

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GUSTAVO MCKENZIE,)	Civil No. 12cv1602 BEN (RBB)
)	
Plaintiff,)	ORDER DENYING MOTION FOR
)	APPOINTMENT OF COUNSEL
v.)	PURSUANT TO 28 U.S.C. 1915(d)
)	& (e)(1) [ECF NO. 35]
R. CASILLAS, J. NUTT, M.D.)	
CARPIO, J. OLIVO, HECTOR LOPEZ,)	
D. RODERICK, E. URIBE, E.)	
CASTILLO, R. LIZARRAGA, B.)	
HATFIELD, J. SALCEDA, DOE 1, P.)	
ALANIS,)	
)	
Defendants.)	
)	
)	

Plaintiff Gustavo McKenzie, a state prisoner proceeding pro se and in forma pauperis, initiated this civil rights action pursuant to 42 U.S.C. 1983, alleging that Defendants violated the First Amendment when they retaliated against him for filing internal grievances and a civil action against prison employees. (Compl. 7-17, ECF No. 1; Order Granting Pl.'s Mot. Proceed In Forma Pauperis 1, ECF No. 4.)¹ Before the Court is McKenzie's Motion for

¹ Because the Complaint is not consecutively paginated, the Court will cite to the page numbers assigned by the electronic case filing system.

1 Appointment of Counsel, filed nunc pro tunc to January 2, 2013 [ECF
2 No. 35].

3 **I. Procedural Background**

4 This lawsuit relates to a civil rights action McKenzie filed
5 on March 25, 2010, against several prison employees in California
6 Superior Court ("underlying action"). That case was subsequently
7 removed to the United States District Court for the Southern
8 District of California on December 8, 2010. See McKenzie v. Ellis,
9 No. 10cv1490-LAB (MDD), 2011 U.S. Dist. LEXIS 118373, at *1-2 (S.D.
10 Cal. July 18, 2011) (report and recommendation regarding
11 defendants' motion to dismiss complaint). In the underlying
12 action, McKenzie claimed that Defendants violated his First and
13 Fourteenth Amendment rights when they refused to accommodate his
14 religious dietary needs. Id. at *1-5. Plaintiff's federal claims
15 were dismissed without leave to amend, and his state claims were
16 remanded to the California Superior Court on September 13, 2012.
17 McKenzie v. Ellis, No. 10cv1490-LAB [MDD] 2012 U.S. Dist. LEXIS
18 130973, at *1 (S.D. Cal. Sept. 13, 2012) (order dismissing federal
19 claims and remanding case to state court).

20 McKenzie filed his Complaint in this matter on June 27, 2012,
21 naming thirteen Defendants [ECF No. 1]. Plaintiff alleges that
22 Defendants retaliated against him for filing internal grievances
23 and the underlying lawsuit. (Compl. 7-17, ECF No. 1.) Plaintiff
24 maintains that Defendants have engaged in various retaliatory
25 actions, including breaking Plaintiff's typewriter; writing a false
26 rule violation report; "maliciously" imposing various sanctions as
27 punishment; refusing to accommodate Plaintiff's religious dietary
28 requirements even though he had a "Religious Diet Card"; removing

1 McKenzie from the "Religious Diet List"; threatening to fight
2 Plaintiff; denying McKenzie "allowable books, hygiene items[,] and
3 some collectible postcards[]" that were provided to everyone else
4 housed in Plaintiff's unit; and arbitrarily rejecting McKenzie's
5 inmate grievances. (Id. at 8-17.)

6 On October 2, 2012, Defendants filed a Motion to Revoke
7 Plaintiff's IFP Status and Dismiss [ECF No. 20] ("Motion to Revoke
8 and Dismiss"). Defendants maintain that McKenzie has three strikes
9 within the meaning of 28 U.S.C. § 1915(g) and that he is not in
10 imminent danger of serious physical injury. (Defs.' Mot. Revoke &
11 Dismiss 2, ECF No. 20.) Plaintiff filed an Opposition, claiming
12 that Defendants' Motion to Revoke and Dismiss was untimely pursuant
13 to Federal Rule of Civil Procedure 12(a)(1)(A)(i) and that he does
14 not have three strikes within the meaning of 28 U.S.C. § 1915(g).
15 (Opp'n Defs.' Mot. Revoke & Dismiss 5-11, ECF No. 22.)² Defendants
16 filed their Reply on November 2, 2012, asserting that their motion
17 was timely filed pursuant to Federal Rule of Civil Procedure
18 12(a)(1)(A)(ii) and that McKenzie failed to show that he does not
19 have three strikes within the meaning of 28 U.S.C. § 1915(g).
20 (Defs.' Reply Pl.'s Opp'n 1-2, ECF No. 23.) Defendants' Motion to
21 Revoke and Dismiss is currently pending before the Honorable Roger
22 T. Benitez.

23 Plaintiff submitted a Motion for Entry of Default against
24 Defendant J. Nutt, which was filed nunc pro tunc to November 30,
25 2012 [ECF No. 29]. Nutt filed an opposition on December 11, 2012,
26 stating that he timely responded in this case before McKenzie moved
27

28 ² The Court cites to the page numbers assigned by the
electronic case filing system.

1 for default. (Def.'s Opp'n Mot. Entry Default 2, ECF No. 30.)
2 Plaintiff filed a reply on December 26, 2012 [ECF No. 32]. The
3 Honorable Roger T. Benitez denied McKenzie's Motion for Entry of
4 Default on January 3, 2013 [ECF No. 33].

5 Plaintiff's Motion for Appointment of Counsel ("Motion") was
6 filed nunc pro tunc to January 2, 2013 [ECF No. 35]. McKenzie
7 asserts that appointed counsel is appropriate for several reasons:
8 (1) Defendants' ongoing retaliation is resulting in "periodic
9 denials of access to the facility's law library"; (2) his medical
10 condition (open-angle glaucoma) has resulted in the loss of vision
11 in his right eye, which has "become a major impediment in the
12 preparation of documents"; (3) he is a "layman at law"; and (4) he
13 has been unable to obtain independent counsel. (Mot. Appointment
14 Counsel 5, ECF No. 35.)

15 II. Discussion

16 Plaintiff requests the appointment of counsel to assist him in
17 prosecuting this civil action. The Constitution does not provide a
18 right to appointment of counsel in a civil case unless an indigent
19 litigant may lose his physical liberty if he loses the litigation.
20 Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981).

21 Nonetheless, district courts maintain discretion to appoint counsel
22 for indigent persons. 28 U.S.C.A. § 1915(e)(1) (West 2012). This
23 discretion may be exercised only under "exceptional circumstances."
24 Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991).

25 A finding of exceptional circumstances requires an
26 evaluation of both "the likelihood of success on the
27 merits [and] the ability of the petitioner to articulate
28 his claims pro se in light of the complexity of the legal
issues involved." Neither of these factors is
dispositive and both must be viewed together before
reaching a decision

1 Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986)
2 (alteration in original) (quoting Weygandt v. Look, 718 F.2d 952,
3 954 (9th Cir. 1983)). When examining a plaintiff's ability to
4 proceed pro se, courts generally require, as a threshold matter,
5 the plaintiff to show that (1) he is indigent, and (2) he "has made
6 a reasonably diligent effort to secure counsel." Bailey v.
7 Lawford, 835 F. Supp. 550, 552 (S.D. Cal. 1993); see also Cota v.
8 Scribner, No. 09cv2507-AJB (BLM), 2012 U.S. Dist. LEXIS 20460, at
9 *2-3 (S.D. Cal. Feb. 16, 2012).

10 McKenzie alleges that he has "writ[en] to numerous pro bono
11 attorneys, and legal clinics, with no response." (Mot. Appointment
12 Counsel 5, ECF No. 35.) Thus, Plaintiff appears to have made a
13 reasonably diligent effort to obtain counsel. See Cota, 2012 U.S.
14 Dist. LEXIS 20460, at *3 (holding that the plaintiff had shown a
15 reasonably diligent effort to secure counsel by "stat[ing] that he
16 attempted to secure counsel on his own[]" (emphasis added) (citing
17 Bailey, 835 F. Supp. at 552)). Appointment of counsel is
18 nonetheless inappropriate at this time because McKenzie's Complaint
19 may not withstand Defendants' pending Motion to Dismiss [ECF No.
20 20]. See Harris v. Duc, No. S CIV 06-2138 DOC, 2009 U.S. Dist.
21 LEXIS 68786, at *10 (E.D. Cal. July 21, 2009) (denying motion to
22 appoint counsel due to insufficient information to assess
23 likelihood of success on merits); see also Bailey, 835 F. Supp. at
24 552.

25 Defendants filed a motion to revoke Plaintiff's in forma
26 pauperis status under 28 U.S.C. § 1915(g), alleging that McKenzie
27 has accumulated three strikes within the meaning of the statute,
28 and he is not in imminent danger of serious bodily injury. (Defs.'

1 Mot. Revoke & Dismiss 2, ECF No. 20.) Judge Benitez issued a
2 minute order indicating that the motion would be submitted on the
3 papers; the hearing date was vacated; and the court intended to
4 issue a written order [ECF No. 24].

5 Section 1915(g) prohibits a prisoner from proceeding in forma
6 pauperis if, while incarcerated, he has brought at least three
7 prior lawsuits "in a court of the United States that [were]
8 dismissed on the grounds that [they were] frivolous, malicious, or
9 fail[ed] to state a claim upon which relief may be granted"
10 28 U.S.C.A. § 1915(g) (West 2006). A defendant who challenges a
11 plaintiff's in forma pauperis status bears the initial burden of
12 providing the court with documentation of prior dismissals that
13 count as strikes under § 1915(g). Andrews v. King, 398 F.3d 1113,
14 1120 (9th Cir. 2005). After a defendant has produced sufficient
15 evidence to make a prima facie case for revocation of a plaintiff's
16 in forma pauperis status, the burden shifts to the plaintiff, who
17 "bears the ultimate burden of persuading the court that § 1915(g)
18 does not preclude [in forma pauperis] status." Id.

19 "[O]nce a prisoner has accumulated three strikes, he is
20 prohibited by § 1915(g) from pursuing any other action [in forma
21 pauperis] in federal court unless he is under 'imminent danger of
22 serious physical injury.'" McNeil v. Eply, No. 09-2485 BEN (CAB),
23 2009 U.S. Dist. LEXIS 120520, at *3 (S.D. Cal. Dec. 28, 2009)
24 (quoting 28 U.S.C. § 1915(g)). "Prisoners qualify for the
25 exception based on the alleged conditions at the time the complaint
26 was filed." Andrews v. Cervantes, 493 F.3d 1047, 1052 (9th Cir.
27 2007); see also id. at 1056-57 (holding that plaintiff satisfied
28 the imminent danger exception in § 1915(g) because he alleged that

1 the defendants' ongoing practice of housing plaintiff with
2 contagious cell mates placed him at risk of contracting serious
3 disease). "[T]he exception applies if the complaint makes a
4 plausible allegation that the prisoner faced imminent danger of
5 serious physical injury at the time of filing." Id. at 1055
6 (internal quotation marks omitted).

7 McKenzie does not make any plausible allegations that he faced
8 imminent serious bodily injury on June 27, 2012, the date he filed
9 his Complaint. See id. Although Plaintiff contends that Defendant
10 Uribe threatened to fight McKenzie six months earlier, on January
11 22, 2011, Plaintiff does not state that the threat is ongoing, nor
12 does he maintain that he is in imminent danger of serious bodily
13 injury. (See Compl. 13, EFC No. 1; Opp'n Defs.' Mot. Revoke &
14 Dismiss 1-2, ECF No. 22); see also Tierney v. Atkins, No. 12-00308
15 SOM/KSC, 2012 U.S. Dist. LEXIS 76982, at *6 (D. Haw. June 4, 2012).
16 "'[A] prisoner's allegation that he faced danger in the past' does
17 not satisfy § 1915(g)'s imminent danger exception[]." Tierney,
18 2012 U.S. Dist. LEXIS 76982, at *6 (quoting Abdul-Akbar v.
19 McKelvie, 239 F.3d 307, 311 (3rd Cir. 2001)); see also Cervantes,
20 493 F.3d at 1053 ("[T]he availability of the exception turns on the
21 conditions a prisoner faced at the time the complaint was filed,
22 not at some earlier or later time."). Thus, if the imminent danger
23 exception in § 1915(g) does not apply, and Plaintiff has three
24 strikes under the statute, he will lose his ability to proceed
25 without the prepayment of filing fees. See Griffin v. U.S.
26 Marshals, No. 10cv2246 H (CAB), 2010 U.S. Dist. LEXIS 127779, at *5
27 (S.D. Cal. Nov. 30, 2010) (denying in forma pauperis status and
28 dismissing for failure to pay filing fee).

1 In support of their Motion to Revoke and Dismiss, Defendants
2 have identified six of Plaintiff's previous cases that they contend
3 count as five strikes under § 1915(g),³ along with supporting
4 documents. (Defs.' Mot. Revoke & Dismiss Attach. #1 Mem. P. & A.
5 3-5, ECF No. 20; id. Attach. #2 Defs.' Req. Judicial Notice, 1-60.)
6 In his Opposition to Defendants' Motion to Revoke, McKenzie argues
7 that (1) the motion is untimely; (2) he does not have three strikes
8 under § 1915(g); and (3) the district court should not take
9 judicial notice of Defendants' submissions. (See Opp'n Defs.' Mot.
10 Revoke & Dismiss 4-11, ECF No. 22.)

11 Because Judge Benitez has not yet ruled on Defendants' Motion
12 Revoke and Dismiss, it is too early for this Court to assess
13 Plaintiff's likelihood of success on the merits. The resolution of
14 Defendants' pending motion is uncertain, and if granted, whether
15 McKenzie will pay filing fees or post security for the filing fees
16 is unknown.

17 McKenzie has also failed to show that exceptional
18 circumstances justify the appointment of counsel. Plaintiff
19 insists that he lacks sufficient legal knowledge to proceed without
20 the assistance of counsel. (Mot. Appointment Counsel 5, ECF No.

21
22 ³ Defendants maintain that Plaintiff's following prior cases
23 count as strikes under 28 U.S.C. § 1915(g): (1) McKenzie v.
24 Woodford, Case No. 1:04-cv-05903-AWI-WMW (E.D. Cal. Dec. 20, 2007)
25 (dismissed); (2) McKenzie v. Ellis, Case No. 3:10-cv-01490-LAB
26 (MDD) (S.D. Cal. Sept. 12, 2012) (federal claims dismissed and
27 remaining claims remanded to state court); (3) McKenzie v. Alameda,
28 Case No. CV-02-07551 (C.D. Cal. Dec. 10, 2002) (dismissed),
combined with Ninth Circuit dismissal in McKenzie v. Alameda, Case
No. 03-55221 (9th Cir. 2003); (4) McKenzie v. Woodford, Case No.
1:06-cv-00062-OWW-LJO (E.D. Cal. Dec. 23, 2006) (dismissed); and
(5) McKenzie v. Woodford, Case No. 1:06-cv-01490-AWI-SMS (E.D. Cal.
Feb. 15, 2007) (dismissed). (Defs.' Mot. Revoke & Dismiss Attach.
#1 Mem. P. & A. 3-5, ECF No. 20; see also id. Attach. #2 Req.
Judicial Notice 1-60.)

1 35.) This argument is unpersuasive, however, as McKenzie has
2 demonstrated in his Complaint that he can adequately articulate the
3 facts to support his causes of action. See Pough v. Almager, No.
4 08cv1498 JM(RBB), 2010 U.S. Dist. LEXIS 51782, at *1-3 (S.D. Cal.
5 May 26, 2010) (finding no exceptional circumstance due to factual
6 complexity because plaintiff grasped "the legal issues involved"
7 and was able to "adequately set[] forth a factual basis for his
8 claims[]"); Shields v. Davis, No. C 07-0157 RMW (PR), 2008 U.S.
9 Dist. LEXIS 90687, at *2-3 (N.D. Cal. Oct. 27, 2008) (denying
10 motion for appointment of counsel because the case was not
11 particularly complex). McKenzie is an experienced litigant. He
12 possesses a sufficient understanding of his claims, the facts, and
13 the law to continue to represent himself.

14 McKenzie further asserts that he has suffered "periodic
15 denials of access to the facility's law library" (Mot.
16 Appointment Counsel 5, ECF No. 35.) "However, the Constitution
17 does not guarantee a prisoner unlimited access to a law library.
18 Prison officials of necessity must regulate the time, manner, and
19 place in which library facilities are used." Lindquist v. Idaho
20 State Bd. of Corr., 776 F.2d 851, 858 (9th Cir. 1985) (citation
21 omitted). Plaintiff has timely filed an Opposition to Defendants'
22 Motion Revoke and Dismiss [ECF No. 22], as well as a Motion for
23 Clerk's Entry of Default [ECF No. 29], and a Reply to Defendant
24 Nutt's Opposition to Plaintiff's Motion for Clerk's Entry of
25 Default [ECF No. 32]. McKenzie also filed the current Motion,
26 complete with citations to relevant authority. (See Mot.
27 Appointment Counsel 7-8, ECF No. 35.) Plaintiff has not shown that
28 he does not have reasonable access to a law library or other means

1 of conducting legal research, or that he is subjected to burdens
2 beyond those ordinarily experienced by pro se plaintiffs.

3 Finally, McKenzie maintains that he suffers from open-angle
4 glaucoma, for which he has undergone several surgeries, and from
5 which he has lost the ability to see with his right eye. (Id. at
6 5.) Plaintiff urges that his medical condition has "become a major
7 impediment in the preparation of documents" (Id.)
8 McKenzie has not demonstrated how his physical infirmity impairs
9 his ability to proceed pro se. Based on the filings to date,
10 Plaintiff appears to be able to adequately present his claims. See
11 Jones v. Frazesn, No. 2:07-cv-02769 RCT, 2009 U.S. Dist. LEXIS
12 49639, at *2-3 (E.D. Cal. June 1, 2009) (finding no exceptional
13 circumstance when plaintiff claimed his pain medication impaired
14 his ability to read and write).

15 McKenzie has not established that he is unable to proceed as a
16 pro se litigant. See Harris, 2009 U.S. Dist. LEXIS 68786, at *11-
17 13 (finding no exceptional circumstances, in part, because
18 plaintiff was able to submit adequate documentation and motion
19 work); see also Agyeman v. Corr. Corp. of Am., 390 F.3d 1101, 1103
20 (9th Cir. 2004) (reviewing district court's denial of appointed
21 counsel for abuse of discretion and explaining that a finding of
22 exceptional circumstances justifying appointment of counsel
23 requires an evaluation of plaintiff's ability to articulate his
24 claims); Plummer v. Grimes, 87 F.3d 1032, 1033 (8th Cir. 1996)
25 (holding district court did not abuse its discretion in denying
26 plaintiff appointed counsel, in part because plaintiff adequately
27 filed a complaint and other pretrial materials). Plaintiff's
28 situation is similar to that of other incarcerated pro se

1 plaintiffs. McKenzie has demonstrated that he is able to
2 adequately present his claims. See Harris, 2009 U.S. Dist. LEXIS
3 68786, at *11-13; Agyeman, 390 F.3d at 1103; Plummer, 87 F.3d at
4 1033.


5 Plaintiff has not established exceptional circumstances that
6 entitle him to appointed counsel. See Agyeman, 390 F.3d at 1103.
7 The Court denies McKenzie's request without prejudice as neither
8 the interests of justice nor exceptional circumstances warrant
9 appointment of counsel at this time. LaMere v. Risley, 827 F.2d
10 622, 626 (9th Cir. 1987); see also Terrell, 935 F.2d at 1017.

11 **III. CONCLUSION**

12 For the above reasons, Plaintiff Gustavo McKenzie's Motion for
13 Appointment of Counsel is **DENIED**.

14 **IT IS SO ORDERED.**

15
16 DATED: April 16, 2013


17 Ruben B. Brooks
United States Magistrate Judge

18 cc: Judge Benitez
19 All parties of record
20
21
22
23
24
25
26
27
28