos. 13, 16. The instant request includes 114 pages of exhibits which plaintiff asserts demonstrate the likelihood of success on the merits of his claims. Plaintiff states that his claims are complex, that he is indigent and not trained in the law, and that he is “still in recovery from cancer (lymphoma-chemo-

1 radiation) and. . . still in a depression requiring an increase in medication (Prozac).” ECF No. 23
2 at 2. In addition, plaintiff states that another inmate prepared his prior filings but has been
3 transferred to another prison and “[t]here is no one here with any legal education to help me.” Id.
4 Plaintiff has also filed a “Reply Brief to Defendants’ Answer,” ECF No. 27, without exhibits,
5 which is worded more like a notice of summary judgment motion. See Fed. R. Civ. P. 56.
6 Plaintiff states therein that he possesses “indisputable evidence” to prove his claims. ECF No. 27
7 at 1.

8 As plaintiff was previously informed, district courts lack authority to require counsel to
9 represent indigent prisoners in Section 1983 cases. Mallard v. United States Dist. Court, 490 U.S.
10 296, 298 (1989). Only in certain exceptional circumstances will a district court request the
11 voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d
12 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

13 The test for exceptional circumstances requires the court to evaluate plaintiff’s likelihood
14 of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the
15 complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th
16 Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). The burden of demonstrating
17 exceptional circumstances is on the plaintiff. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir.
18 2009). Circumstances common to most prisoners, such as lack of legal education and limited law
19 library access, do not establish the requisite exceptional circumstances.

20 In the present case, the court again finds that plaintiff has not demonstrated exceptional
21 circumstances warranting appointment of counsel at this time. Plaintiff’s physical health appears
22 to be stabilized and he is receiving medication for his depression. While plaintiff asserts that his
23 claims are complex, he is pursuing the same claim against all six defendants – that defendants
24 violated plaintiff’s First Amendment rights by retaliating against him for filing administrative
25 grievances. Plaintiff is proceeding on a solid operative complaint and appears to possess
26 substantial evidence in support of his claims. The wording of plaintiff’s request for appointment
27 of counsel and “reply brief” indicate that he is capable of identifying additional evidence that

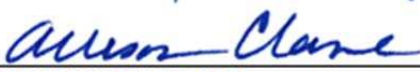
28 ///

1 would support his claims, and formulating his discovery requests accordingly.¹ Plaintiff also
2 appears capable of adequately responding to defendants' discovery requests to the extent that
3 plaintiff possesses the requested evidence or can easily obtain it (e.g., from his central file).
4 Plaintiff has already shared substantial evidence with defendants by filing it with the court, and
5 defendants should circumscribe their discovery requests accordingly. Thereafter, on or before
6 October 2, 2015, plaintiff may move for summary judgment in his favor, with all of his
7 supporting evidence; plaintiff must also timely oppose any motion for summary judgment filed by
8 defendants. The court will then examine the merits of his plaintiff's claims and evidence.

9 Based on the court's assessment that plaintiff appears capable of proceeding effectively in
10 this action on his own, at this time, his request for appointment of counsel will again be denied.
11 Plaintiff is informed that the court will, on its own motion, reconsider the appointment of counsel
12 if the case proceeds to trial setting following dispositive motions.

13 For these reasons, IT IS HEREBY ORDERED that plaintiff's motion for appointment of
14 counsel, ECF No. 23, is denied without prejudice.

15 DATED: April 21, 2015

16 
17 ALLISON CLAIRE
18 UNITED STATES MAGISTRATE JUDGE

19
20
21
22
23
24
25
26

¹ Plaintiff's discovery requests may include the following: (1) requests for admission (yes-or-no
27 statements of fact) directed to each defendant, see Fed. R. Civ. P. 36; (2) up to twenty-five
28 interrogatories (questions) directed to each defendant, see Fed. R. Civ. P. 33; and (3) requests for
copies of documents, electronically stored information, or other tangible evidence directed to
each defendant, see Fed. R. Civ. P. 34.