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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RAYNARD VALLERY,)	Civil No. 08cv00095 DMS(RBB)
)	
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION FOR APPOINTMENT OF
v.)	COUNSEL [ECF NO. 65]
)	
J. BROWN, et al.,)	
)	
Defendants.)	
_____)	

Plaintiff Raynard Vallery, a state prisoner proceeding pro se and in forma pauperis, filed a Complaint on January 16, 2008, and a First Amended Complaint on June 25, 2008, pursuant to 42 U.S.C.A. § 1983 [ECF Nos. 1, 5]. Defendants Allen, Bell, Bourland, Dee, and Stratton filed a Motion to Dismiss and Strike Plaintiff's First Amended Complaint on November 19, 2008; at the time of the Defendants' Motion, Defendant Brown had not been served, and he subsequently filed a separate Motion to Dismiss [ECF Nos. 15, 33-35]. This Court recommended that the Motion to Dismiss and Strike be granted in part and denied in part, and the district court adopted the recommendation [ECF Nos. 32, 45].

1 On October 21, 2009, Vallery filed a Second Amended Complaint
2 against Defendants Dee, Bell, Bourland, Stratton, Brown, and
3 unknown mailroom employees at Calipatria State Prison
4 ("Calipatria") [ECF No. 47].¹ There, Vallery purports to state
5 causes of action arising under the First, Fourth, and Eighth
6 Amendments as well as the Due Process Clause, the Equal Protection
7 Clause, and the Director's Rule. (Second Am. Compl. 12-15, ECF No.
8 47 (citing Cal. Code Regs. tit. 15, § 3401(c)).)

9 Defendants Dee, Bell, Bourland, Stratton, and Brown moved to
10 dismiss Vallery's equal protection and Director's Rule allegations
11 in the Second Amended Complaint for failure to state a claim.
12 (Mot. Dismiss Pl.'s Second Am. Compl. 1-2, ECF No. 48.) The
13 Director's Rule assertions against Defendants Dee, Bell, Bourland,
14 Stratton, and Brown were dismissed with prejudice, but the equal
15 protection claims against all of these Defendants were dismissed
16 without prejudice. (Order Adopting Report & Recommendation 2, ECF
17 No. 55; see Report & Recommendation 24, ECF No. 50.) United States
18 District Judge Dana M. Sabraw gave Plaintiff leave to file a third
19 amended complaint by October 1, 2010, but Vallery did not do so.
20 (See Order Adopting Report & Recommendation 2, ECF No. 55.) On
21 October 15, 2010, Defendants Bell, Bourland, Brown, Dee, and
22 Stratton filed an Answer to the remaining claims alleged in the
23 Second Amended Complaint [ECF No. 56].

24 The Plaintiff filed this Motion for Appointment of Counsel on
25 April 1, 2011 [ECF No. 65]. In support of his request for the
26 appointment of counsel, Vallery asserts the following: (1) He is

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28 ¹ The Court will cite to the Second Amended Complaint using
the page numbers assigned by the Court's electronic filing system.

1 unable to afford an attorney; (2) Plaintiff's imprisonment limits
2 his ability to litigate; (3) the issues in this case require
3 significant investigation and research; (4) Vallery has limited
4 access to the law library and knowledge of the law; (5) he needs
5 assistance with investigating current and former Calipatria
6 employees who are defendants, witnesses, or victims; (6) an
7 attorney would be able to hire investigators and expert witnesses;
8 (7) a trial will likely involve conflicting testimony, and counsel
9 would assist Vallery in presenting evidence and cross-examining
10 witnesses; (8) Plaintiff has had difficulty mailing confidential
11 legal mail from Calipatria and Centinela prisons as well as
12 maintaining possession of his legal materials in Centinela State
13 Prison ("Centinela"); (9) counsel would help protect Vallery's
14 interests during his deposition; and (10) the Plaintiff has
15 attempted to secure counsel but was unsuccessful. (Mot.
16 Appointment Counsel 2-4, ECF No. 65.)

17 "The court may request an attorney to represent any person
18 unable to afford counsel." 28 U.S.C.A. § 1915(e)(1) (West 2006).
19 But "it is well-established that there is generally no
20 constitutional right to counsel in civil cases." United States v.
21 Sardone, 94 F.3d 1233, 1236 (9th Cir. 1996) (citations omitted).
22 There is also no constitutional right to appointed counsel to
23 pursue a § 1983 claim. Rand v. Rowland, 113 F.3d 1520, 1525 (9th
24 Cir. 1997) (citing Storseth v. Spellman, 654 F.2d 1349, 1353 (9th
25 Cir. 1981)); accord Campbell v. Burt, 141 F.3d 927, 931 (9th Cir.
26 1998). Federal courts do not have the authority "to make coercive
27 appointments of counsel." Mallard v. United States Dist. Court,
28 490 U.S. 296, 310 (1989) (discussing § 1915(d)); see also United

1 States v. \$292,888.04 in U.S. Currency, 54 F.3d 564, 569 (9th Cir.
2 1995).

3 Nevertheless, district courts have discretion, pursuant to 28
4 U.S.C.A. § 1915(e)(1), to request attorney representation for
5 indigent civil litigants upon a showing of exceptional
6 circumstances. See Agyeman v. Corrs. Corp. of Am., 390 F.3d 1101,
7 1103 (9th Cir. 2004) (citing Franklin v. Murphy, 745 F.2d 1221,
8 1236 (9th Cir. 1984)). "A finding of the exceptional circumstances
9 of the plaintiff seeking assistance requires at least an evaluation
10 of the likelihood of the plaintiff's success on the merits and an
11 evaluation of the plaintiff's ability to articulate his claims 'in
12 light of the complexity of the legal issues involved.'" Id.
13 (quoting Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir.
14 1986)). "Neither of these factors is dispositive and both must be
15 viewed together before reaching a decision.'" Terrell v. Brewer,
16 935 F.2d 1015, 1017 (9th Cir. 1991) (quoting Wilborn, 789 F.2d at
17 1331).

18 **A. Likelihood of Plaintiff's Success on the Merits**

19 To receive court-appointed counsel, Vallery must present a
20 nonfrivolous claim that is likely to succeed on the merits.
21 Wilborn, 789 F.2d at 1331. In his Second Amended Complaint,
22 Plaintiff alleges numerous causes of action arising under the
23 Constitution.

24 Vallery is currently a prisoner at Centinela, but the
25 allegations in his Second Amended Complaint stem from events that
26 occurred while he was incarcerated at Calipatria State Prison.
27 (Second Am. Compl. 1, ECF No. 47.) Vallery claims that on April
28 15, 2004, and again on 17, 2004, he was sexually harassed by

1 Correctional Officer Brown while Brown's superior, Correctional
2 Sergeant Dee, observed. (Id. at 6-8, 12-13.) In inmate grievances
3 and appeals, the Plaintiff contends that Appeals Coordinator Bell,
4 Warden Bourland, and Correctional Lieutenant Stratton were notified
5 of prior instances of sexual misconduct by Brown; these three
6 Defendants were deliberately indifferent to the substantial risk
7 that Brown would repeat the misconduct against Plaintiff. (Id. at
8 10-12, 14.) Vallery further explains that Defendants Stratton and
9 Bourland failed to have Brown removed from the prison. (Id. at
10 11.) Plaintiff claims to have suffered from elevated blood
11 pressure and depression as a result of Brown's conduct and was
12 consequently placed on medications. (Id. at 9-10, 14.) Vallery
13 believes his equal protection rights were violated when Defendants
14 did not follow regulations when responding to his complaints, yet
15 they did adhere to the regulations when dealing with other
16 prisoners. (Id. at 14-15.) As a result, the Plaintiff alleges
17 that Brown violated the Fourth Amendment when he searched Vallery
18 two times without probable cause and for Brown's sexual
19 gratification. (Id. at 12.)

20 Vallery maintains that unnamed mailroom employees violated his
21 First Amendment rights by preventing the delivery of his
22 correspondence to the FBI. (Id. at 14.) Defendant Dee violated
23 the Eighth Amendment because she was aware of Brown's misconduct
24 and did nothing to prevent it, including failing to report it as
25 required by the Director's Rule. (Id. at 13.) Vallery contends
26 that Defendants Bourland, Stratton, Bell, and unnamed mailroom
27 employees, who were aware of prior complaints against Brown,
28 violated his Eighth Amendment rights by acting with deliberate

1 indifference to the substantial risk that Brown would engage in
2 improper conduct. (Id. at 14.) Bell, Bourland, and Stratton are
3 also alleged to have violated the Director's Rule (Id. at 15.)
4 According to Plaintiff, Defendant Brown violated Plaintiff's due
5 process rights by failing to comply with portions of the Director's
6 Rule that require correctional officers to refrain from sexual
7 abuse and to treat prisoners respectfully. (Id. at 12-13.)
8 Finally, Vallery submits that his equal protection rights were
9 violated. (Id. at 14-15.)

10 As discussed above, Plaintiff's Director's Rule allegations
11 against Defendants Dee, Bell, Bourland, Stratton, and Brown were
12 dismissed with prejudice. (Order Adopting Report & Recommendation
13 2, ECF No. 55; see Report & Recommendation 24, ECF No. 50.)
14 Vallery's equal protection contentions against these five
15 Defendants were dismissed without prejudice. (Order Adopting
16 Report & Recommendation 2, Aug. 27, 2010, ECF No. 55; see Report &
17 Recommendation 24, Apr. 12, 2010, ECF No. 50.) The Plaintiff did
18 not file a third amended complaint. Accordingly, only his
19 allegations arising under the First, Fourth, and Eighth Amendments
20 remain.

21 "[A] prison inmate retains those first amendment rights that
22 are not inconsistent with his status as a prisoner or with the
23 legitimate penological objectives of the corrections system." Pell
24 v. Procunier, 417 U.S. 817, 822 (1974). Prisoners' First Amendment
25 rights include the right to free speech and to petition the
26 government. Bradley v. Hall, 64 F.3d 1276, 1278-79 (9th Cir.
27 1995); see also Sandin v. Conner, 515 U.S. 472, 487 n.11 (1995).
28 Nevertheless, "the constitutional rights that prisoners possess are

1 more limited in scope than the constitutional rights held by
2 individuals in society at large." Shaw v. Murphy, 532 U.S. 223,
3 229 (2001). Prison officials who deliberately deny an inmate
4 access to a legitimate means to petition for redress of grievances
5 may violate the prisoner's right to access to the courts. See
6 Lewis v. Casey, 518 U.S. 342, 353-55 (1996); Vandelft v. Moses, 31
7 F.3d 794, 796 (9th Cir. 1994); Soranno's Gasco, Inc. v. Morgan, 874
8 F.2d 1310, 1314 (9th Cir. 1989) ("The right of access to the courts
9 is subsumed under the first amendment right to petition the
10 government for redress of grievances.").

11 The Fourth Amendment protects against unreasonable searches,
12 and its protections extends to prisoners. Michenfelder v. Sumner,
13 860 F.2d 328, 332 (9th Cir. 1988); see Thompson v. Souza, 111 F.3d
14 694, 699 (9th Cir. 1977). "[T]he reasonableness of a particular
15 search is determined by reference to the prison context."
16 Michenfelder, 860 F.2d at 332. "Courts must consider the scope of
17 the particular intrusion, the manner in which it is conducted, the
18 justification for initiating it, and the place in which it is
19 conducted." Bell v. Wolfish, 441 U.S. 520, 559 (1979). Inmates'
20 legitimate expectations of bodily privacy from persons of the same
21 or opposite sex are extremely limited. Jordan v. Garner, 986 F.2d
22 1521, 1524 (9th Cir. 1993); Grummett v. Rushen, 779 F.2d 491, 495-
23 96 (9th Cir. 1985); see Michenfelder, 860 F.2d 328.

24 The Eighth Amendment "requires that inmates be furnished with
25 the basic human needs, one of which is 'reasonable safety.'" Helling v. McKinney, 509 U.S. 25, 33 (1993) (quoting Deshaney v.
26 Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989)).
27 Therefore, under the Eighth Amendment, a plaintiff has a right to
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1 be protected from harm while in custody. Farmer v. Brennan, 511
2 U.S. 825, 833 (1994); Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir.
3 2000); Valandingham v. Bojorquez, 866 F.2d 1135, 1138 (9th Cir.
4 1989). A sexual assault on an inmate by a guard is "deeply
5 offensive to human dignity." Schwenk v. Hartford, 204 F.3d 1187,
6 1197 (9th Cir 2000). A plaintiff must show that the defendants
7 acted with deliberate indifference to a substantial risk of serious
8 harm to the prisoner's safety. Farmer, 511 U.S. at 834; see Wallis
9 v. Baldwin, 70 F.3d 1074, 1077 (9th Cir. 1995); Madrid v. Gomez,
10 889 F. Supp 1146, 1267-68 (N.D. Cal. 1995). The purported
11 violation must be objectively "sufficiently serious." Farmer, 511
12 U.S. at 834 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)).
13 Also, the prison official must subjectively "know of and disregard
14 an excessive risk to inmate health or safety." Id. at 837.

15 Although Plaintiff's allegations may be sufficient to state a
16 claim for relief, there is insufficient information before the
17 Court to conclude that Vallery is likely to succeed on the merits.
18 See Bailey v. Lawford, 835 F. Supp. 550, 552 (S.D. Cal. 1993).

19 **B. Plaintiff's Ability To Proceed Without Counsel**

20 To be entitled to appointed counsel, Vallery must also show he
21 is unable to effectively litigate the case pro se in light of the
22 complexity of the issues involved. See Wilborn, 789 F.2d at 1331.
23 Courts have required that "indigent plaintiffs make a reasonably
24 diligent effort to secure counsel as a prerequisite to the court's
25 appointing counsel for them." Bailey, 835 F. Supp. at 552.

26 Here, Vallery states he has made efforts to secure counsel,
27 and he attaches to his Motion letters from two attorneys stating
28 that they cannot represent him. (Mot. Appointment Counsel 4-5, ECF

1 No. 65.) Plaintiff has made a reasonably diligent effort to secure
2 counsel prior to seeking an order appointing counsel. Vallery
3 further contends he is unable to afford an attorney and that he has
4 already been granted in forma pauperis status. (Id. at 2.) This
5 argument is not sufficient because indigence alone does not entitle
6 a plaintiff to appointed counsel.

7 Plaintiff raises other grounds for the appointment of counsel.
8 He asserts that his imprisonment will limit his ability to
9 litigate. (Id. at 2.) He describes the issues involved in the
10 case as complex and requiring significant research. (Id.) Vallery
11 also argues that he has limited access to the law library and
12 limited knowledge of the law. (Id.) He alleges a need for an
13 attorney to assist him in coordinating the investigation of current
14 and former Calipatria employees who are defendants, witnesses, or
15 victims. (Id.) Further, a lawyer understands court rules and
16 procedures and would be able to hire investigators and expert
17 witnesses. (Id.) Plaintiff complains that an attorney would also
18 help him present evidence and cross-examine witnesses at trial due
19 to the likelihood of conflicting testimony. (Id.) Moreover, he
20 has experienced difficulty mailing confidential legal mail from
21 Calipatria and Centinela prisons as well as maintaining possession
22 of his legal materials while in Centinela. (Id. at 2-3.) Finally,
23 Vallery explains that counsel would assist Plaintiff in protecting
24 his interests during his deposition. (Id. at 3.) Based on these
25 facts, Vallery requests a court-appointed attorney.

26 Although Plaintiff asserts that his access to legal materials
27 is limited, he has not demonstrated that he is being denied
28 "reasonable" access. See Lindquist v. Idaho State Bd. of Corrs.,

1 776 F.2d 851, 858 (9th Cir. 1985). "[T]he Constitution does not
2 guarantee a prisoner unlimited access to a law library. Prison
3 officials of necessity must regulate the time, manner, and place in
4 which library facilities are used." Id. (citation omitted).
5 Despite his purported frustrations in sending and maintaining his
6 legal mail, Vallery has effectively pursued his claims although he
7 is subjected to burdens experienced by many pro se plaintiffs.

8 Factual disputes and anticipated cross-examination of
9 witnesses do not indicate the presence of complex legal issues
10 warranting a finding of exceptional circumstances. See Rand, 113
11 F.3d at 1525 (holding that while the appellant might have fared
12 better with counsel during discovery and in securing expert
13 testimony, this is not the test). Seeking an attorney to
14 investigate Calipatria employees and to hire expert witnesses is
15 similarly insufficient. Most actions require the development of
16 additional facts during the litigation, and a pro se plaintiff is
17 typically not in the position to easily investigate the facts
18 needed; without more, counsel may not be appointed on this basis.
19 See Wilborn, 789 F.2d at 1131 (footnote omitted). A court-
20 appointed lawyer is also not required for his or her knowledge of
21 court rules or to assist Vallery in depositions. "[A]ny pro se
22 litigant certainly would be better served with the assistance of
23 counsel." Rand, 113 F.3d at 1525; see also Wilborn, 789 F.2d at
24 1331 ("[A] pro se litigant will seldom be in a position to
25 investigate easily the facts necessary to support the case.").
26 Plaintiff is only entitled to appointed counsel if he can show
27 "that because of the complexity of the claims he [is] unable to
28 articulate his positions." Rand, 113 F.3d at 1525. Vallery has

1 not demonstrated anything in the record that makes this case
2 "exceptional" or the issues in it particularly complex.

3 Moreover, Plaintiff's Second Amended Complaint is adequate in
4 form. Vallery was able to amend his Complaint twice, seek numerous
5 extensions of time to respond to various deadlines, oppose two
6 Motions to Dismiss, ask that the Court assist him in serving
7 Defendant Brown, request the appointment of counsel, and file two
8 discovery motions. (ECF Nos. 1, 5, 17, 20, 22, 41, 44, 47, 49, 65,
9 67, 69); see Plummer v. Grimes, 87 F.3d 1032, 1033 (8th Cir. 1996)
10 (finding the district court did not abuse its discretion in denying
11 plaintiff counsel, in part because plaintiff adequately filed a
12 complaint and other pre-trial materials).

13 The "exceptional circumstances" required for appointment of
14 counsel pursuant to 28 U.S.C.A. § 1915(e)(1) are absent. Because
15 Plaintiff has failed to demonstrate either a likelihood of success
16 on the merits or an inability to represent himself beyond the
17 ordinary burdens encountered by pro se prisoners, Vallery's Motion
18 for Appointment of Counsel is **DENIED** without prejudice.

19 **IT IS SO ORDERED.**

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21 DATE: June 23, 2011


RUBEN B. BROOKS
United States Magistrate Judge

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23 cc: Judge Sabraw
24 All Parties of Record

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