

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JERRY M. FREDERICK,
Plaintiff,
v.
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,
Defendant.

) No. C 08-2222 MMC (PR)
)
) **ORDER ADDRESSING PLAINTIFF’S**
) **PENDING MOTIONS; GRANTING**
) **PLAINTIFF’S REQUEST FOR**
) **EXTENSION OF TIME TO FILE**
) **OPPOSITION TO MOTION FOR**
) **SUMMARY JUDGMENT**
) **(Docket Nos. 19, 20, 40, 43, 52)**

On April 29, 2008, plaintiff, a California prisoner then incarcerated at the Correctional Training Facility at Soledad (“CTF-Soledad”)¹ and proceeding pro se, filed the above-titled civil rights action. Thereafter, the Court granted plaintiff’s application to proceed in forma pauperis and found the complaint stated cognizable claims for injunctive relief and damages under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (“ADA”). The Court ordered the complaint served on the California Department of Corrections and Rehabilitation (“CDCR”), a public entity that is a proper defendant to an ADA claim. Further, the Court dismissed from the action all of the prison employees named as individual defendants, for the reason that individuals cannot be sued directly under the ADA. (Order of Service, filed Sept. 26, 2008 (Docket No. 4) at 3:9-15.)

¹Plaintiff currently is incarcerated at the Sierra Conservation Center in Jamestown.

1 On June 22, 2009, plaintiff filed a motion by which he sought leave to amend the
2 original complaint. The Court construed the filing as a request to add a claim for damages
3 based on an allegation of the unlawful use of excessive force by CTF-Soledad Correctional
4 Counselor P. Taporco (“Taporco”). By order filed July 9, 2009, the Court denied plaintiff’s
5 motion on the ground that plaintiff had not exhausted his administrative remedies with
6 respect to the claim against Taporco prior to filing the instant action, as is required under 42
7 U.S.C. § 1997e(a). (Docket No. 21 at 2:26-3:3.) See McKinney v. Carey, 311 F.3d 1198,
8 1199 (9th Cir. 2002) (holding action brought under § 1983 must be dismissed unless prisoner
9 exhausted available administrative remedies before filing suit, even if claims are fully
10 exhausted while suit is pending). Subsequently, plaintiff filed a notice of appeal with the
11 Ninth Circuit, objecting to the Court’s ruling denying him leave to amend. By order filed
12 September 18, 2009, the Ninth Circuit dismissed the appeal for lack of jurisdiction because
13 the order denying leave to amend is not a final or appealable order. (Docket No. 33.)

14 1. Motion for Leave to File Motion for Reconsideration

15 Now before the Court is plaintiff’s motion for leave to file, pursuant to Civil Local
16 Rule 7-9(a), a motion for reconsideration of the Court’s July 9, 2009 order denying leave to
17 amend the complaint. (Docket No. 40.) In his declaration filed in support of his Rule 7-9(a)
18 motion, plaintiff states that the Court misunderstood his earlier motion for leave to amend the
19 complaint when it construed his argument as one to add an excessive force claim against
20 Taporco. Rather, plaintiff asserts he was merely trying to add additional information to his
21 complaint to include a claim for damages against Taporco for having discriminated against
22 plaintiff under the ADA.

23 The Court finds plaintiff’s argument unpersuasive. First, plaintiff’s proposed
24 amended complaint specifically set forth, in addition to the ADA claim previously found
25 cognizable by the Court, a claim that Taporco violated plaintiff’s Eighth Amendment rights
26 by inflicting physical harm on plaintiff and causing him to suffer emotional distress. (Docket
27 No. 16 at 6-8.) Second, as noted above, the Court expressly informed plaintiff in the Court’s
28 September 26, 2008 Order of Service that individual defendants cannot be sued directly

1 under the ADA. (See Docket No. 4 at 3:9-15.) Consequently, whether, as the Court
2 understood, plaintiff was seeking to add an excessive force claim or, as plaintiff now asserts,
3 he was seeking to add a new claim for damages against Taporco under the ADA, leave to
4 amend was not warranted. Accordingly, plaintiff's motion for leave to file a Rule 7-9(a)
5 motion for reconsideration will be denied, as will plaintiff's motion for leave to submit
6 exhibits in support of his motion for reconsideration. (Docket No. 43.)

7 2. Motion for Extension of Time

8 On December 3, 2009, the CDCR filed a motion for summary judgment. (Docket No.
9 47.) Plaintiff has filed a motion for an extension of time to file opposition thereto. (Docket
10 No. 52.) Good cause appearing, plaintiff's motion will be granted. Plaintiff shall file his
11 opposition on or before February 15, 2010. Defendant shall file a reply within **twenty (20)**
12 days of the date the opposition is filed.

13 3. Motion for Leave to File Additional Exhibits to Complaint

14 Also before the Court is a motion by which plaintiff seeks leave to file additional
15 exhibits to supplement the allegations in his complaint. (Docket No. 19.) The motion will be
16 denied as moot, for the reason that plaintiff may submit such exhibits in support of his
17 opposition to defendant's motion for summary judgment without first including them in his
18 complaint.

19 4. Motion for Appointment of Counsel

20 Plaintiff has filed a motion requesting the appointment of counsel to represent him in
21 this action. (Docket No. 20.) There is no constitutional right to counsel in a civil case such
22 as this. See Lassiter v. Dep't of Social Services, 452 U.S. 18, 25 (1981). Rather, pursuant to
23 28 U.S.C. § 1915, a district court has the power to "request" that counsel represent a litigant
24 who is proceeding in forma pauperis. 28 U.S.C. § 1915(e)(1). The decision to request
25 counsel to represent an indigent litigant under § 1915 is within "the sound discretion of the
26 trial court and is granted only in exceptional circumstances." Franklin v. Murphy, 745 F.2d
27 1221, 1236 (9th Cir. 1984). A finding of "exceptional circumstances" requires an evaluation
28 of (1) the likelihood of the plaintiff's success on the merits, and (2) the plaintiff's ability to

1 articulate his claims pro se in light of the complexity of the legal issues involved. See
2 Agyeman v. Corrections Corp. of America, 390 F.3d 1101, 1103 (9th Cir. 2004). To date,
3 plaintiff has been able to present his claims in an adequate manner and there are no
4 exceptional circumstances warranting appointment of counsel at this time. Should the
5 circumstances of the case materially change, the Court may reconsider plaintiff's request sua
6 sponte. Accordingly, plaintiff's motion for the appointment of counsel will be denied.

7 **CONCLUSION**


8 For the foregoing reasons, the Court orders as follows:

- 9 1. Plaintiff's motions to file a motion for reconsideration and to submit exhibits in
10 support thereof are hereby DENIED. (Docket Nos. 40 & 43.)
11 2. Plaintiff's motion for an extension of time to file opposition to defendant's motion
12 for summary judgment is hereby GRANTED, as set forth above. (Docket No. 52.)
13 3. Plaintiff's motion for leave to file additional exhibits to supplement his complaint
14 is hereby DENIED. (Docket No. 19.)
15 4. Plaintiff's motion for the appointment of counsel is hereby DENIED. (Docket No.
16 20.)

17 This order terminates Docket Nos. 19, 20, 40, 43 and 52.

18 IT IS SO ORDERED.

19 DATED: January 14, 2010

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21 MAXINE M. CHESNEY
22 United States District Judge
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