

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

Richard Zakosky,  
  
Plaintiff,  
  
v.  
  
Department of Veterans Affairs,  
  
Defendant.

Case No.: 17cv1373-JAH (BGS)  
  
ORDER GRANTING PLAINTIFF’S  
MOTION TO PROCEED IN FORMA  
PAUPERIS (Doc No. 2); DISMISSING  
COMPLAINT WITHOUT PREJUDICE;  
AND DENYING PLAINTIFF’S  
REQUEST FOR APPOINTMENT OF  
COUNSEL (Doc. No. 3)

**INTRODUCTION**

Pending before this Court are Plaintiff’s motions to proceed in forma pauperis and motion to appoint counsel. Doc. Nos. 2, 3. For the reasons set forth below, the Court **DENIES** both Plaintiff’s motion to proceed in forma pauperis and Plaintiff’s request for appointment of counsel.

//  
//  
//

1 **BACKGROUND**

2 On July 6, 2017, Plaintiff filed a complaint (“Complaint”) against the Department  
3 of Veteran Affairs. Doc. No. 1. On the same day, Plaintiff also filed his motion to  
4 proceed in forma pauperis and requested appointment of counsel. Doc. Nos. 2, 3.

5 **DISCUSSION**

6 **I. In Forma Pauperis**

7 **a. Ability to Pay**

8 **i. Legal Standard**

9 All parties instituting any civil action, suit, or proceeding in a district court of the  
10 United States, except an application for writ of habeas corpus, must pay a filing fee of  
11 \$400. See 28 U.S.C. § 1914 (a). A court may authorize the commencement of a suit  
12 without prepayment of fees if the plaintiff submits an affidavit, including a statement of  
13 all his or her assets, showing that he or she is unable to pay the fees. See 28 U.S.C. §  
14 1915(a).

15 **ii. Analysis**

16 In support of his application to proceed in forma pauperis, Plaintiff presents a  
17 declaration indicating he is currently unemployed but receives \$1,000 a month in  
18 retirement payments. Doc. No. 2 at pg. 2. Plaintiff posits he has zero funds in his  
19 checking account and owns a vehicle worth \$500. Id. at pgs. 2-3. Plaintiff indicates  
20 monthly basic-living costs (including rent, food, clothing, and medical expenses) that  
21 amount to \$1,120. Id. at pg. 4. Based on Plaintiff’s declaration, the Court finds Plaintiff  
22 has sufficiently shown he is unable to pay the fees required to commence his suit.

23 **b. Screening**

24 **i. Legal Standard**

25 In forma pauperis notwithstanding, the Court is obligated to review a complaint  
26 filed in forma pauperis and dismiss the action if it is “frivolous or malicious; fails to state  
27 a claim on which relief may be granted; or seeks monetary relief against a defendant who  
28 is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B); Calhoun v. Stahl, 254 F.3d 845,

1 845 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to  
2 prisoners.”).

### 3 **ii. Analysis**

4 After a careful review, the Court finds that Plaintiff’s complaint is frivolous and  
5 void of any plausible claims for relief. Plaintiff does not present actionable claims  
6 beyond stating there was wrongdoing at the Department of Veterans Affairs and that his  
7 complaints were ignored by superiors. Doc. No. 1 at pgs. 2-3. Plaintiff fails to state any  
8 plausible claims for relief. Based on the allegations in his Complaint, the Court finds  
9 Plaintiff has not met the screening standard required to proceed in forma pauperis.

## 10 **II. Request for Appointment of Counsel**

### 11 **a. Legal Standard**

12 There is no constitutional right to be represented by counsel in a civil action.  
13 Hedges v. Resolution Trust Corp., 32 F.3d 1360, 1363 (9th Cir. 1994); See Hernandez v.  
14 Whiting, 881 F.2d 768, 770-71 (9th Cir. 1989). Under 28 U.S.C. § 1915 (e) (1),  
15 however, district courts may appoint counsel for indigent litigants under “exceptional  
16 circumstances.” See Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991) (quoting  
17 Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986)). Determining whether  
18 “exceptional circumstances” exist requires a court to evaluate (1) the likelihood of  
19 success on the merits, and (2) the ability of the petitioner to articulate his claims pro se in  
20 light of the complexity of the issues. Id. “Neither of these issues is dispositive and both  
21 must be viewed together before reaching a decision.” Id.

### 22 **b. Analysis**

23 Here, while Plaintiff’s indigence and corresponding inability to pay for counsel has  
24 been established, Plaintiff has failed to meet other requirements. Plaintiff fails to state  
25 grounds that would allow this Court to determine whether exceptional circumstances  
26 exist. Plaintiff fails to argue why he would succeed on the merits. Plaintiff also fails to  
27 articulate his claims beyond stating there was wrongdoing at the Department of Veterans  
28 Affairs and that his complaints were ignored by superiors. Doc. No. 1 at pgs. 2-3.

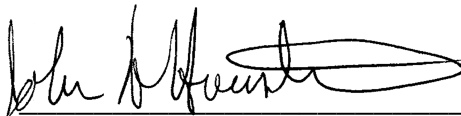
1 Plaintiff's statement neither expresses his likelihood of success on the merits nor  
2 articulate the complexity of the issues involved.

3 **CONCLUSION**

4 Accordingly, IT IS HEREBY ORDERED:

- 5 1) Plaintiff's motion to proceed in forma pauperis is GRANTED (doc. no.  
6 2);
- 7 2) Plaintiff's complaint is DISMISSED for failure to state a claim upon  
8 which relief may be granted. The complaint is DIMISSED without  
9 prejudice. Plaintiff has until November 30, 2017, to file an Amended  
10 Complaint; and
- 11 3) Plaintiff's request for appointment of counsel is DENIED without  
12 prejudice (doc. no. 3).

13  
14 DATED: October 24, 2017



15  
16 JOHN A. HOUSTON  
17 United States District Judge  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28