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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TIMOTHY RAY BAKER,  
Plaintiff,  
v.  
J. MACOMBER, et al.,  
Defendants.

No. 2:15-cv-0248 GEB AC P

ORDER

Plaintiff is a state prisoner at California State Prison Sacramento (CSP-SAC), who proceeds pro se and in forma pauperis with this civil rights action against defendant Correctional Officer (CO) J. McCowan. Presently pending are plaintiff’s third and fourth requests for appointment of counsel. See ECF Nos. 27, 32. For the reasons that follow, plaintiff’s requests are denied without prejudice.

The court denied without prejudice plaintiff’s first and second requests for appointment of counsel. See ECF Nos. 18, 24. The court reasoned that this action presents relatively straightforward claims against only one defendant, and that plaintiff’s complaint and briefing indicate he is capable of articulating his claims and arguments and pursuing essential discovery despite his pro se status. Although plaintiff stated that he relied on other inmates to prepare his court filings, the court noted that plaintiff had submitted no documentation to substantiate his alleged educational, mental health, and physical impairments. See ECF No. 18 at 2. Plaintiff has

1 now submitted documentation supporting these allegations.

2 Plaintiff had the assistance of Unit Field Representative M. Desilets in preparing his  
3 fourth request for appointment of counsel. See ECF No. 32 at 5. Plaintiff has submitted  
4 documentation demonstrating that he is housed at the Psychiatric Services Unit (PSU) for  
5 treatment of mood disorder, antisocial personality disorder, recurring depression and post-  
6 traumatic stress disorder (PTSD). See ECF No. 32 at 2, 7. Plaintiff is assigned to the Enhanced  
7 Outpatient Program (EOP).<sup>1</sup> ECF No. 27 at 5. A May 2015 Inmate Health Assessment form  
8 noted that plaintiff was also assigned to the Developmentally Disabled Program but appeared to  
9 have “adequate cognitive functioning.” ECF No. 27 at 12. However, plaintiff’s TAFE (Test of  
10 Adult Basic Education) score is apparently “O.” See ECF No. 27 at 5 (“under 4.0/no TAFE”); id.  
11 at 9 (“TAFE Reading score of 0.0”); id. at 14 (Initial TAFE Score 00.0, dated 9/16/2011).  
12 Consistently, staff notes from a December 2015 Classification Hearing indicate that plaintiff “did  
13 not appear to understand the communication” despite wearing his hearing aid, reiterating in his  
14 own words matters that were explained to him, and asking appropriate questions. ECF No. 27 at  
15 5.

16 Plaintiff is mobility impaired and uses a cane; he wears special shoes and is restricted to  
17 bottom bunks in lower tier cells. ECF No. 27 at 13, 14, 16. Plaintiff is sight impaired, which he  
18 describes as progressive macular degeneration in his right eye and “thin nerves” in his left eye.  
19 ECF No. 32 at 2, 4. Plaintiff wears prescription glasses. ECF No. 27 at 14, 16. Plaintiff is  
20 entitled to accommodations under the Americans with Disabilities Act (ADA), and has a  
21 permanent chrono requiring special cuffing and waist chains. ECF No. 27 at 14, 16.

22 Plaintiff again states that he relies on the assistance of other inmates to prepare his legal  
23 documents. He asserts that the issues involved in this case are complex and outside his  
24 “comprehension and full understanding.” ECF No. 27 at 1. Plaintiff states that he is “unable to

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25 <sup>1</sup> EOP “provides care to mentally disordered inmate-patients who would benefit from the  
26 structure of a therapeutic environment that is less restriction than inpatient settings” and includes  
27 inmates with “a serious mental illness that is of long duration with moderate to severe and  
28 persistent functional impairments.” CDCR Mental Health Services Delivery System, Program  
Guide Overview, Chap. 1(D)(2) (2009).

1 comprise witnesses, affidavits or statements or to gather discover info.” Id. Plaintiff contends  
2 that appointed counsel will be necessary at trial to examine and cross-examine witnesses.  
3 Plaintiff also asserts that appointment of a neutral medical expert will be required “to explain to  
4 the court and jury the extent of plaintiff’s injuries and suffering from defendant’s constitutional  
5 violations.” ECF No. 27 at 2.

6 As plaintiff was previously informed, this court is without authority to require counsel to  
7 represent indigent prisoners in Section 1983 cases. Mallard v. United States Dist. Court, 490 U.S.  
8 296, 298 (1989). However, under 28 U.S.C. § 1915(e)(1), this court may request the voluntary  
9 assistance of an attorney in exceptional circumstance. See Terrell v. Brewer, 935 F.2d 1015,  
10 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). The test  
11 for exceptional circumstances requires an evaluation of plaintiff’s likelihood of success on the  
12 merits of his claims and ability to articulate his claims pro se in light of the complexity of the  
13 factual and legal issues presented by his case. See Wilborn v. Escalderon, 789 F.2d 1328, 1331  
14 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances common  
15 to most prisoners, such as lack of legal education and limited law library access, do not establish  
16 the requisite exceptional circumstances. The burden of demonstrating exceptional circumstances  
17 is on the plaintiff. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009).

18 This court must carefully assess these matters in each case because there are far fewer  
19 attorneys willing to undertake such representation than the number of requests for appointed  
20 counsel filed by prisoners in civil rights cases.

21 Plaintiff has demonstrated that he has significant mental, emotional and physical  
22 disabilities that impair his ability to pursue litigation on his own behalf. Nevertheless, many of  
23 plaintiff’s personal challenges are shared by other prisoners and are therefore not exceptional  
24 within the prison context. Moreover, the factual allegations of this case are succinct<sup>2</sup> and

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25 <sup>2</sup> The facts of the instant case are relatively short in duration and of limited complexity. Plaintiff  
26 alleges that on August 10, 2012, at 3:00 p.m., he entered CSP-SAC’s Facility C Medical Clinic to  
27 obtain his afternoon insulin injection. In response to plaintiff’s verbal interaction with another  
28 CO, defendant McCowan rushed into the clinic and exchanged words with plaintiff. McCowan  
told plaintiff to “stand up turn around face the wall and cuff-up.” ECF No. 1 at ¶ 14. Plaintiff  
(continued...)

1 plaintiff's legal claims – Eighth Amendment claims for excessive force and deliberate  
2 indifference to plaintiff's serious medical needs – are straightforward. See ECF No. 10 at 6-9.  
3 Because ultimate resolution of this case will depend on the parties' credibility, the court is unable  
4 to conclude at this juncture that plaintiff has a strong likelihood of success on the merits of his  
5 claims. Should this case proceed to trial, appointed counsel for plaintiff appears warranted.  
6 However, at this juncture,<sup>3</sup> and in light of the limited number of available volunteer attorneys,  
7 appointment is not clearly warranted. Matters of credibility cannot be determined on summary  
8 judgment. Should defendant file a motion for summary judgment, plaintiff should submit all of  
9 his evidence in opposition and attempt, to the best of his ability (and/or with the continuing  
10 assistance of other inmates), to respond to defendant's arguments in a manner that conforms with  
11 the Local Rules. The court will liberally construe plaintiff's filings, as it is required to do. See  
12 Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010).

13 For these reasons, the court finds that plaintiff has not met his burden of demonstrating  
14 exceptional circumstances warranting the appointment of counsel at this time.

15 Plaintiff's request for appointment of a neutral medical expert will also be denied. The  
16 purpose of a court-appointed expert under Federal Rule of Evidence 706 is to assist the trier of

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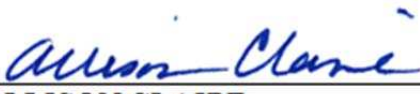
17 told McCowan that he had a medical chrono authorizing only frontal waist restraints but  
18 McCowan insisted that plaintiff cuff-up behind his back. Defendant placed plaintiff in handcuffs  
19 and "abruptly fastwalked him out of the clinic toward a holding cage outside in the sally port  
20 whereupon defendant told plaintiff in a threatening manner 'You feel Froggy Jump!'" Id. at ¶ 17.  
21 Plaintiff told defendant that he wasn't afraid of him. Defendant "walked plaintiff out of plain  
22 view of . . . others as well as out of view of the cameras that are located out in the sally port  
23 above the top floor pointing downwards at the sally port and the visiting room stairs. Defendant  
24 took Baker by his right arm in cuffs then raised the arms up midway passed (sic) plaintiff's back.  
25 Beyond their designed capacity." Id. at ¶ 18. Defendant placed plaintiff in the holding cage on  
26 the farthest side of the sally port and removed the cuffs. Id. at ¶¶ 18, 19. Defendant disregarded  
27 plaintiff's complaints of pain in his left shoulder and wrists. Id. at ¶ 19. Defendant denied  
28 plaintiff's request to speak with a nurse or the sergeant on duty. Id. at ¶ 20. While in the holding  
cage, plaintiff complained of pain and heat exhaustion because it was over 100 degrees outside.  
Id. Sergeant Andes stopped by to talk with plaintiff, then talked with defendant; Andes returned  
to plaintiff, put him in cuffs and escorted plaintiff to the Medical Clinic where plaintiff was seen  
by LVN Joe Maalihan who completed a Form 7219 Medical Report. Id. at ¶ 21. Andes then  
released plaintiff back to his housing unit. Id. at ¶ 24.

<sup>3</sup> The discovery deadline expired in this action on April 29, 2016; the dispositive motion deadline  
is July 29, 2016. See ECF No. 21.

1 fact, not to serve as an advocate, and the court retains the authority to appoint a neutral expert  
2 witnesses at any time. See Walker v. American Home Shield Long Term Disability Plan, 180  
3 F.3d 1065, 1071 (9th Cir. 1999) (“district court . . . has the discretion to appoint an expert sua  
4 sponte under Federal Rule of Evidence 706(a)”); Pedraza v. Jones, 71 F.3d 194, 196 (5th Cir.  
5 1995) (“[t]he plain language of section 1915 does not provide for the appointment of expert  
6 witnesses to aid an indigent litigant”).

7 Accordingly, IT IS HEREBY ORDERED that plaintiff’s motions for appointment of  
8 counsel, ECF Nos. 27, 32, and related request for appointment of a neutral medical expert, are  
9 denied without prejudice.

10 DATED: May 3, 2016

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12 ALLISON CLAIRE  
13 UNITED STATES MAGISTRATE JUDGE  
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