

1

2

3

4

5

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

6

7

8

PAUL MCCREARY,
#78362,

9

Plaintiff,

10

vs.

11

12

JIM GIBBONS, *et al.*

13

Defendants.

14

2:10-cv-01578-PMP-PAL

ORDER

15

This *pro se* prisoner civil rights action by an inmate in the custody of the Nevada Department of Corrections (“NDOC”) comes before the Court on Plaintiff’s application (#1) to proceed *in forma pauperis* and for initial review under 28 U.S.C. § 1915A, as well as on Plaintiff’s motion (#2) to raise his copy credit limit, motion (#3) for an evidentiary hearing, motion (#4) for appointment of counsel, motion (#5) to be present at hearings, first motion (#6) to submit evidence or discovery, second motion (#7) to submit evidence or discovery, motion (#8) to notice retaliations, motion (#9) to notice investigations, motion (#10) to notice employment history, and motion(#13) to submit evidence.

23

The Court finds that Plaintiff is unable to pay a significant initial partial filing fee, and the application therefore will be granted, subject to the remaining provisions herein. The Court accordingly turns to initial review.

26

Screening

27

When a “prisoner seeks redress from a governmental entity or officer or employee of a governmental entity,” the court must “identify cognizable claims or dismiss the complaint,

28

1 or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to state a
2 claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who
3 is immune from such relief.” 28 U.S.C. § 1915A(b).

4 In considering whether the plaintiff has stated a claim upon which relief can be granted,
5 all material factual allegations in the complaint are accepted as true for purposes of initial
6 review and are to be construed in the light most favorable to the plaintiff. *See, e.g., Russell*
7 *v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). However, mere legal conclusions
8 unsupported by any actual allegations of fact are not assumed to be true in reviewing the
9 complaint. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949-51 & 1954, 173 L.Ed.2d 868
10 (2009). That is, bare and conclusory assertions that constitute merely formulaic recitations
11 of the elements of a cause of action and that are devoid of further factual enhancement are
12 not accepted as true and do not state a claim for relief. *Id.*

13 Further, the factual allegations must state a plausible claim for relief, meaning that the
14 well-pleaded facts must permit the court to infer more than the mere possibility of misconduct:

15
16 [A] complaint must contain sufficient factual matter,
17 accepted as true, to “state a claim to relief that is plausible on its
18 face.” [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127
19 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007).] A claim has facial
20 plausibility when the plaintiff pleads factual content that allows the
21 court to draw the reasonable inference that the defendant is liable
22 for the misconduct alleged. *Id.*, at 556, 127 S.Ct. 1955. The
23 plausibility standard is not akin to a “probability requirement,” but
24 it asks for more than a sheer possibility that a defendant has
25 acted unlawfully. *Ibid.* Where a complaint pleads facts that are
26 “merely consistent with” a defendant’s liability, it “stops short of
27 the line between possibility and plausibility of ‘entitlement to relief.’
28 ” *Id.*, at 557, 127 S.Ct. 1955 (brackets omitted).

29 [W]here the well-pleaded facts do not permit the court
30 to infer more than the mere possibility of misconduct, the
31 complaint has alleged - but it has not “show[n]” - “that the pleader
32 is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

33 *Iqbal*, 129 S.Ct. at 1949-50.

34 Allegations of a *pro se* complainant are held to less stringent standards than formal
35 pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30
36 L.Ed.2d 652 (1972).

1 In the complaint, Plaintiff Paul McCreary brings claims for injunctive relief against, in
2 their official capacity only, Governor Jim Gibbons, NDOC Director Howard Skolnik, Assistant
3 Director James G. Cox, and Administrator of Offender Management Rex Reed. He seeks
4 injunctive relief as to his classification and transfer within the Nevada prison system, legal
5 assistance, and medical care.

6 The complaint fails to state a claim upon which relief may be granted on any of the
7 three counts presented.

8 In Count I, Plaintiff alleges that prison officials improperly classified him as a maximum
9 security inmate and “unjustly” transferred him from Ely State Prison to High Desert State
10 Prison. Plaintiff has no constitutionally protected right to a particular classification or to be
11 housed in a particular facility rather than another. *See, e.g., Hernandez v. Johnston*, 833 F.2d
12 1316, 1318 (9th Cir.1987).

13 In Count II, Plaintiff alleges that the prison law library has not provided him copies of
14 the Federal Rules of Civil Procedure, the state civil procedure rules, and the state and federal
15 appellate rules. The right guaranteed by the First Amendment is not a right to a particular set
16 of legal resources but instead is a right of access to the courts. *Lewis v. Casey*, 518 U.S. 343,
17 350-51, 116 S.Ct. 2174, 2179-80, 135 L.Ed.2d 606 (1996). In order to present a viable First
18 Amendment claim, for either monetary or injunctive relief, plaintiff must present factual
19 allegations that would show actual injury to his ability to present a claim to the courts. 518
20 U.S. 343 at 351-52, 116 S.Ct. at 2180. The allegations in the complaint fail to do so. Plaintiff
21 further alleges that “[t]he law library lady wearing a pink shirt had issues of picking up out
22 going legal mail.” To the extent, if any, that this allegation makes any sense, it does not state
23 a claim for relief.

24 In Count III, Plaintiff alleges that the medical unit at the prison has committed “medical
25 neglect/malpractice” by not responding to a kite requesting an appointment for pain in his left
26 ankle and lower back that he alleges resulted from a sexual assault and excessive force at
27 his prior institution. The sparse allegations presented fail to state a claim. In order to state
28 a claim for relief under the Eighth Amendment for deliberate indifference to serious medical

1 needs, plaintiff must present factual allegations tending to establish that the defendant official
2 knew of and disregarded an excessive risk to inmate health or safety. *See, e.g., Simmons v.*
3 *Navajo County, Arizona*, 609 F.3d 1011, 1017-18 (9th Cir. 2010). The official both must be
4 aware of the facts from which the inference of an excessive risk to inmate health or safety
5 could be drawn, and he also must draw the inference. *Id.* In other words, a plaintiff must
6 show that the official was “(a) *subjectively aware* of the serious medical need and (b) failed
7 adequately to respond.” *Id.*, (quoting prior authority, with emphasis in original). Medical
8 misdiagnosis, differences in medical opinion, medical malpractice, and negligence do not
9 amount to deliberate indifference. *See, e.g., McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th
10 Cir.1992), *rev’d on other grounds*, *WMX Tech., Inc. v. Miller*, 104 F.3d 1133 (9th Cir.1997)(*en*
11 *banc*); *Sanchez v. Vild*, 891 F.2d 240, 241-42 (9th Cir.1989). Plaintiff does not present
12 allegations of actual fact satisfying this standard as to any of the named defendants.

13 Plaintiff further alleges that he received a response back stating that there was nothing
14 in his chart regarding such a prior complaint. Plaintiff maintains that “this proves tampering
15 with my medical chart.” The mere fact that a health care provider responded that there was
16 nothing in his chart in this regard does not permit the Court to infer more than the mere
17 possibility of misconduct. *Cf. Iqbal, supra*. There may be any number of possible reasons why
18 the chart does not include the information, such as, for example, any such pertinent records
19 not having been forwarded to his current institution.

20 The complaint accordingly will be dismissed for failure to state a claim upon which relief
21 may be granted, subject to leave to amend.

22 ***Remaining Matters***

23 The motion (#2) to raise Plaintiff’s copy credit limit at the institution will be denied on
24 the unsworn showing made. Plaintiff does not attach any paper from NDOC showing that he
25 has exceeded his copy credit limit, and he does not identify any particularized need for the
26 essentially blanket order requested. Plaintiff instead must document that he has exceeded
27 the copy credit limit, and he must show a particularized need for a specified increase in his
28 copy credit limit. Increases to the copy credit limit are not ordered routinely as a matter of

1 course, and the Court in no event will enter a blanket order for unlimited copying. In the
2 meantime, Plaintiff appears to have no difficulty filing papers with the Court, the majority of
3 which are unnecessary filings.

4 The motion (#3) for an evidentiary hearing will be denied. Plaintiff is not entitled to an
5 evidentiary hearing merely upon the filing of a complaint.

6 The motion (#4) for appointment of counsel will be denied. There is no constitutional
7 right to appointed counsel in a Section 1983 action. *E.g., Rand v. Rowland*, 113 F.3d 1520,
8 1525 (9th Cir. 1997), *opinion reinstated in pertinent part*, 154 F.3d 952, 954 n.1 (9th Cir.
9 1998)(*en banc*). The provision in 28 U.S.C. § 1915(e)(1), however, gives a district court the
10 discretion to request that an attorney represent an indigent civil litigant. *See, e.g., Wilborn v.*
11 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986); 28 U.S.C. § 1915(e)(1)("The court may
12 request an attorney to represent any person unable to afford counsel."). Yet the statute does
13 not give the court the authority to compel an attorney to accept appointment, such that
14 counsel remains free to decline the request. *See Mallard v. United States District Court*, 490
15 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989). While the decision to request counsel is
16 a matter that lies within the discretion of the district court, the court may exercise this
17 discretion to request counsel only under "exceptional circumstances." *E.g., Terrell v. Brewer*,
18 935 F.2d 1015, 1017 (9th Cir. 1991). A finding of exceptional circumstances requires an
19 evaluation of both the likelihood of success on the merits and the plaintiff's ability to articulate
20 his claims *pro se* in light of the complexity of the legal issues involved. *Id.* Neither of these
21 factors is determinative and both must be viewed together before reaching a decision. *Id.* In
22 the present case, looking to both the likelihood of success and Plaintiff's ability to articulate
23 the claims presented, the Court does not find that exceptional circumstances exist herein.

24 The motion (#5) to be present at hearings will be denied as unnecessary. No hearings
25 are scheduled in this matter. The Court does not conduct *ex parte* hearings without an inmate
26 being able to participate in one fashion or another.

27 The motions (## 6, 7 & 13) to submit evidence or discovery both will be denied. Local
28 Rule 26-8 expressly prohibits the filing of discovery materials in the record, and a party

1 otherwise may not unilaterally file evidentiary material into the record of the Court. If Plaintiff
2 continues to unilaterally file evidentiary material, the Court will enter a bar order directing the
3 Clerk to return any such material unfiled. The Court assumes no responsibility for the
4 safekeeping of documents improperly sent to the Clerk.

5 The motions (## 8, 9 and 10) to notice sundry facts will be denied. The motions to take
6 notice are not pertinent to any proceeding currently ongoing in this action. The Court is not
7 going to take notice of any fact in such a manner with no connection to an ongoing or
8 scheduled proceeding. Moreover, in all events, the alleged facts as to which Plaintiff seeks
9 the taking of judicial notice are not the kinds of facts as to which judicial notice can be taken
10 under Rule 201(b) of the Federal Rules of Evidence.

11 IT THEREFORE IS ORDERED that the application (#1) to proceed *in forma pauperis*
12 is GRANTED that the application (#1) to proceed in forma pauperis is GRANTED. Plaintiff
13 shall not be required to pay an initial partial filing fee. However, even if the action is
14 dismissed, plaintiff still must pay the full filing fee pursuant to 28 U.S.C. § 1915(b)(2).

15 IT FURTHER IS ORDERED that the movant herein is permitted to maintain this action
16 to a conclusion without the necessity of prepayment of any additional fees or costs or the
17 giving of security therefor. This order granting *forma pauperis* status shall not extend to the
18 issuance of subpoenas at government expense.

19 IT FURTHER IS ORDERED that the Nevada Department of Corrections shall pay to
20 the Clerk of the United States District Court, District of Nevada, 20% of the preceding month's
21 deposits to Plaintiff's account (in the months that the account exceeds \$10.00) until the full
22 \$350.00 filing fee has been paid for this action. **The Clerk of Court shall send a copy of
23 this order to the Finance Division of the Clerk's office. The Clerk shall also send a copy
24 of this order to the attention of the Chief of Inmate Services for the Nevada Department
25 of Corrections, P.O. Box 7011, Carson City, NV 89702.**

26 IT FURTHER IS ORDERED that the Clerk shall file the Complaint and that the
27 Complaint is DISMISSED for failure to state a claim upon which relief may be granted, subject
28 to leave to amend within thirty (30) days of entry of this order.

1 IT FURTHER IS ORDERED that, on any such amended complaint filed, Plaintiff shall
2 clearly title the amended complaint as an amended complaint by placing the word
3 "AMENDED" immediately above "Civil Rights Complaint" on page 1 in the caption and shall
4 place the docket number, 2:10-cv-01578-PMP-PAL, above the word "AMENDED" in the space
5 for "Case No." Under Local Rule LR 15-1 any amended complaint filed must be complete in
6 itself without reference to prior filings. Thus, any allegations, parties, or requests for relief
7 from prior papers that are not carried forward in the amended complaint no longer will be
8 before the Court.

9 IT IS FURTHER ORDERED that Plaintiff's remaining motions (## 2-10 & 13) are
10 DENIED, for the reasons stated herein.

11 The Clerk shall provide Plaintiff with a copy of the Complaint together with two copies
12 of a § 1983 complaint form and one copy of the instructions for same.

13 If an amended complaint is filed in response to this order, the Court will screen the
14 amended pleading before ordering any further action in this case.

15 If Plaintiff does not timely mail an amended complaint to the Clerk for filing, final
16 judgment will be entered dismissing the action.

17 DATED: December 29, 2010.

18
19 

20 PHILIP M. PRO
21 United States District Judge
22
23
24
25
26
27
28