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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RAYMOND NEWSON,
Plaintiff,
v.
STEPHEN SHAW, et al.,
Defendants.

No. 2:18-cv-2010 CKD P

ORDER

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

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

1 exceptional circumstances that would warrant a request for voluntary assistance of counsel.

2 Plaintiff moves for appointment of counsel on the grounds that he requires the assistance
3 of counsel in conducting discovery, defending against a motion for summary judgment, and
4 proceeding at trial given the complexity of the issues. (ECF No. 30.) He further asserts that
5 because the case deals with medical issues he requires an expert witness, which requires that he
6 be appointed counsel. (Id.)

7 The fact that plaintiff may face difficulties in conducting discovery does not make his
8 circumstances extraordinary or the issues in this case complex. Wilborn v. Escalderon, 789 F.2d
9 1328, 1331 (9th Cir. 1986) (finding that “a *pro se* litigant will seldom be in a position to
10 investigate easily the facts necessary to support the case” and that “practically all cases would
11 involve complex legal issues” if the need for fact development was all that was needed to
12 establish complexity). It also has not yet been determined that this case will proceed to trial,
13 making appointment of counsel on that ground unwarranted. As for the complexity of the issues
14 in this case, the court previously noted that, at this stage, the issues in the case do not appear
15 complex, and plaintiff has not provided any evidence or information that would convince the
16 court otherwise. The complaint is based upon plaintiff’s claims that defendants failed to treat his
17 severe elbow pain for approximately a year, at which point an x-ray was finally ordered and it
18 was discovered that his elbow was fractured. (ECF No. 1.) The case therefore does not appear to
19 present issues with the level of complexity that would warrant the appointment of counsel.
20 Furthermore, plaintiff has yet to provide any evidence, such as medical records, that would
21 demonstrate he has a likelihood of success on the merits. Finally, plaintiff has so far shown
22 himself capable of articulating his claims without assistance.

23 Plaintiff’s request for appointment of an expert witness will also be denied. Federal Rule
24 of Evidence 706 authorizes the appointment of a neutral expert witness, with expenses shared by
25 the parties. The appointment of an independent expert witness pursuant to Rule 706 is within the
26 court’s discretion, Walker v. Am. Home Shield Long Term Disability Plan, 180 F.3d 1065, 1071
27 (9th Cir. 1999), and may be appropriate when “scientific, technical, or other specialized
28 knowledge will assist the trier-of-fact to understand the evidence or decide a fact in issue,”

1 Ledford v. Sullivan, 105 F.3d 354, 358-59 (7th Cir. 1997). However, the statute authorizing
2 plaintiff's in forma pauperis status does not authorize the expenditure of public funds for expert
3 witnesses. See 28 U.S.C. § 1915; Tedder v. Odel, 890 F.2d 210, 211-12 (9th Cir. 1989) (per
4 curiam) (expenditure of public funds on behalf of indigent litigant is proper only when authorized
5 by Congress); Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987) (no provision to pay fees
6 for expert witnesses). The federal courts have uniformly held that an indigent prisoner litigant
7 must bear his own costs of litigation, including witnesses. Tedder, 890 F.2d at 211 (in forma
8 pauperis statute, 28 U.S.C. § 1915, does not authorize waiver of fees or expenses for an indigent's
9 witnesses).

10 In this case, it appears that plaintiff is seeking to have the court appoint an expert witness
11 to advocate on his behalf, which is not authorized by Rule 706. However, even if plaintiff is truly
12 seeking a neutral expert, the court does not find that the issues in this case are complicated such
13 that the testimony of a neutral expert would be warranted and the request is denied. To the extent
14 the expenses of an expert retained on behalf of a prisoner litigant may be recovered if
15 preauthorized and arranged by counsel appointed by this court's Pro Bono Panel, as addressed
16 above, plaintiff has not demonstrated extraordinary circumstances to warrant appointment of
17 counsel. The court will therefore decline to appoint counsel for the purpose of obtaining an
18 expert witness.

19 Accordingly, IT IS HEREBY ORDERED that plaintiff's request for the appointment of
20 counsel and an expert witness (ECF No. 30) is denied.

21 Dated: October 10, 2019

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23 _____
24 CAROLYN K. DELANEY
25 UNITED STATES MAGISTRATE JUDGE

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