

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RUBEN DARIO GARCIA, JR.,)	Civil No. 10cv1187 AJB(RBB)
)	
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION FOR APPOINTMENT OF
v.)	COUNSEL [ECF NO. 82]
)	
SMITH, STEWART, CHANCE, MOORE,)	
CLUCK, VASQUEZ, WALL, BROWN,)	
STRICKLAND, ELIAS, SAVALA,)	
MERCHANT, SUGLICH, CONTRERAS,)	
MORRIS, CORTEZ, PEDERSEN,)	
HIRING AUTHORITY JOHN/JANE)	
DOE'S #1 TO 5,)	
)	
Defendants.)	
)	

Plaintiff Ruben Dario Garcia, Jr., a state prisoner proceeding pro se and in forma pauperis, filed a Complaint on June 1, 2010, pursuant to 42 U.S.C. § 1983 [ECF No. 1, 5]. Garcia's complaint was dismissed for failure to state a claim [ECF No. 5]. Plaintiff filed a First Amended Complaint on October 5, 2010, which was also dismissed sua sponte for failing to state a claim [ECF Nos. 9, 15].

Garcia filed a Second Amended Complaint on December 7, 2010, alleging claims for cruel and unusual punishment, a due process violation, retaliation, conspiracy, a violation of equal

1 protection, and interference with his access to the courts [ECF No.
2 16]. On February 3, 2011, the due process, cruel and unusual
3 punishment, and access to courts causes of action were dismissed
4 for failing to state a claim [ECF No. 17]. The Defendants filed a
5 Motion to Dismiss the Second Amended Complaint [ECF No. 50], which
6 was granted in part and denied in part [ECF Nos. 64, 72].
7 Defendants Brown, Chance, Cluck, Contreras, Cortez, Elias,
8 Merchant, Moore, Savala, Smith, Stewart, Vasquez, and Wall
9 subsequently filed an Answer [ECF No. 74].

10 Garcia filed this Motion to Appoint Counsel nunc pro tunc to
11 April 17, 2012 [ECF No. 82]. In support of his request for
12 counsel, the Plaintiff asserts that (1) the issues in this case are
13 factually complex, (2) he is unable to investigate, (3) the matter
14 involves conflicting testimony and credibility will be central to
15 his case, (4) Garcia is unable to adequately present his claims,
16 (5) his causes of action have merit, and (6) the issues are legally
17 complex. (Mot. Appointment Counsel 5-12, ECF No. 82.)¹ On May 2,
18 2012, the Defendants' Memorandum of Points and Authorities in
19 Opposition to Plaintiff's Motion for the Appointment of Counsel was
20 filed [ECF No. 83]. There, Defendants argue that none of
21 Plaintiff's stated reasons are "exceptional circumstances" that
22 warrant appointed representation. (Defs.'s Mem. P. & A. Opp'n 2-5,
23 ECF No. 83.)

24 "The court may request an attorney to represent any person
25 unable to afford counsel." 28 U.S.C.A. § 1915(e)(1) (West 2006).

26
27 ¹ Because the Motion for Appointment of Counsel and
28 attachments are not consecutively paginated, the Court will cite to
them using the page numbers assigned by the electronic case filing
system.

1 But "it is well-established that there is generally no
2 constitutional right to counsel in civil cases." United States v.
3 Sardone, 94 F.3d 1233, 1236 (9th Cir. 1996) (citations omitted).
4 There is also no constitutional right to appointed counsel to
5 pursue a § 1983 claim. Rand v. Rowland, 113 F.3d 1520, 1525 (9th
6 Cir. 1997) (citing Storseth v. Spellman, 654 F.2d 1349, 1353 (9th
7 Cir. 1981)); accord Campbell v. Burt, 141 F.3d 927, 931 (9th Cir.
8 1998). Federal courts do not have the authority "to make coercive
9 appointments of counsel." Mallard v. U.S. Dist. Court, 490 U.S.
10 296, 310 (1989) (discussing § 1915(d)); see also United States v.
11 \$292,888.04 in U.S. Currency, 54 F.3d 564, 569 (9th Cir. 1995).

12 Nevertheless, district courts have discretion, pursuant to 28
13 U.S.C. § 1915(e)(1), to request attorney representation for
14 indigent civil litigants upon a showing of exceptional
15 circumstances. See Agyeman v. Corr. Corp. of Am., 390 F.3d 1101,
16 1103 (9th Cir. 2004) (citing Franklin v. Murphy, 745 F.2d 1221,
17 1236 (9th Cir. 1984)). "A finding of the exceptional circumstances
18 of the plaintiff seeking assistance requires at least an evaluation
19 of the likelihood of the plaintiff's success on the merits and an
20 evaluation of the plaintiff's ability to articulate his claims 'in
21 light of the complexity of the legal issues involved.'" Id.
22 (quoting Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir.
23 1986)). "'Neither of these factors is dispositive and both must be
24 viewed together before reaching a decision.'" Terrell v. Brewer,
25 935 F.2d 1015, 1017 (9th Cir. 1991) (quoting Wilborn, 789 F.2d at
26 1331).

27

28

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

2 To receive court-appointed counsel, Garcia must present a
3 nonfrivolous claim that is likely to succeed on the merits.
4 Wilborn, 789 F.2d at 1331. The contentions in Garcia's Second
5 Amended Complaint arise from events that occurred while he was
6 incarcerated at Richard J. Donovan Correctional Facility in San
7 Diego, California ("Donovan"). (Second Am. Compl. 1, ECF No. 16.)²
8 The Plaintiff's surviving claims are for retaliation, conspiracy,
9 and a violation of equal protection.

10 In count one, Garcia asserts that the Defendants retaliated
11 and conspired to retaliate against him for submitting an inmate
12 grievance. (Second Am. Compl. 8-15, ECF No. 16.) The grievance
13 was based on a policy that required all inmates to walk single file
14 with their shirts tucked in when they went to "chow hall." (Id. at
15 8.) Plaintiff urges that the Defendants retaliated by placing him
16 in administrative segregation and, without looking at his central
17 file, housing him with inmates that he was to be segregated from.
18 (Id. at 11-13.)

19 Next, in count two, Garcia contends that the Defendants
20 continued to retaliate and conspire against him when they refused
21 his request under the "convenient cell move program" to be housed
22 with his brother. (Id. at 17.) The Defendants purportedly granted
23 four other sets of brothers' requests during this period, but
24 denied his request. (Id. at 18.)

25 The Plaintiff maintains in count three that Defendants
26 violated his equal protection rights by denying his request to be

27
28 ² The Court will also cite to the Second Amended Complaint
using the page numbers assigned by the electronic case filing
system.

1 reassigned to his job in the prison laundry division after he was
2 released from administrative segregation. (Id. at 19.) The
3 Defendants continued to deny his requests even though there were at
4 least thirty openings in the laundry division since Garcia's
5 release from administrative segregation. (Id.)

6 Finally, in count four, Plaintiff makes generalized
7 allegations of a conspiracy to violate his civil rights,
8 reiterating the constitutional violations he specified in counts
9 one, two, and three. (Id. at 20.)

10 To state a conspiracy claim under § 1983, a plaintiff must
11 show (1) an agreement between the defendants to deprive plaintiff
12 of a constitutional right, (2) an overt act in furtherance of the
13 conspiracy, and (3) a constitutional deprivation. Garcia v. Grimm,
14 No. 1:06-cv-225-WQH (PCL), 2011 U.S. Dist. LEXIS 20522, at *24
15 (S.D. Cal. Mar. 2, 2011); see also Gilbrook v. City of Westminster,
16 177 F.3d 839, 856-57 (9th Cir. 1999). Because conspiracies are
17 secret agreements, "[a] defendant's knowledge of and participation
18 in a conspiracy may be inferred from circumstantial evidence and
19 from evidence of the defendant's actions." Gilbrook, 177 F.3d at
20 856-57. Conclusory allegations of conspiracy are insufficient to
21 state a claim for relief. Burns v. County of King, 883 F.2d 819,
22 821 (9th Cir. 1989). To plead a claim of conspiracy under § 1983,
23 plaintiff must allege facts with sufficient particularity to show
24 an agreement or a meeting of the minds to violate the plaintiff's
25 constitutional rights. Miller v. California, 355 F.3d 1172, 1177
26 n.3 (9th Cir. 2004); Marqolis v. Ryan, 140 F.3d at 853; Woodrum v.
27 Woodward County, 866 F.2d 1121, 1126 (9th Cir. 1989).

28

1 Government officials may not retaliate against prisoners who
2 exercise their First Amendment rights. Vignolo v. Miller, 120 F.3d
3 1075, 1077-78 (9th Cir. 1997); Soranno's Gasco, Inc. v. Morgan, 874
4 F.2d 1310, 1314 (9th Cir. 1989). Inmates have a First Amendment
5 right to meaningful access to the courts that includes the right to
6 use established prison grievance procedures. Trueman v. State, No.
7 CV 09-2179-PHX-RCB(DKD), 2010 U.S. Dist. LEXIS 67847, at *12 (D.
8 Ariz. June 15, 2010) (citing Bradley v. Hall, 64 F.3d 1276, 1279
9 (9th Cir. 1995)). Prisoner retaliation allegations are reviewed
10 with particular care. Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir.
11 1995).

12 Finally, "whenever the government treats any person unequally
13 because of his or her [membership in a protected class], that
14 person has suffered an injury that falls squarely within the
15 language and spirit of the Constitution's guarantee of equal
16 protection." Adherent Constructors, Inc. v. Pena, 515 U.S. 200,
17 229-30 (1995). The equal protection guarantee safeguards not only
18 groups of people, but also individuals who would constitute a
19 "class of one." Vill. of Willowbrook v. Olech, 528 U.S. 562, 564
20 (2000).

21 A plaintiff can establish an equal protection cause of action
22 by demonstrating that the defendant intentionally discriminated on
23 the basis of plaintiff's membership in a protected class, such as
24 race, religion, national origin, and poverty. Barren v.
25 Harrington, 152 F.3d 1193, 1194-95 (9th Cir. 1998); Damiano v. Fla.
26 Parole & Prob. Comm'n, 785 F.2d 929, 932-33 (11th Cir. 1986); see
27 United States v. Whitlock, 639 F.3d 935, 941 (9th Cir. 2011)
28 (stating that prisoners do not constitute a suspect class for equal

1 protection purposes). Alternatively, if the state action does not
2 implicate a fundamental right or a suspect classification, a
3 plaintiff can make an equal protection claim by establishing that
4 the defendant intentionally treated plaintiff differently from
5 other similarly situated individuals without a rational basis for
6 the difference in treatment. Engquist v. Or. Dep't of Agric., 553
7 U.S. 591, 601 (2008); Olech, 528 U.S. at 564.

8 In his Motion for Appointment of Counsel, Garcia argues that
9 he is entitled to an attorney because if he can prove his
10 allegations, it would establish clear constitutional violations.
11 (Mot. Appointment Counsel 12, ECF No. 82.) Plaintiff urges that,
12 on its face, his case is meritorious. (Id.) In their Opposition,
13 Defendants insist that Garcia has failed to present any arguments
14 or evidence demonstrating that he will prevail on the merits.
15 (Def.' Mem. P. & A. Opp'n 3, ECF No. 83.) They argue that
16 Plaintiff has merely demonstrated the sufficiency of the pleadings.
17 (Id.)

18 Although Garcia's retaliation, conspiracy, and equal
19 protection claims survived Defendant's Motion to Dismiss, it is too
20 early to determine the likelihood of success on the merits.
21 Without more, it is not certain whether any of Plaintiff's causes
22 of action will survive summary judgment. See Harris v. Duc, No. S
23 CIV 06-2138 DOC, 2009 U.S. Dist. LEXIS 68786, at *10 (E.D. Cal.
24 July 21, 2009); see also Bailey v. Lawford, 835 F. Supp. 550, 552
25 (S.D. Cal. 1993). This factor does not support Garcia's request
26 for an appointed lawyer.

27

28

1 **B. Plaintiff's Ability to Proceed Without Counsel**

2 The Court must also consider whether Plaintiff is able to
3 effectively litigate the case pro se in light of the complexity of
4 the issues involved. See Wilborn, 789 F.2d at 1331.

5 Courts generally require, as a threshold matter, that
6 Plaintiff show that (1) he is indigent, and (2) that he "has made a
7 reasonably diligent effort to secure counsel." Bailey v. Lawford,
8 835 F. Supp. 550, 552 (S.D. Cal. 1993); see Cota v. Scribner, No.
9 09cv2507-AJB (BLM), 2012 U.S. Dist. LEXIS 20460, at *2-3 (S.D. Cal.
10 Feb. 16, 2012). Here, Garcia has claimed that he is indigent.
11 (Mot. Appointment Counsel 1, ECF No. 82.) Yet, Defendants urge
12 that he has failed to allege that he has made a diligent effort to
13 secure counsel. (Defs.' Mem. P. & A. Opp'n 5, ECF No. 83.) Garcia
14 does not show that he made any attempt to obtain a lawyer. Merely
15 alleging indigence is insufficient to entitle him to appointed
16 counsel; he must also demonstrate that he made a good faith effort,
17 but was unable, to obtain counsel prior to filing this Motion. See
18 Bailey, 835 F. Supp. at 552.

19 Plaintiff insists that this case is factually complex because
20 of the "sheer number of claims and defendants" involved. (Mot.
21 Appointment Counsel 6, ECF No. 82.) Defendants counter that Garcia
22 is more than capable of setting forth the factual basis for his
23 claims. (Defs.' Mem. P. & A. Opp'n 3, ECF No. 83.) Plaintiff has
24 demonstrated, in his Second Amended Complaint, that he can
25 adequately articulate the facts to support his causes of actions.
26 See Pough v. Almager, No. 08cv1498 JM(RBB), 2010 U.S. Dist. LEXIS
27 51782, at *1-3 (S.D. Cal. May 26, 2010) (finding no exceptional
28 circumstance due to factual complexity because plaintiff was able

1 to "adequately set forth a factual basis for his claims."); Shields
2 v. Davis, No. C 07-0157 RMW (PR), 2008 U.S. Dist. LEXIS 90687, at
3 *2-3 (N.D. Cal. Oct. 27, 2008) (denying motion for appointment of
4 counsel because the case was not particularly complex).

5 Garcia also proffers that he is unable to investigate the
6 matter pro se. (Mot. Appointment Counsel 6, ECF No. 82.)
7 Specifically, he claims that he needs to obtain the identity of
8 witnesses, the officers' reports and statements, and the officers'
9 histories of abuse of authority. (Id. (citing Tucker v. Dickey,
10 613 F. Supp. 1124, 1133-34 (W.D. Wis. 1985)).) The Defendants
11 counter that every case requires discovery, and the Ninth Circuit
12 has recognized that this is not a ground entitling an inmate to
13 appointed counsel. (Defs.' Mem. P. & A. Opp'n 4, ECF No. 83.)
14 Indeed, most lawsuits require the development of facts over the
15 course of the litigation, and pro se plaintiff's are typically not
16 in the position to easily investigate the facts. See Davidson v.
17 Vail, No. C11-6048 BHS/KLS, 2012 U.S. Dist. LEXIS 82003, at *2-4
18 (W.D. Wash. June 13, 2012) (citing Wilborn, 789 F.2d at 1331).
19 Although the investigation may be difficult, it does not rise to
20 the level of an "exceptional circumstance" that would entitle
21 Garcia to appointed counsel.

22 Plaintiff next asserts that he is entitled to appointed
23 counsel because conflicting testimony in this case creates a
24 credibility contest between the Defendants and himself. (Mot.
25 Appointment Counsel 6, ECF No. 82 (citing Gatson v. Coughlin, 679
26 F. Supp. 270 (W.D.N.Y. 1988).) Defendants urge that Garcia has
27 been able articulate his claims with a high level of verbal and
28 legal proficiency. (Defs.' Mem. P. & A. Opp'n 3, ECF No. 83.)

1 Nevertheless, conflicting testimony and factual disputes are not
2 "exceptional circumstances" that entitle a plaintiff to appointed
3 counsel. See Rand, 113 F.3d at 1525 (holding that while appellant
4 might have fared better with counsel during discovery and in
5 securing expert testimony, this is not the test).

6 Plaintiff insists that is unable to adequately present his
7 case because he has no legal education and was barely able to earn
8 his "General Equivalent Degree (GED) Certificate" at the age of
9 thirty-nine. (Mot. Appointment Counsel 7, ECF No. 82.) Further,
10 he has no legal education and must therefore depend on the
11 assistance of "jailhouse lawyers" who are limited in their
12 abilities to help Garcia. (Id.) As a result, more than fifteen
13 notices of document discrepancies have been issued by the Court,
14 which could have caused the dismissal of his case. (Id.)
15 Additionally, Plaintiff contends that he suffers from a mental
16 illness and is taking "multiple powerful antipsychotic medications
17 3 times a day" that obstruct his ability to concentrate, read, and
18 understand. (Id.)

19 Despite Garcia's claimed legal shortcomings, he has not shown
20 that his burden will be greater than those that are typically
21 experienced by incarcerated pro se plaintiffs. Additionally,
22 Plaintiff has demonstrated that he is capable of navigating the
23 legal process. His Second Amended Complaint is adequate in form,
24 and Garcia presented a detailed recitation of the underlying facts
25 against multiple defendants. (See Second Am. Compl. 7-23, ECF No.
26 16.) Additionally, Plaintiff evidenced his legal understanding
27 when he cited relevant legal authority to support his claims. (See
28 id. at 20, 23.) Garcia further supported his claims with over 200

1 pages of exhibits. (See id. citing Attachs. #1-5 Exs. 1-25.)
2 Plaintiff also was able to file a Motion for Reconsideration [ECF
3 No. 20], appeals to the Ninth Circuit [ECF Nos. 22, 49, 76], an
4 Opposition to Defendants' Motion to Dismiss [ECF No. 58], a
5 Surreply [ECF No. 63], and this Motion for Appointment of Counsel
6 [ECF No. 82].

7 Plaintiff has not demonstrated that he is unable to proceed as
8 a pro se litigant. See Harris, 2009 U.S. Dist. LEXIS 68786, at
9 *11-13 (finding no exceptional circumstances, in part, because
10 plaintiff was able to submit adequate documentation and motion
11 work); see also Agyeman, 390 F.3d at 1103 (reviewing for abuse of
12 discretion and explaining that a finding of exceptional
13 circumstances justifying appointment of counsel requires an
14 evaluation of plaintiff's ability to articulate his claims);
15 Plummer v. Grimes, 87 F.3d 1032, 1033 (8th Cir. 1996) (finding the
16 district court did not abuse its discretion in denying plaintiff
17 counsel, in part because plaintiff adequately filed a complaint and
18 other pretrial materials). Garcia also has not demonstrated how
19 his mental state impairs his ability to proceed pro se. Again,
20 based on the filings to date, Plaintiff appears to be able to
21 adequately present his claims. See Jones v. Frazesn, No. 2:07-cv-
22 02769 RCT, 2009 U.S. Dist. LEXIS 49639 at *2-3 (E.D. Cal. June 1,
23 2009) (finding no exceptional circumstance when plaintiff claimed
24 his pain medication impaired his ability to read and write).

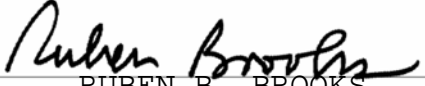
25 Finally, Garcia contends that the issues in his case are
26 legally and factually complex. (Mot. Appointment Counsel 8-12, ECF
27 No. 82.) He maintains that the court dismissed one of his claims
28 without properly following the law. (Id. at 8.) In their

1 Opposition, Defendants assert that the issues are not complicated,
2 and will likely hinge on whether their actions were justified.
3 (Defs.' Mem. P. & A. Opp'n 4, ECF No. 83.) The Plaintiff is only
4 entitled to appointed counsel if he can show "that because of the
5 complexity of the claims he [is] unable to articulate his
6 positions." Rand, 113 F.3d at 1525 ("[A]ny pro se litigant
7 certainly would be better served with the assistance of counsel.").
8 Garcia has not demonstrated that his case is "exceptional" or that
9 the issues are particularly complex. He also has been able to
10 sufficiently articulate his positions to survive a motion to
11 dismiss the claims.

12 Therefore, Plaintiff has not sufficiently established
13 exceptional circumstances that would entitle him to appointed
14 counsel at this stage. See Agyeman, 390 F.3d at 1103. Garcia's
15 Motion for Appointment of Counsel is **DENIED**.

16 **IT IS SO ORDERED.**

17
18 DATE: June 27, 2012


RUBEN B. BROOKS
United States Magistrate Judge

19
20 cc: Judge Battaglia
21 All Parties of Record
22
23
24
25
26
27
28