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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTOINE E. MODICA, SR.,  
Plaintiff,  
v.  
RUSSELL, et al.,  
Defendants.

No. 2:15-cv-00057 MCE AC PS

ORDER

Plaintiff is a former state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983, against defendants Russell and Olah, correctional officials at the California Correctional Center (CCC) in Susanville. Plaintiff challenges the conduct of these defendants during his incarceration at CCC; plaintiff is now on parole and resides in Hayward. This proceeding is referred to this court pursuant to 28 U.S.C. § 636(b)(1)(B), Local Rule 302(c), and Local General Order No. 262.

I. In Forma Pauperis Application

Plaintiff requests leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Although the application submitted by plaintiff is not on the standard form used by this district, it contains the requisite information and is submitted by plaintiff under penalty of perjury. See ECF No. 3. The court finds that the application makes the showing required by 28 U.S.C. § 1915(a). Accordingly, plaintiff’s request to proceed in forma pauperis will be granted.

1           II.       Screening of Complaint

2           Pursuant to 28 U.S.C. § 1915(e)(2), the court must dismiss a case proceeding under the in  
3 forma pauperis statute if the court determines, inter alia, that the action is frivolous or malicious,  
4 fails to state a claim on which relief may be granted, or seeks monetary relief against an immune  
5 defendant.

6           Plaintiff makes the following allegations in the instant complaint against defendants  
7 Russell and Olah.<sup>1</sup> On October 23, 2011, while waiting for his dorm to be unlocked, plaintiff was  
8 approached by defendant Olah who instructed plaintiff to place his hands up against the wall.  
9 While plaintiff was in this position, defendant Russell passed by and “pressed a strange hot metal  
10 box against the back handside of my left hand with excessive force.” ECF No. 1 at 5. Plaintiff  
11 alleges that defendant Olah “used his authority to perform a staged search of my person, but in  
12 reality, only served as a diversion . . . to burn and brand me with a prohibited device, by C/O  
13 Russell.” Id. at 4. The complaint further alleges, id. at 5-6:

14                       With a visible burn mark/brand it left and a painful sting as C/O  
15 Olah and C/O Russell laughed at me. I screamed out in pain, “Hey,  
16 you just burned me.” C/O Russell turned and displayed a colored  
17 box with a metal tip in his hand, then asked to his co-worker C/O  
18 Olah, “You smell something,” as he mocked me. He Russell said,  
“it smells like porks skin.” C/O Russell stared at me and he in a  
cold manner said, “You scream like a little bitch, you scream like a  
little bitch.” Adding insult to injury. I was in fear.

19           According to the complaint, neither defendant reported the incident. On October 29,  
20 2011, plaintiff sought mental health care due to fear of retaliation by Russell and Olah if plaintiff  
21 reported the incident. On October 30, 2011, plaintiff obtained a medical examination and filed an  
22 administrative grievance alleging officer misconduct by defendant Russell, with the cooperation  
23 of defendant Olah. Plaintiff was interviewed by a member of CDCR’s Office of Internal Affairs  
24 (OIA) the same day; the interview was videotaped. Plaintiff requested placement in  
25 administrative segregation (ad seg) for his own safety, and the request was granted, effective

26 \_\_\_\_\_  
27 <sup>1</sup> The question marks in plaintiff’s complaint appear to indicate plaintiff’s lack of certainty  
28 regarding defendants’ positions at CCC (both appear to be correctional officers), not confusion  
about defendants’ names.

1 October 30, 2011. On November 11, 2011, plaintiff was visited by the head of Inmate Appeals  
2 who viewed plaintiff's burn, informed plaintiff that his appeal was legitimate and being reviewed  
3 by OIA, and explained that plaintiff would remain in ad seg until completion of the investigation.  
4 In November 2011, plaintiff filed a claim with the Victim Compensation and Government Claims  
5 Board. In March or April 2012, three members of the Office of Inspector General (OIG)  
6 conducted an audio-recorded interview of plaintiff.

7 Plaintiff states that he was released from custody in December 2012, while his  
8 administrative grievance and the OIA investigation were still pending. In March 2013, plaintiff  
9 received "a memo in the mail stating C/O Russell had violated CDCR Policy and Procedure and  
10 my claim was legitimate a violation did occur[] . . . [but] I was not offered any support or relief."  
11 ECF No. 1 at 9. Moreover, plaintiff states that "[t]he Chief of Inmate Appeals would not process  
12 my appeal at the third and final level. I made several attempts to solve my inmate grievance  
13 '602' within the CDCR appeals process, however, each attempt was return[ed]. . . ." Id. Plaintiff  
14 states that he still bears the "branded scar on my left hand, to this day." Id. at 4. Plaintiff seeks  
15 compensatory and punitive damages.

16 The complaint recounts a prior federal civil rights action filed by plaintiff "just before I  
17 was attacked by C/O Russell and C/O Olah." Id. at 7. That action, Modica v. Cox et al., Case  
18 No. 2:11-cv-02163 DAD P, filed against other defendants at CCC regarding an unrelated  
19 incident, was commenced August 15, 2011. (The parties reached a settlement in June 2013, and  
20 the case was voluntarily dismissed on August 22, 2013.) The filing date of that action supports  
21 plaintiff's claim that defendants acted in retaliation.

22 The court finds that the complaint states the following cognizable claims against  
23 defendants Russell and Olah, pursuant to 42 U.S.C. § 1983: (1) that, in violation of plaintiff's  
24 First Amendment rights, defendants acted in retaliation against plaintiff because he had recently  
25 filed a prior civil rights action against CCC coworkers;<sup>2</sup> (2) that defendants' excessive and

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26 <sup>2</sup> "Within the prison context, a viable claim of First Amendment retaliation entails five basic  
27 elements: (1) An assertion that a state actor took some adverse action against an inmate (2)  
28 because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's  
(continued...)

1 “barbaric” use of force against plaintiff, causing physical injury, violated plaintiff’s Eighth  
2 Amendment right to be free from cruel and unusual punishment;<sup>3</sup> and (3) that defendants acted in  
3 concert to violate plaintiff’s civil rights, thus stating a claim for conspiracy under Section 1983.<sup>4</sup>

4 Accordingly, pursuant to plaintiff’s in forma pauperis status, he will be granted leave to  
5 submit the documents necessary for the United States Marshal to serve process on defendants  
6 Russell and Olah.

7 III. Request for Appointment of Counsel

8 Plaintiff also requests appointment of counsel. Plaintiff states that he is indigent and on  
9 parole; that he has limited knowledge of the law but the issues in this case are complex and will  
10 require significant research and investigation; that a trial in this case will involve conflicting  
11 testimony and appointed counsel would be better able to present plaintiff’s evidence and cross-  
12 examine witnesses; and that plaintiff is “under Doctor’s care on medication and suffering as a  
13 direct result of the injuries he suffered at the hand of the defendants.” ECF No. 3 at 2.

14 District courts lack authority to require counsel to represent indigent litigants in Section  
15 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In exceptional  
16 circumstances, the court may request that an attorney voluntarily represent such a litigant. See 28  
17 U.S.C. § 1915(e)(1); see also Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v.  
18 Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). When determining whether “exceptional

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19 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate  
20 correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (fn. and citations  
21 omitted). Direct and tangible harm will support a First Amendment retaliation claim even  
22 without demonstration of a chilling effect on the further exercise of a prisoner’s First Amendment  
rights. Id. at 568 n.11.

23 <sup>3</sup> To state an Eighth Amendment claim premised on excessive force, a plaintiff must allege that  
24 the use of force was an “unnecessary and wanton infliction of pain.” Jeffers v. Gomez, 267 F.3d  
25 895, 910 (9th Cir. 2001). “When prison officials maliciously and sadistically use force to cause  
26 harm, contemporary standards of decency always are violated. This is true whether or not  
significant injury is evident. Hudson v. McMillian, 503 U.S. 1, 9 (1992) (citation omitted).  
However, plaintiff does not state a cognizable Fourth Amendment claim premised on his  
temporary detention.

27 <sup>4</sup> To state a claim for conspiracy under Section 1983, a plaintiff must plead specific facts that  
28 suggest a mutual understanding among conspirators to deprive plaintiff of his constitutional  
rights. Duvall v. Sharp, 905 F.2d 1188, 1189 (8th Cir. 1990) (per curiam).

1 circumstances” exist, the court must consider plaintiff’s likelihood of success on the merits as  
2 well as the ability of the plaintiff to articulate his claims pro se in light of the complexity of the  
3 legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009). The burden of  
4 demonstrating exceptional circumstances is on the plaintiff. Id.

5 In the present case, plaintiff has demonstrated the ability to articulate and pursue his  
6 claims pro se. While there is a reasonable likelihood that plaintiff may succeed on the merits of  
7 his claims if his allegations are proven, the personal circumstances he recounts are common to  
8 most indigent litigants. Moreover, while plaintiff states that his medical conditions impede his  
9 ability to proceed pro se, the only injury identified in this action is a scar to the back of plaintiff’s  
10 left hand, without any allegation that the injury impaired plaintiff’s ability to use his hand. There  
11 are no pertinent allegations in plaintiff’s former case, Modica v. Cox et al., Case No. 2:11-cv-  
12 02163 DAD P, demonstrating a disabling medical condition. For these several reasons, the court  
13 finds that plaintiff has failed to meet his burden of demonstrating exceptional circumstances  
14 warranting the appointment of counsel at this time.

15 IV. Conclusion

16 Accordingly, IT IS HEREBY ORDERED that:

- 17 1. Plaintiff’s request for leave to proceed in forma pauperis, ECF No. 3, is granted.
- 18 2. Plaintiff’s request for appointment of counsel, ECF No. 2, is denied without prejudice.
- 19 3. Service of the complaint is appropriate for defendants Russell and Olah.
- 20 4. The Clerk of the Court shall send plaintiff one summons, two USM-285 forms, a copy  
21 of the endorsed original complaint filed January 8, 2015, and an instruction sheet informing  
22 plaintiff how to proceed in completing and submitting the necessary service documents.
- 23 5. Within thirty days from the filing date of this order, plaintiff shall complete the  
24 attached Notice of Submission of Documents and submit the following documents to the court:
  - 25 a. The completed Notice of Submission of Documents;
  - 26 b. One completed summons;
  - 27 c. One completed USM-285 form for each defendant (two forms total); and
  - 28 d. Three copies of the endorsed original complaint filed January 8, 2015.

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6. Plaintiff need not attempt service on defendants and need not request waiver of service. Upon receipt of the above-described documents, the court will direct the United States Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure 4 without payment of costs.

7. Failure of plaintiff to timely comply with this order may result in a recommendation that this action be dismissed without prejudice.

DATED: May 7, 2015

  
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ALLISON CLAIRE  
UNITED STATES MAGISTRATE JUDGE

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No. 2:15-cv-00057 MCE AC PS

NOTICE OF SUBMISSION OF DOCUMENTS

Plaintiff submits the following documents in compliance with the court's order filed  
\_\_\_\_\_:

- \_\_\_\_\_ One completed summons form
- \_\_\_\_\_ Two completed USM-285 forms
- \_\_\_\_\_ Three copies of the endorsed original complaint filed January 8, 2015

\_\_\_\_\_  
Date

\_\_\_\_\_  
Plaintiff