IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER S. RIDER,

Plaintiff, No. CIV S-09-0637 MCE DAD P

vs.

PARENTE, et al., ORDER AND FINDINGS AND RECOMMENDATIONS

Defendants.

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Plaintiff is a state prisoner proceeding pro se with a civil rights action seeking relief under 42 U.S.C. § 1983. This matter is before the court on defendants' motion to revoke plaintiff's in forma pauperis ("IFP") status and to dismiss this action because plaintiff has had three or more actions dismissed for failure to state a claim. Plaintiff has filed an opposition to the motion, and defendants have filed a reply.

BACKGROUND

Plaintiff is proceeding on his second amended complaint against defendants Brautigam, Vansant, Smith, Callison, Tovar, Felker, Davey, McDonald, Harper, Switzer and Dodge. Therein, plaintiff alleges that: (1) defendant Brautigam violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) and plaintiff's rights under the First Amendment; (2) defendants Vansant, Smith, Callison, and Tovar used excessive force against plaintiff in

violation of the Eighth Amendment; (3) defendants Felker, Davey, McDonald, and Harper violated plaintiff's Eighth Amendment right to receive adequate medical care; and (4) defendants Switzer and Dodge failed to adequately protect plaintiff in violation of the Eighth Amendment. (Sec. Am. Compl. (Doc. No. 13) at 2-16.) In terms of relief, plaintiff seeks monetary damages and an order directed at prison officials requiring that the Special Needs Yards at his institution of confinement be segregated. (Id. at 3, 8, 15.)

DEFENDANTS' MOTION TO REVOKE PLAINTIFF'S IFP STATUS

I. Defendants' Motion

Defense counsel argues that the court should revoke plaintiff's IFP status and dismiss this action because on at least three occasions prior to the filing of this action, plaintiff incurred a strike under 28 U.S.C. § 1915(g). Counsel lists four actions, three in the Northern District of Indiana and one in the Eastern District of California, that plaintiff brought prior to his filing of this action.[1] According to defense counsel, in each of these earlier-filed civil actions, the court dismissed plaintiff's complaint for failure to state a claim upon which relief could be granted. (Defs.' Mot. to Dismiss (Doc. No. 23) at 3-5.)

II. Plaintiff's Opposition

In opposition to defendants' motion, plaintiff argues that this court should allow him to continue to proceed IFP in this action because: (1) three of the earlier-filed civil actions relied upon by defendants were brought by plaintiff against family members or other inmates and therefore those dismissals cannot count as strikes under 28 U.S.C. § 1915(g); (2) plaintiff had been granted IFP status in the earlier-filed civil actions and a dismissal of a case can only be counted as a strike under 28 U.S.C. § 1915(g) when a plaintiff is not allowed to proceed IFP; (3)

[1] Defendants request judicial notice be taken of the four previous cases brought by plaintiff which were dismissed. Judicial notice of adjudicative facts is appropriate with respect to matters that are beyond reasonable dispute in that they are either generally known or capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned. See Fed. R. Evid. 201 and Advisory Committee Notes. Here, the court will grant defendants' request for judicial notice.

three of his earlier-filed civil actions relied upon by defendants are still pending; (4) the filing fee must be paid at the outset of an action and here plaintiff has already be granted IFP status; and (5) three of the earlier-filed civil actions were only dismissed because they were not brought against government defendants and therefore those dismissals cannot count as strikes. (Pl.'s Opp'n. to Defs.' Mot. to Dismiss (Doc. No. 26) at 1-3.)

III. Defendants' Reply

In reply, defense counsel argues that plaintiff's arguments are meritless and fail to refute defendants' evidence that plaintiff acquired at least three strikes prior to initiating this action. (Defs.' Reply (Doc. No. 27) at 1-3.)

ANALYSIS

The federal in forma pauperis statute includes a limitation on the number of actions in which a prisoner can proceed in forma pauperis.

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under [§ 1915] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). "[T]he plain language of § 1915(g) requires that the court look at cases dismissed prior to the enactment of the [Prison Litigation Reform Act] to determine when a prisoner has used his three strikes." Rodriguez v. Cook, 169 F.3d 1176, 1181 (9th Cir. 1999).

For purposes of § 1915(g), the court must determine whether plaintiff has, on three or more occasions prior to the filing of this new action, brought a civil action or appeal that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief could be granted. Where a court denies a prisoner's application to file an action without prepayment of fees on the grounds that the submitted complaint is frivolous, malicious or fails to state a claim upon which relief may be granted, the complaint has been "dismissed" for

purposes of § 1915(g). O'Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008).

Here, defendants have demonstrated that plaintiff has suffered at least four such dismissals that qualify under the terms of § 1915(g). In this regard, plaintiff suffered a strike on July 7, 2003, when the district court specifically dismissed Rider v. Kelley, 3:03-cv-474-AS (N.D. Ind.), for failure to state a claim upon which relief may be granted. Plaintiff suffered a second strike on July 8, 2003, when the district court dismissed Rider v. Vanater, 3:03-cv-473-RM (N.D. Ind.), for failure to state a claim upon which relief may be granted. Plaintiff suffered a third strike on July 16, 2003, when the district court dismissed Rider v. Rider, 3:03-cv-0472-RLM-CAN (N.D. Ind.), again due to plaintiff's failure to state a claim upon which relief may be granted. Finally, plaintiff suffered a fourth strike on February 22, 2008 when the district court dismissed Rider v. Hernandez, No. CIV 07-1862-LJO-SMS (E.D. Cal.), for failure to state a claim upon which relief may be granted. (Defs.' Mot. to Dismiss Ex. C-1, D-1, D-2, E-1, E-2, F-1 & F-2 (Doc. No. 23-2) at 5-34.)

Moreover, on January 13, 2011, in Rider v. Rangel, No.1:07-cv-1340-LJO-MJS (E.D. Cal.) the assigned Magistrate Judge issued findings and recommendations recommending that plaintiff's IFP status in that case be revoked because plaintiff had suffered at least three strikes under § 1915(g) prior to filing his complaint in that action.[2] In those findings and recommendations the assigned Magistrate Judge counted the dismissals in Rider v. Rider, Rider v. Vanater, and Rider v. Kelley, noted above, as strikes pursuant to § 1915(g).[3] The assigned

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[2] A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

[3] The Magistrate Judge's January 13, 2011 findings and recommendations in Rider v. Rangel did not count the dismissal in Rider v. Hernandez as qualifying as a strike only because plaintiff filed his complaint in Rider v. Rangel prior to the issuance of the order of dismissal in Rider v. Hernandez on February 22, 2008. Here, plaintiff filed his original complaint in this action on March 9, 2009, well after the order dismissing plaintiff's complaint in Rider v. Hernandez was filed. Thus, in this case the dismissal of plaintiff's complaint in Rider v. Hernandez for failure to state a claim upon which relief may be granted qualifies as yet another strike against plaintiff for purposes of § 1915(g).

District Judge adopted those January 31, 2011 findings and recommendations on March 7, 2011, and ordered plaintiff's IFP status in Rider v. Rangel revoked.

Here, plaintiff commenced this action on March 9, 2009, by filing a civil rights complaint together with an application to proceed in forma pauperis. As noted above, however, plaintiff filed this action after having brought three or more prior federal civil actions that were dismissed on the grounds specified in 28 U.S.C. § 1915(g). Therefore, plaintiff is precluded from proceeding in forma pauperis in this action unless he can demonstrate that he is under imminent danger of serious physical harm. See 28 U.S.C. § 1915(g).[4]

Under the imminent danger exception of § 1915(g) a prisoner may use IFP status to bring a civil action despite three prior dismissals only where the prisoner is under imminent danger of serious physical injury. See Andrews v. Cervantes, 493 F.3d 1047, 1056-57 (9th Cir. 2007) ("[A] prisoner who alleges that prison officials continue with a practice that has injured him or others similarly situated in the past will satisfy the 'ongoing danger' standard and meet the imminence prong of the three-strikes exception."). "Prisoners qualify for [this] exception based on the alleged conditions at the time the complaint was filed. And qualifying prisoners can file their entire complaint IFP; the exception does not operate on a claim-by-claim basis or apply to only certain types of relief." Andrews, 493 F.3d at 1052. However, "the exception applies if the complaint makes a plausible allegation that the prisoner faced 'imminent danger of serious physical injury' at the time of filing." Id. at 1055.

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[4] Plaintiff's other arguments in opposition to the pending motion have no support in the law and are therefore unpersuasive.

Here, plaintiff alleges in his second amended complaint that in 2007 defendant Brautigam confiscated his religious property.[5] (Sec. Am. Compl. (Doc. No. 13) at 3-5.) Plaintiff also alleges that in 2008, defendants Vansant, Smith, Callison, and Tovar forced him to lay in scolding hot water and then used excessive force against him while trying to quell a prison disturbance involving other inmates, and that defendants Felker, Davey, McDonald, and Harper violated plaintiff's right to receive adequate medical care for the injuries sustained during that incident. (Id. at 8-12.) These allegations all concern events that occurred well before plaintiff commenced this civil action in 2009. Based on these allegations of his complaint, it is not plausible that plaintiff faced an imminent danger of serious physical injury at the time he filed this action and plaintiff does not assert otherwise.

Plaintiff also alleges in his second amended complaint that defendants Switzer and Dodge failed to adequately protect him from a known threat of harm in violation of his rights under the Eighth Amendment. (Id. at 15-16.) Specifically, plaintiff alleges that while he was incarcerated at High Desert State Prison (HDSP) an inmate began telling other inmates that plaintiff was a sex offender. (Id. at 15.) Plaintiff alleges that he had previously been assaulted in prison because of his status as a sex offender. (Id.) Plaintiff claims that he informed defendants Switzer and Dodge "about the problem and informed them that [he] was in fear for [his] safety being housed on that yard with that individual." (Id. at 15.) Defendants Switzer and Dodge allegedly determined there was no threat to plaintiff's safety and took no action. (Id. at 15-16.) Plaintiff alleges that he was thereafter assaulted on April 14, 2010. (Id. at 16.)

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[5] Plaintiff's original complaint was filed on March 9, 2009, on behalf of himself and forty fellow inmates and was dismissed with leave to amend because the allegations set forth therein were found to be vague and conclusory. (Compl. (Doc. No. 1); Screening Order, Feb. 5, 2010 (Doc. No. 7.)) Plaintiff's first amended complaint was filed on February 24, 2010. (Am. Compl. (Doc. No. 10.)) On August 5, 2010, plaintiff's first amended complaint was also dismissed with leave to amend because the allegations set forth therein were once again found to be vague and conclusory. (Screening Order, Aug. 6, 2010 (Doc. No. 12.)).

Such allegations, if expounded upon with respect to a continuing practice, could conceivably meet the ongoing danger standard and the imminence prong of the three-strikes exception. See Andrews, 493 F.3d at 1056-57. However, on August 4, 2010, plaintiff notified this court that he had been transferred to Salinas Valley State Prison. (Doc. No. 11.) Moreover, plaintiff raised his failure to protect claim against defendants Switzer and Dodge for the first time in his second amended complaint filed on August 25, 2010, after he had already been transferred from HDSP to Salinas Valley State Prison. (Doc. No. 13.) Plaintiff does not allege that defendant Switzer or defendant Dodge work at Salinas Valley State Prison and counsel has represented that the "[d]efendants are all located" at HDSP. (Defs.' Mot. to Dismiss (Doc. No. 23) at 5.) Thus, it is apparent that plaintiff was not in imminent danger of serious physical injury because of these defendants' alleged failure to protect him at the time plaintiff filed his second amended complaint. Therefore the imminent danger exception to § 1915(g)'s three-strikes provision does not apply here. See Andrews, 493 F.3d at 1055 ("Instead, the exception applies if the complaint makes a plausible allegation that the prisoner faced 'imminent danger of serious physical injury' at the time of filing."); see also Medberry v. Butler, 185 F.3d 1189, 1193 (11th Cir. 1999) (finding failure to protect allegations against prison officials who put an inmate convicted of sexual battery in general population failed to meet imminent danger standard because the threat had ceased prior to filing the complaint and there were no allegations that plaintiff was in imminent danger of serious physical injury at the time he filed his complaint or that he was in jeopardy of any ongoing danger); Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) ("Allegations that the prisoner faced imminent danger in the past are insufficient to trigger this exception to § 1915(g) and authorize the prisoner to pay the filing fee on the installment plan."); Winfield v. Schwarzenegger, No. 2:09-cv-0636 KJN P, 2010 WL 3397397, at *2 (E.D. Cal. Aug. 27, 2010) ("At the time of filing the operative . . . complaint, plaintiff was incarcerated at [CSP-Sacramento]; thus, he is not facing imminent danger of serious physical injury based on allegations against defendant . . .at San Quentin State Prison.")

Plaintiff has also filed with the court a document styled "Motion under 1915(g) imminent danger of serious physical injury requirements." (Doc. No. 39.) Therein plaintiff recounts the threats and assaults he endured over the course of his incarceration because of his status as a sex offender. Plaintiff alleges that "because of [his] charges he is always in imminent danger of serious injury[.]" (Doc. No. 39 at 2.)

While plaintiff alleges that he has been previously assaulted because of his status as a sex offender, plaintiff does not allege, either in his second amended complaint or in his motion, that these prior assaults occurred because of a practice by prison officials of failing to protect him nor does he allege that such a practice is ongoing. While it may be true that plaintiff has been previously assaulted in prison because of his status as a sex offender, plaintiff has not alleged that he is facing an ongoing danger of being assaulted because prison officials are continuing with a practice that has injured him in the past. See Andrews, 493 F.3d at 1056-57 ("[A] prisoner who alleges that prison officials continue with a practice that has injured him or others similarly situated in the past will satisfy the 'ongoing danger' standard and meet the imminence prong of the three-strikes exception."); Ashley, 147 F.3d at 717 ("In short, because Ashley has properly alleged an ongoing danger, and because his complaint was filed very shortly after the last attack, we conclude that Ashley meets the imminent danger exception in § 1915(g)."); see also Allen v. Georgia, Civil Action No. CV210-076, 2010 WL 3418923, at *1 (S.D. Ga. Aug. 30, 2010) ("The mere status of being an incarcerated sex offender is not enough to meet the imminent danger exception of § 1915.")

Therefore, plaintiff may proceed with this action only if he pays the $350 filing fee in full. In this regard, the Ninth Circuit Court of Appeals has made clear that issues surrounding the denial of an application to proceed in forma pauperis become moot upon a litigant's paying of the filing fee. See Lipscomb v. Madigan, 221 F.2d 798 (9th Cir. 1955) (movant's application to docket his appeal in forma pauperis, "having become moot" by payment of docket fee, was dismissed); Funtanilla v. Tristan, No. 05-17096, 2007 WL 1663670 at *1 (9th

Cir. Mar. 12, 2007) (reversing a district court's dismissal under 28 U.S.C. 1915(g) where plaintiff paid the filing fee in full prior to dismissal since "once [plaintiff's] fee was paid, the issue of his IFP status became moot")[6]; see also Stringham v. Bick, No. CIV S-09-0286 MCE DAD P, 2010 WL 580019 at *1 (E.D. Cal. Feb. 11, 2010) (vacating findings and recommendations to dismiss a civil rights action pursuant to § 1915(g) because plaintiff paid the filing fee); Hernandez v. Ventura County, No. CV 09-7838 GHK (JC), 2010 WL 3603491 at *6 (C.D. Cal. July 27, 2010) (recommending that defendants' motion to revoke plaintiff's in forma pauperis status be granted, plaintiff's in forma pauperis status be revoked, and the action be dismissed unless plaintiff paid the statutory filing fee); Johnson v. Tilton, No. CV 09-2862, 2010 WL 3782446 at *4 (C.D. Cal. July 22, 2010) (same).[7]

Accordingly, the undersigned will recommend that plaintiff be allowed to proceed with this civil action only if he pays the filing fee within twenty-one days after being served with these findings and recommendations, the same period of time provided for the filing of objections to these findings and recommendations.

OTHER MATTERS

Also pending before the court are plaintiff's motion to strike defendants' request for judicial notice and plaintiff's motion to strike defendants' motion to revoke his IFP status. As to plaintiff's motion to strike defendants' request for judicial notice, defendants sought judicial notice of court records concerning plaintiff's earlier-filed civil actions. A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). As to plaintiff's motion to

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[6] Citation to this latter unpublished decision is appropriate pursuant to Ninth Circuit Rule 36-3(b).

[7] The Eleventh Circuit Court of Appeals has held that lower courts must dismiss an action and not allow a litigant to pay the filing fee after revoking his IFP status pursuant to § 1915(g). See Dupree v. Palmer, 284 F.3d 1234 (11th Cir. 2002). However, that authority is not binding on this court which is bound by the decisions of the Ninth Circuit.

strike defendants' motion to revoke plaintiff's IFP status, plaintiff has provided no legal authority for striking defendants' motion. Accordingly, both of the motions filed by plaintiff will be denied.

CONCLUSION

IT IS HEREBY ORDERED that:

1. Plaintiff's February 4, 2011 motion to strike defendants' request for judicial notice (Doc. No. 29) is denied;

2. Plaintiff's February 7, 2011 motion to strike defendants' motion to revoke plaintiff's IFP status (Doc. No. 30) is denied; and

3. Plaintiff's April 6, 2011 motion to strike defendants' motion to revoke plaintiff's IFP status (Doc. No. 40) is denied.

IT IS HEREBY RECOMMENDED that:

1. Defendants' January 5, 2011 motion to revoke plaintiff's IFP status (Doc. No. 23) be granted;

2. Plaintiff's April 6, 2011 motion under § 1915(g) (Doc. No. 39) be denied;

3. Plaintiff's IFP status be revoked; and

4. This action be dismissed without prejudice, unless plaintiff pays the full statutory filing fee by the deadline for the filing of objections to these findings and recommendations.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within seven days after service of the objections. The parties are

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advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: July 13, 2011.

DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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