

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  
DISTRICT OF NEVADA**

COUNTRY 'SINGING HORSE'	)	3:09-cv-00227-RCJ (RAM)
STEVENS,	)	
Plaintiff,	)	<b><u>ORDER</u></b>
vs.	)	
HOWARD SKOLNIK, et al.,	)	
Defendants.	)	
_____	)	

Before the court is Plaintiff's Motion for Default Judgment. (Doc. #39.)<sup>1</sup> Defendants have opposed the motion. (Doc. #41). There is no reply. Also before the court is Plaintiff's Motion to Sever Counsel. (Doc. #53). Defendants have opposed the motion (Doc. #55), and Plaintiff has replied (Doc. #58). After a thorough review, the court denies the motions.

**I. BACKGROUND**

Plaintiff, a *pro se* litigant in custody of the Nevada Department of Corrections, brings this action pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 2000cc *et seq.*, 28 U.S.C. § 994, and the Nevada State Constitution based on the confiscation of his religious materials and interference with his ability to practice his religious beliefs. (Pl.'s Compl. 5, 24, 32 (Doc. #8).) At all relevant times, Plaintiff has been an inmate at either the Lovelock Correctional Center (LCC) or the Northern Nevada Correctional Center (NNCC). (*Id.* at 1.) Defendants are various

\_\_\_\_\_  
<sup>1</sup> Refers to court's docket number.

1 NDOC officials, administrators, and employees. (*Id.* at 2-4.) Plaintiff seeks declaratory relief,  
2 injunctive relief, compensatory damages, and punitive damages. (*Id.* at 35-37.) .

## 3 II. DISCUSSION

### 4 **A. Motion for Default Judgment**

5 Plaintiff argues that the court should enter default judgment against all defendants for  
6 failure to defend against suit. (Pl.’s Mot. for Default 1 (Doc. #39).) According to Plaintiff, the  
7 motion for partial dismissal filed by Defendants does not constitute an answer to his  
8 complaint. (*Id.* at 4.)

9 Defendants contend that they have defended by presenting a defense by motion as  
10 authorized under Fed. R. Civ. P. 12(b). (Defs.’ Opp’n for Default Judgment 1-2 (Doc. #41).)  
11 The court agrees.

12 Rule 55 of the Federal Rules of Civil Procedure provides that when a party “has failed  
13 to plead or otherwise defend . . . the clerk must enter the party’s default.” Fed. R. Civ. P. 55(a).  
14 Entry of default judgment is inappropriate if a defendant has filed a response indicating its  
15 intent to defend the action. *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies,*  
16 *Inc.*, 840 F.2d 685, 689 (9th Cir. 1988). “It is undisputed that a motion challenging a  
17 complaint for failure to state a claim upon which relief can be granted falls squarely within the  
18 ambit of the phrase ‘otherwise defend.’” *Rashidi v. Albright*, 818 F. Supp. 1354, 1356 (D. Nev.  
19 1993). Here, Defendants filed a timely motion pursuant to Fed. R. Civ. P. 12(b)(6) arguing  
20 that several aspects of Plaintiff’s complaint fail to state a claim upon which relief can be  
21 granted. (Doc. #26). Therefore, Defendants have shown an intent to defend, which precludes  
22 entry of default.

### 23 **B. Motion to Sever Counsel**

24 Plaintiff argues that the court should remove the Nevada Attorney General’s Office as  
25 defense counsel because the Attorney General’s Office is responsible for prosecuting anyone  
26 who violates the Nevada Hate Crime Statute. (Pl.’s Mot. to Sever Counsel 2 (Doc. #53).)  
27 According to Plaintiff, Defendants Bauman and Olivas have violated the Nevada Hate Crime  
28

1 Statute, which creates a conflict of interest. (*Id.* at 2-3.) Plaintiff also argues that NRS § 7.105  
2 precludes the Attorney General’s Office from acting as defense counsel in this action. (*Id.* at  
3 3.)

4 Defendants contend that no conflict of interest exists because the Attorney General has  
5 not filed criminal charges against Olivas and Bauman for hate crimes. (Defs.’ Opp’n to Mot.  
6 to Sever Counsel 2 (Doc. #55).) Furthermore, Defendants assert that NRS § 7.105 only  
7 prohibits prosecuting attorneys from undertaking criminal defense while NRS § 41.0339  
8 requires the Attorney General to provide a civil defense to state employees acting in good faith  
9 in the course and scope of their employment. (*Id.*)

10 In *Keyter v. Bush*, 2004 U.S. Dist. LEXIS 29046, at \*8-9, 2004 WL 3591125, at \*3  
11 (D.D.C. Aug. 6, 2004), the plaintiff moved to disqualify the United States Attorney from  
12 defending the President of the United States in the civil action filed by the plaintiff. According  
13 to the plaintiff, because the U.S. Attorney has a duty to prosecute the President for alleged  
14 crimes, the U.S. Attorney cannot also defend the President in a civil action. *Id.* at \*9. The  
15 court denied plaintiff’s motion and found that his argument was “utterly without merit.” *Id.*  
16 The court concluded that the U.S. Attorney was acting within his statutory authority in  
17 representing the President because 28 U.S.C. § 547(2) requires the U.S. Attorney to defend on  
18 behalf of the Government in all civil actions in which the United States is concerned. *Id.*

19 In affirming the district court’s holding, the District of Columbia Circuit concluded that  
20 plaintiff’s argument that “there is a conflict of interest for the U.S. Attorneys to represent the  
21 President in this action, has no basis in fact or law.” *Keyter v. Bush*, 2005 U.S. App. LEXIS  
22 2792, at \*1, 2005 WL 375623, at \*1 (D.C. Cir. Feb. 16, 2005)(per curiam)(unpublished  
23 disposition).

24 Here, Plaintiff’s argument concerning the Attorney General’s Office is analogous to the  
25 plaintiff’s argument in *Keyter*. NRS §§ 41.0338 - 41.0339 require the Attorney General to  
26 provide for the defense of any present employee of the state in a civil action. The parties do  
27 not dispute that Defendants Olivas and Bauman are Nevada state employees. Therefore, the  
28

1 Attorney General's Office is acting within its statutory authority. Moreover, as Defendants  
2 correctly argue, NRS § 7.105 only prohibits prosecuting attorneys from undertaking criminal  
3 defense. NRS § 7.105 is inapplicable to this case, which is a civil action where the Attorney  
4 General's Office is defending. Similar to the plaintiff's argument in *Keyter*, Plaintiff's  
5 argument in this case is without merit. Accordingly, Plaintiff's Motion to Sever Counsel is  
6 denied.

7 **III. CONCLUSION**

8 For the reasons set forth above, Plaintiff's Motion for Default Judgment (Doc. #39) and  
9 Plaintiff's Motion to Sever Counsel (Doc. #53) are **DENIED**.

10 DATED: May 19, 2010.

11 

12  
13 UNITED STATES MAGISTRATE JUDGE