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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MATTHEW DENNIS,  
Plaintiff,  
v.  
SCOTT KERNAN, et al.,  
Defendants.

No. 2:16-cv-0542 JAM AC P

ORDER

Plaintiff, a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983, has filed a motion for a Rule 16 pretrial conference in which he requests the appointment of counsel and alleges that he is being retaliated against by various correctional officers for pursuing this action. ECF No. 97.

Shortly after this case was referred to the court’s Post-Screening Alternative Dispute Resolution (ADR) Project for a settlement conference, plaintiff filed an interlocutory appeal of an earlier denial of preliminary injunctive relief. ECF No. 80. The court then stayed the proceedings pending resolution of the appeal. ECF No. 87. After the stay was issued, the parties filed several matters. Defendants requested to opt-out of the Post-Screening ADR Project, ECF No. 88, and filed an answer to the third amended complaint, ECF No. 89, while plaintiff submitted a declaration directed to the court’s ADR judge, ECF No. 92, and another addressing his preparations for discovery, ECF No. 93. The undersigned acknowledged plaintiff’s desire to

1 pursue discovery and defendants' disinclination to participate in ADR, and advised that those  
2 matters would be revisited upon resolution of the interlocutory appeal. ECF No. 95. Now that  
3 the appeal has been resolved, the court will address these outstanding matters.

4 In requesting to opt out of the Post-Screening ADR Project, defendants cited plaintiff's  
5 settlement expectations, but also relied on the pending interlocutory appeal, concerns regarding  
6 COVID-19, and the fact that they had not received all of plaintiff's medical records. ECF No. 88.  
7 Because the appeal has been resolved, COVID-19 concerns may have changed, and the passage  
8 of time may have allowed defendants to obtain plaintiff's medical records, defendants will be  
9 required to notify the court whether they still seek to opt out of ADR. If defendants are no longer  
10 seeking to opt out, formal discovery will remain stayed and the case will be scheduled for a  
11 settlement conference. If defendants are still seeking to opt out, the stay in this case will be lifted  
12 and a discovery and scheduling order will issue, at which time plaintiff may send out his  
13 discovery requests.

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

20 "When determining whether 'exceptional circumstances' exist, a court must consider 'the  
21 likelihood of success on the merits as well as the ability of the [plaintiff] to articulate his claims  
22 *pro se* in light of the complexity of the legal issues involved.'" Palmer v. Valdez, 560 F.3d 965,  
23 970 (9th Cir. 2009) (quoting Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983)). The burden  
24 of demonstrating exceptional circumstances is on the plaintiff. Id. Circumstances common to  
25 most prisoners, such as lack of legal education and limited law library access, do not establish  
26 exceptional circumstances that would warrant a request for voluntary assistance of counsel.

27 Plaintiff requests counsel on the grounds that he requires help with a pretrial conference  
28 and discovery and that he is not being afforded sufficient law library access. ECF No. 97 at 2.

1 Plaintiff's claim of insufficient law library access is common to most inmates and does not  
2 warrant appointment of counsel. If plaintiff requires additional time to meet deadlines due to his  
3 limited access, he may file motions for extension of time that identify the deadline he needs  
4 extended, how much additional time he requires, and why he requires the additional time.  
5 Furthermore, because plaintiff is a prisoner proceeding pro se, this case will not be set for a Rule  
6 16 pretrial conference. With respect to plaintiff's claim that he requires counsel to assist with  
7 discovery, plaintiff states that he has already prepared several discovery requests and discovery  
8 motions, and it has not been shown that his attempts at obtaining discovery will be unsuccessful.  
9 Additionally, plaintiff's chances of success on the merits are not yet clear, and plaintiff has shown  
10 himself capable of articulating his claims and arguments without assistance. For these reasons,  
11 the request for counsel will be denied.

12 Finally, with respect to plaintiff's claims of retaliation, it is unclear what relief he is  
13 seeking. However, there is no indication that defendants are involved in the retaliation, and  
14 absent evidence that the individuals allegedly retaliating against plaintiff are working in concert  
15 with defendants, this court has no jurisdiction over them. See Zenith Radio Corp. v. Hazeltine  
16 Research, Inc., 395 U.S. 100, 112 (1969) (“[A] nonparty with notice cannot be held in contempt  
17 until shown to be in concert or participation.”)). Therefore, if plaintiff seeks any relief with  
18 respect to the alleged retaliation, he will need to file a separate complaint against the individuals  
19 he believes are retaliating against him.

20 Accordingly, IT IS HEREBY ORDERED that:

- 21 1. Within fourteen days of the service of this order, defendants shall advise the court  
22 whether they are still seeking to opt out of the Post-Screening ADR Project.
- 23 2. Plaintiff's motion for a pretrial conference, ECF No. 97, is DENIED.
- 24 3. Plaintiff's request for appointment of counsel, ECF No. 97, is DENIED.

25 DATED: April 5, 2021

26   
27 ALLISON CLAIRE  
28 UNITED STATES MAGISTRATE JUDGE