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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 HENRY VASQUEZ,

12 Plaintiff,

13 v.

14 N. UHDE, Correctional Officer,

15 Defendant.
16

Case No.: 18cv2097-GPC-MDD

**ORDER DENYING PLAINTIFF'S
MOTION FOR
RECONSIDERATION AND
MOTION FOR RECUSAL OF
MAGISTRATE JUDGE**

[ECF No. 52]
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18 Plaintiff Henry Vasquez (“Plaintiff”), a state prisoner proceeding *pro se*
19 and *in forma pauperis*, moves the Court to reconsider its August 22, 2019
20 Order denying Plaintiff’s motion for appointment of counsel. (ECF No. 52).
21 Plaintiff also moves for the recusal of Magistrate Judge Mitchell D. Dembin.
22 (*Id.*). For the reasons discussed herein, the Court **DENIES** Plaintiff’s
23 motion.

24 **I. MOTION FOR RECONSIDERATION**

25 A motion for reconsideration may be brought under Federal Rules of
26 Evidence 59(e) or 60(b). A motion is treated as a motion to alter or amend
27 judgment under Rule 59(e) if it is filed within twenty-eight days of entry of

1 judgment or the ruling; otherwise, it is treated as a Rule 60(b) motion for
2 relief from a judgment or order. *Am. Ironworks & Erectors, Inc. v. N. Am.*
3 *Constr. Corp.*, 248 F.3d 892, 898-99 (9th Cir. 2001). Here, the Order Plaintiff
4 seeks reconsideration of was filed on August 22, 2019. (ECF No. 48).
5 Accordingly, Plaintiff's motion is properly brought under Rule 60(b), as it was
6 filed more than twenty-eight days ago.¹ *See Am. Ironworks & Erectors, Inc.*,
7 248 F.3d at 898-99.

8 Pursuant to Rule 60(b), district courts have the power to reconsider a
9 previous ruling or entry of judgment. Fed. R. Civ. P. 60(b). Reconsideration
10 under Rule 60(b) may be granted in the case of: (1) mistake, inadvertence,
11 surprise or excusable neglect; (2) newly discovered evidence; or (3) fraud; or if
12 (4) the judgment is void; (5) the judgment has been satisfied; or (6) for any
13 other reason justifying relief. *See* Fed. R. Civ. P. 60(b).

14 In its Order, the Court noted that although Plaintiff's complaint
15 survived initial screening and an early summary judgment motion, his
16 "claims are not particularly complex" and he demonstrated neither
17 exceptional circumstances nor a likelihood of success on the merits. (ECF No.
18 48). Plaintiff contends the Court erred in denying his motion for appointment
19 of counsel for lack of exceptional circumstances and for failure to demonstrate
20 a likelihood of success on the merits. (ECF No. 52). He maintains that courts
21 may exercise their discretion to appoint counsel where a Plaintiff survives
22 summary judgment and that the Court's scheduling order regulating
23 discovery and pre-trial proceedings shows Plaintiff has demonstrated a
24 likelihood of success on the merits. (*Id.* at 2, 4). Plaintiff further argues his

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27 ¹ Plaintiff signed the proof of service more than twenty-eight days after the Order was
filed. (*See* ECF No. 52 at 33).

1 medical treatment makes it “impossible” to obtain the expert disclosures and
2 that the Court should consider his limited legal knowledge and difficulty
3 accessing the law library and research materials due to a physical disability.
4 (*Id.* at 3, 5, 9).

5 District courts lack authority to require counsel to represent indigent
6 prisoners in 42 U.S.C. § 1983 cases. *Mallard v. United States Dist. Court*,
7 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may
8 request an attorney to voluntarily represent such a plaintiff. *See* 28 U.S.C. §
9 1915(e)(1); *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). Courts
10 consider a plaintiff’s likelihood of success on the merits as well as the
11 plaintiff’s ability to articulate his claims *pro se* in light of the complexity of
12 the legal issues involved. *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009).
13 In light of Plaintiff’s arguments, the Court focuses its analysis on exceptional
14 circumstances and Plaintiff’s likelihood of success on the merits.

15 As indicated previously, Plaintiff did survive an early motion for
16 summary judgment for exhaustion of administrative remedies, but the
17 Court’s ruling did not demonstrate a likelihood of success on the merits
18 regarding the claims against the sole remaining defendant. (*See* ECF No.
19 25). Rather, the Court’s ruling demonstrates that Plaintiff exhausted
20 available remedies, as required by 42 U.S.C. § 1997e(a), only as to one
21 defendant and that his claims could only proceed against Defendant Uhde.
22 (*See id.*). However, Plaintiff has not yet survived a motion for summary
23 judgment on the substantive merits of his claims. (*See* ECF No. 35 at 2
24 (setting the deadline to file pretrial motions, such as a motion for summary
25 judgment on the substantive merits, for March 6, 2020)). As such, Plaintiff
26 has not demonstrated the “exceptional circumstances” required for the Court
27 to appoint counsel. *See Rios v. Paramo*, No. 14-cv-01073-WQH (DHB), 2016

1 U.S. Dist. LEXIS 106523, at *9 (S.D. Cal. Aug. 11, 2016); *Garcia v. Smith*,
2 No. 10cv1187 AJB (RBB), 2012 U.S. Dist. LEXIS 89147, at *9-10 (S.D. Cal.
3 June 27, 2012).

4 With respect to Plaintiff's inability to obtain expert disclosures due to
5 his medical treatment, a *pro se* litigant's difficulty conducting discovery is
6 insufficient to satisfy the exceptional circumstances standard. *See Wilborn v.*
7 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986) ("If all that was required to
8 establish successfully the complexity of the relevant issues was a
9 demonstration of the need for development of further facts, practically all
10 cases would involve complex legal issues."). Similarly, circumstances
11 common to most prisoners, such as lack of legal education, limited law library
12 access, mental illness and disability, or deficient general education, do not
13 amount to exceptional circumstances. *See, e.g., Wood v. Housewright*, 900
14 F.2d 1332, 1335-36 (9th Cir. 1990) (affirming denial of appointment of
15 counsel where plaintiff lacked legal education and had limited law library
16 access); *Galvan v. Fox*, No. 2:15-CV-01798-KJM (DB), 2017 U.S. Dist. LEXIS
17 56280, at *23 (E.D. Cal. Apr. 12, 2017) ("Circumstances common to most
18 prisoners, such as lack of legal education and limited law library access, do
19 not establish exceptional circumstances to warrant a request for voluntary
20 assistance of counsel."); *Jones v. Kuppinger*, 2:13-CV-0451 WBS AC, 2015
21 U.S. Dist. LEXIS 124606, at *11 (E.D. Cal. Sept. 17, 2015) ("Circumstances
22 common to most prisoners, such as deficient general education, lack of
23 knowledge of the law, mental illness and disability, do not in themselves
24 establish exceptional circumstances").

25 Accordingly, the Court **DENIES** Plaintiff's motion for reconsideration.

26 **II. MOTION FOR RECUSAL**

27 Plaintiff also "moves to disqualify Magistrate Judge . . . Mitchell D.

Dembin” pursuant to 28 U.S.C. § 144. (ECF No. 52 at 1, 6). Section 144 requires a party to show “personal bias or prejudice either against him or in favor of any adverse party[.]” 28 U.S.C. § 144. “The standard for recusal is ‘whether a reasonable person with knowledge of all the facts would conclude that the judge’s impartiality might reasonably be questioned.’” *Mayes v. Leipziger*, 729 F.2d 605, 607 (9th Cir. 1984) (quoting *United States v. Nelson*, 718 F.2d 315, 321 (9th Cir. 1983)). To provide adequate grounds for recusal, the prejudice must result from an extrajudicial source as a judge’s previous adverse ruling alone is insufficient for recusal. *See id.* “A judge’s previous adverse ruling alone is not sufficient bias.” *Id.*

Here, Plaintiff does not allege facts that would support the contention that the Undersigned exhibits bias or prejudice directed towards him or in favor of Defendant from an extrajudicial source. Plaintiff’s motion for recusal alleges bias and prejudice arising out of prior rulings denying appointment of counsel. (ECF No. 52 at 13). These are not proper grounds to disqualify a judge for bias and prejudice. *See Mayes*, 729 F.2d at 607. As a result, there is no reason why a reasonable person with knowledge of all the facts would question the Undersigned’s impartiality in this case. Therefore, the Court **DENIES** Plaintiff’s motion for recusal.

III. CONCLUSION

Based on the foregoing, the Court **DENIES** Plaintiff’s motion for reconsideration and Plaintiff’s motion for recusal.

IT IS SO ORDERED.

Dated: October 8, 2019



Hon. Mitchell D. Dembin
United States Magistrate Judge