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 SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

BART D. KIMBER,
 Plaintiff,
 v.
 TRACY GRANT et al.,
 Defendants.

Case No.: 3:16-cv-01472-BEN-AGS

ORDER:

- (1) DENYING MOTION FOR PRELIMINARY INJUNCTION;**
- (2) DENYING MOTION FOR APPOINTMENT OF COUNSEL; and**
- (3) DENYING MOTION TO AMEND COMPLAINT**

Pending before the Court are the Motions for Injunctive Relief, Appointment of Counsel, and to Amend the Complaint filed by Plaintiff Bart Kimber. (Docket Nos. 27, 37, 39.) The Court finds the Motion suitable for determination on the papers without oral argument, pursuant to Civil Local Rule 7.1.d.1. For the reasons set forth below, each Motion is **DENIED**.

BACKGROUND

Plaintiff filed a Complaint against Defendants (the United States of America and ten individual federal employees or officers), containing twelve claims for relief related to his allegations of invasion of privacy, wrongful termination, employment

1 discrimination, Civil Rights violations, negligent infliction of emotional distress, “reverse
2 sexual discrimination,” and Americans with Disabilities Act (“ADA”) violations.
3 (Docket No. 1.)

4 Plaintiff’s 61-page Complaint alleges that, in June 2006, he was wrongfully
5 terminated from his employment as a firefighter with the Camp Pendleton Fire
6 Department. (Compl.) According to Plaintiff, beginning in June 2003, after he declined
7 Defendant Tracy Grant’s invitation to engage in sexual relations, she and Defendant
8 Dean King created a hostile work environment for him. (*Id.*) Plaintiff more generally
9 alleges that all of the Defendants’ acted in some way to conspire to invade his privacy,
10 engage in employment discrimination, violate his Civil Rights, and violate the ADA,
11 resulting in his wrongful termination and ongoing emotional distress. (*Id.*)

12 DISCUSSION

13 A. Motion for Injunctive Relief

14 Plaintiff filed a Motion for Injunctive Relief alleging Defendant Jalynn Peterson is
15 presently “denying Plaintiff the right to work by concealing, losing, or destroying his
16 Official Personal File (OPF).” (Docket No. 27 at 2.) He seeks an order: (a) requiring
17 Defendant Jalynn Peterson to either produce Plaintiff’s Official Personnel File or admit
18 that she concealed, lost or destroyed it; (b) payment for lost wages, benefits, creditable
19 service, and interest; and (c) “Sanction Punitive Actions against Defendants to Halt their
20 Discriminatory practices, and award restitution to Plaintiff to make him whole [sic].” (*Id.*
21 at 4.)

22 “A plaintiff seeking a preliminary injunction must establish that he is likely to
23 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
24 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in
25 the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).
26 “The first factor under *Winter* is the most important—likely success on the merits.”
27 *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citing *Aamer v. Obama*, 742
28 F.3d 1023, 1038 (D.C. Cir. 2014) (“We begin with the first and most important factor:

1 whether petitioners have established a likelihood of success on the merits.”)). If a
2 plaintiff has failed to show a likelihood of success on the merits, the court need not
3 consider the other three *Winter* elements. *Id.* (citing *Ass'n des Eleveurs de Canards et*
4 *d'Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir.2013) (internal citation omitted)).

5 When a plaintiff seeks a court order requiring another party to take affirmative
6 action, the relief is treated as a “mandatory injunction,” which requires the plaintiff to
7 “establish that the law and facts clearly favor her position not simply that she is likely to
8 succeed.” *Id.* (citing *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571
9 F.3d 873, 879 (9th Cir.2009)). The Ninth Circuit has cautioned that mandatory
10 injunctions go “well beyond simply maintaining the status quo pendente lite [and] is
11 particularly disfavored.” *Id.* (citing *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th
12 Cir.1994)).

13 Plaintiff has failed to establish a likelihood of success on the merits because his
14 Motion is solely based on conclusory allegations. He provides no legal authority to
15 support his request, and thus falls well below the requirement to establish that the law and
16 facts clearly favor his position. *Garcia*, 786 F.3d at 740 (internal citation omitted).

17 Moreover, although the Court need not consider the other factors, it notes that
18 Plaintiff has also failed to establish a likelihood of irreparable harm. “The basis of
19 injunctive relief in the federal courts is irreparable harm and inadequacy of legal
20 remedies.” *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202
21 (9th Cir. 1980). In effect, Plaintiff seeks monetary damages and production of his
22 personnel file, the absence of which is preventing him from commencing work. (Docket
23 No. 27.) Thus, he has not demonstrated that he would suffer irreparable harm without the
24 injunction because monetary compensation may be awarded if he prevails on his claims.

25 Accordingly, Plaintiff’s Motion for Preliminary Injunction is **DENIED**.

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1 **B. Motion for Appointment of Counsel¹**

2 Plaintiff also moves for the appointment of counsel, asserting that he has a
3 meritorious claim, but is unable find an attorney to represent him “on terms that [he] can
4 afford.” (Docket No. 37 at 1.) Plaintiff was previously represented by an attorney, but he
5 indicates his former attorney withdrew after Plaintiff was unable to pay his fees. (*Id.* at
6 9.) He also contacted five other attorneys or firms, three of which were not retained
7 because he could not afford to pay the deposit; the other two were not retained because
8 they did not specialize in his type of claims. (*Id.* at 3, 9.)

9 Courts have discretion to appoint counsel for indigent civil litigants upon a
10 showing of exceptional circumstances. *See Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th
11 Cir. 1991); *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301, 1318 (9th Cir.
12 1981). “A finding of exceptional circumstances requires an evaluation of both the
13 likelihood of success on the merits and the ability of the petitioner to articulate his claims
14 pro se in light of the complexity of the legal issues involved.” *Terrell*, 935 F.2d at 1017
15 (9th Cir. 1991) (internal citations omitted); *see also Bradshaw*, 662 F.2d at 1318.
16 “Neither of these factors is dispositive and both must be viewed together before reaching
17 a decision.” *Terrell*, 935 F.2d at 1017 (internal citations omitted).

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21 ¹ Plaintiff technically filed two separate requests for appointment of counsel, one
22 pursuant to 28 U.S.C. § 1915(e)(1), and one pursuant to 42 U.S.C. 2000e 5(f)(1).
23 (Docket No. 73.) However, because the Court’s determination is based on essentially the
24 same analysis, the Court treats the two motions as a single motion. *See Terrell v. Brewer*,
25 935 F.2d 1015, 1017 (9th Cir. 1991) (“A finding of exceptional circumstances requires an
26 evaluation of both the likelihood of success on the merits and the ability of the petitioner
27 to articulate his claims pro se in light of the complexity of the legal issues involved.”);
28 *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301, 1318 (9th Cir. 1981)
(appointment of counsel pursuant to the 1964 Civil Rights Act requires a court to assess
“(1) the plaintiff’s financial resources, (2) the efforts made by the plaintiff to secure
counsel, and (3) whether the plaintiff’s claim has merit.”) (internal citations omitted).

1 At this time, the Court cannot say there is any likelihood of success on the merits.
2 First, Plaintiff's Complaint acknowledges his claims may be barred by the statute of
3 limitations as it requests the Court "allow equitable tolling of the statute of limitations."
4 (Compl. at 12.) Second, although Plaintiff marked that his Equal Opportunity
5 Commission Right-to-Sue Letter did not show the Commission found "no reasonable
6 cause" to believe the allegations made in the charge were true, he did not attach the letter
7 to his request for appointment of counsel. Moreover, Plaintiff fails to demonstrate an
8 inability to represent himself beyond the ordinary burdens encountered by plaintiffs
9 representing themselves pro se.

10 Therefore, the Court finds that the exceptional circumstances required for the
11 appointment of counsel are not present. Plaintiff's Motion is **DENIED**.

12 **C. Motion to Amend Complaint**

13 Finally, Plaintiff moves to amend his complaint, attaching his proposed First
14 Amended Complaint ("FAC") and supporting exhibits. (Docket No. 39.)

15 Before trial, and after the time has elapsed for which a party may amend its
16 pleading as a matter of course, Rule 15(a)(2) of the Federal Rules of Civil Procedure
17 provides that: "a party may amend its pleading only with the opposing party's written
18 consent or the court's leave." Fed. R. Civ. P. 15(a). Leave to amend under Rule 15(a)(2)
19 should be "freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2).

20 Courts consider "undue delay, bad faith, dilatory motive, repeated failure to cure
21 deficiencies by previous amendments, undue prejudice to the opposing party, and futility
22 of the proposed amendment" in deciding whether justice requires granting leave to amend
23 under Rule 15. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir.
24 1989) (citing *Foman v. Davis*, 370 U.S. 178, 182 (1962)). Although each factor may
25 warrant consideration, "prejudice to the opposing party . . . carries the greatest weight."
26 *Eminence Capital*, 316 F.3d at 1052.

27 Plaintiff's Motion to Amend lacks any explanation as to why he should be granted
28 leave. Instead, in a single paragraph, Plaintiff reiterates his claims for reliefs. (Docket

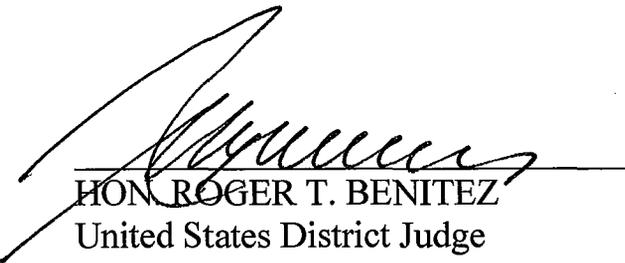
1 No. 39 at 3.) Additionally, Plaintiff's proposed FAC fails to satisfy Rule 8(a)(2) of the
2 Federal Rules of Civil Procedure, which requires "a short and plain statement of the
3 claim showing that the pleader is entitled to relief." Fed. R. Civ. Proc. 8(a)(2). Facially,
4 Plaintiff's proposed 119-page FAC is nearly twice as long as the operative 61-page
5 Complaint, not including the additional 219 pages of supporting exhibits.² (*Compare*
6 Docket Nos. 1, 39.) Substantively, Plaintiff's Complaint contains various accusations
7 and legal conclusions spanning multiple time frames, and it is unclear whether he has
8 stated a claim for relief. Fed. R. Civ. Proc. 8(a)(2). Therefore, he has not met Rule
9 15(a)(2)'s requirement to obtain consent to amendment by the opposing parties, or
10 demonstrated why justice requires the Court to grant him leave. Fed. R. Civ. P. 15(a)(2).
11 Accordingly, Plaintiff's Motion to Amend Complaint is **DENIED**.

12 **CONCLUSION**

13 Plaintiff's Motions for Preliminary Injunction, Appointment of Counsel, and to
14 Amend Complaint are **DENIED**. Defendants shall file their answer, or otherwise
15 respond to Plaintiff's Complaint (docket no. 1) within **twenty-one (21) days** of this
16 Order.

17 **IT IS SO ORDERED.**

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19 DATED: March 3, 2017

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21 HON. ROGER T. BENITEZ
22 United States District Judge
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26 ² The Court further notes Plaintiff did not provide "a version of the proposed amended
27 pleading that shows---through redlining, underlining, strikeouts, or other similarly
28 effective typographic methods---how the proposed amended pleading differs from the
operative pleading," as required by Civil Local Rule 15.1.b.