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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANCISCO MERINO,  
  
Plaintiff,  
  
v.  
  
GOMEZ, et al.,  
  
Defendants.

No. 2:21-cv-0572 DAD KJN P

ORDER

Plaintiff is a state prisoner, proceeding pro se, in an action brought under 42 U.S.C. § 1983. Pending before the court are plaintiff’s motions for appointment of counsel (ECF Nos. 134, 136), and plaintiff’s letters addressing overpayment of the filing fee (ECF Nos. 137, 138).

Motions for Appointment of Counsel

District courts lack authority to require counsel to represent indigent prisoners in section 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an attorney to voluntarily represent such a plaintiff. See 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, the court must consider plaintiff’s 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) (district court did not

1 abuse discretion in declining to appoint counsel). The burden of demonstrating exceptional  
2 circumstances is on the plaintiff. Id. Circumstances common to most prisoners, such as lack of  
3 legal education and limited law library access, do not establish exceptional circumstances that  
4 warrant a request for voluntary assistance of counsel.

5 Having considered the factors under Palmer, the court finds that plaintiff failed to meet his  
6 burden of demonstrating exceptional circumstances warranting the appointment of counsel at this  
7 time.

#### 8 Letters re: Overpayment of Filing Fee

##### 9 *Background*

10 Plaintiff paid the filing fee in full for the instant action.

11 On November 28, 2022, the undersigned ordered the California Department of  
12 Corrections and Rehabilitation (“CDCR”) to file a status report clarifying their records regarding  
13 plaintiff’s filing fee owed in the instant action. (ECF No. 124.) On December 12, 2022, CDCR  
14 informed the court that it mistakenly sent three overpayments to the court toward plaintiff’s filing  
15 fee: 1) \$8 on April 1, 2022; 2) \$14 on July 1, 2022; and 3) \$6 on November 1, 2022. (ECF No.  
16 130.)

17 On December 16, 2022, the undersigned directed the Financial Office of the Court to  
18 refund to plaintiff the \$28 overpaid by CDCR for the filing fee in this action. (ECF No. 131.)

19 After the December 16, 2022 order was filed, the Financial Office of the Court informed  
20 the undersigned that CDCR overpaid \$36, rather than \$28, for plaintiff’s filing fee. (ECF No.  
21 133.) Accordingly, on December 21, 2022, the undersigned directed the Financial Office of the  
22 court to refund \$36 to plaintiff. (Id.)

##### 23 *Discussion*

24 On January 3, 2023, plaintiff filed a letter claiming that CDCR continues to take money  
25 from his trust account to pay the filing fee in this action. (ECF No. 137.) Attached to this letter is  
26 a statement from plaintiff’s trust account reflecting that on July 1, 2022, CDCR send the court  
27 \$14 for the filing fee in this action. (Id. at 3.) On January 4, 2023, plaintiff filed another letter  
28 claiming that CDCR continues to take money from his trust account to pay the filing fee in this


1 action. (ECF No. 138.) Attached to this letter is a statement from plaintiff's trust account  
2 reflecting that on November 1, 2022, CDCR sent the court \$6 for the filing fee in this action. (Id.  
3 at 4.)

4 As discussed above, the court refunded to plaintiff the \$14 and \$6 overpaid by CDCR on  
5 July 1, 2022, and November 1, 2022. Accordingly, the concerns raised in plaintiff's letters, filed  
6 January 3, 2023, and January 4, 2023, regarding overpayment of the filing fee are deemed  
7 resolved.

8 Accordingly, IT IS HEREBY ORDERED that:

- 9 1. Plaintiff's motions for the appointment of counsel (ECF Nos. 134, 136) are denied  
10 without prejudice;
- 11 2. Plaintiff's concerns regarding overpayment of the filing fee raised in his letters filed  
12 January 3, 2023, and January 4, 2023 (ECF Nos. 137, 138), are deemed resolved.

13 Dated: January 18, 2023

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16 KENDALL J. NEWMAN  
17 UNITED STATES MAGISTRATE JUDGE

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