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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS LELAND FLOYD,
Plaintiff,

v.

CITY OF LAKEWOOD, et al.,
Defendants.

CASE NO. C11-5068BHS
ORDER ADOPTING REPORT
AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 16), Plaintiff’s (“Floyd”) objections to the R&R (Dkt. 18), and Floyd’s request for assignment of counsel.

I. DISCUSSION

A. Objections to the R&R

The magistrate judge recommends dismissing Floyd’s case with prejudice under 28 U.S.C. §§ 1915(e)(2)(B)9(i)-(ii) and 1915A(b)(1). Dkt. 16 at 2. The magistrate judge also recommends counting the dismissal as a strike pursuant to 28 U.S.C. § 1915(g)

1 | because Floyd’s complaint is frivolous and fails to state a claim upon which relief can be
2 | granted. *Id.*

3 | A complaint is legally frivolous when it lacks an arguable basis in law or fact.
4 | *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-
5 | 28 (9th Cir. 1984). A court may, therefore, dismiss a claim as frivolous where it is based
6 | on an indisputably meritless legal theory or where the factual contentions are clearly
7 | baseless. *Neitzke*, 490 U.S. at 327. A complaint or portion thereof will be dismissed for
8 | failure to state a claim upon which relief may be granted if it appears the “[f]actual
9 | allegations . . . [fail to] raise a right to relief above the speculative level, on the
10 | assumption that all the allegations in the complaint are true.” *See Bell Atlantic Corp. v.*
11 | *Twombly*, 127 S. Ct. 1955, 1965 (2007) (citations omitted). In other words, failure to
12 | present enough facts to state a claim for relief that is plausible on the face of the
13 | complaint will subject that complaint to dismissal. *Id.* at 1974.

14 | In this case, Floyd has had three opportunities to file a non-frivolous complaint
15 | and to state therein claims for which relief is available. *See, e.g.*, Dkts. 8 (Complaint),
16 | Dkt. 10 (order to amend and show cause why the court should not dismiss), Dkt. 12
17 | (Amended Complaint), Dkt. 14 (second order to amend or show cause), Dkt. 15 (Second
18 | Amended Complaint (“SAC”)). The magistrate judge’s R&R is based on review of the
19 | SAC and prior versions of Floyd’s attempts at filing a viable complaint in this case. *See*
20 | Dkt. 16 at 1-12.

21 | Floyd filed objections to the R&R. However, the document filed simply reiterates
22 | his claims and does not show how the magistrate erred in concluding that he has either

1 presented viable claims that cannot be factually supported or alleged facts that cannot
2 support a viable legal theory. The Court has considered the SAC, the R&R, and Floyd's
3 objections to the R&R and concludes that the magistrate did not err in the analysis or
4 recommendation found within the R&R. *See* Dkt. 16.

5 **B. Motion for Assistance of Counsel**

6 Additionally, because Floyd's complaint is meritless and he has not shown a lack
7 of ability to articulate his claims, he has not met his burden to obtain assigned counsel in
8 a civil matter.

9 "28 U.S.C. § 1915(d) confers on a district court the discretion to designate counsel
10 to represent an indigent civil litigant." *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th
11 Cir. 1986) (citing *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir.1984)). In *Wilborn*,
12 the Ninth Circuit elaborated on this rule:

13 The rule that counsel may be designated under section 1915(d) only in
14 "exceptional circumstances" derives from *Weller v. Dickson*, 314 F.2d 598,
15 600 (9th Cir. [1963]), *cert. denied*, 375 U.S. 845 (1963), which held that "the
16 privilege of pleading in forma pauperis . . . in civil actions for damages should
17 be allowed only in exceptional circumstances." *Weller* was extended, without
18 comment, to "appointment of counsel" in *United States v. Madden*, 352 F.2d
19 792, 794 (9th Cir. 1965). *Madden* was then cited for the rule in *Alexander v.*
20 *Ramsey*, 539 F.2d 25, 26 (9th Cir. 1976); *United States v. McQuade*, 579 F.2d
21 1180, 1181 (9th Cir. 1978), on appeal after remand, (9th Cir.1981), *cert.*
22 *denied*, 455 U.S. 958 (1983); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir.
1980); and *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). A
finding of exceptional circumstances *requires an evaluation of both* "the
likelihood of success on the merits [and] the ability of the petitioner to
articulate his claims pro se in light of the complexity of the legal issues
involved." *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983), quoted in
Kuster, 773 F.2d at 1049. Neither of these factors is dispositive and *both must*
be viewed together before reaching a decision on request of counsel under
section 1915(d).

