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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION**

IAN LaMONTE CORMIER,

Plaintiff,

v.

JACQUELINE LEE COOPER, *et al.*,

Defendants.

Case No. 5:20-cv-01722-SVW (AFM)

**ORDER TO PAY THE FILING FEE
OR SHOW CAUSE PURSUANT TO
28 U.S.C. §1915(G)**

Plaintiff, a prisoner who is presently detained at the Robert Presley Detention Center (“RPDC”), in Riverside, California, filed a *pro se* civil rights action pursuant to 42 U.S.C. § 1983 on August 25, 2020. (ECF No. 1.) Plaintiff did not prepay the filing fees. Instead, he filed a Request to Proceed Without Prepayment of Filing Fees or *in forma pauperis* (“IFP Request”). (See ECF No. 2.)

Pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A, the Court has screened the Complaint to determine whether plaintiff’s action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. Section 1915A requires the Court to screen any “complaint in a civil action” if, at the time the plaintiff files the complaint, he or she is a prisoner seeking “redress from a governmental entity or officer.” *See*

1 *Olivas v. Nev. ex rel. Dep't of Corr.*, 856 F.3d 1281, 1283-84 (9th Cir. 2017).¹

2 A review of past civil actions filed by plaintiff in the federal district courts of
3 California and the Ninth Circuit Court of Appeals reflects that plaintiff is subject to
4 the provisions of 28 U.S.C. §1915(g). Pursuant to §1915(g), a prisoner may not
5 “bring a civil action or appeal a judgment in a civil action or proceeding” without
6 prepayment of the filing fees “if the prisoner has, on 3 or more prior occasions, while
7 incarcerated or detained in any facility, brought an action or appeal in a court of the
8 United States that was dismissed on the grounds that it is frivolous, malicious, or fails
9 to state a claim upon which relief may be granted, unless the prisoner is under
10 imminent danger of serious physical injury.” 28 U.S.C. §1915(g). Such dismissal is
11 deemed a “strike.”

12 The Ninth Circuit has held that the phrase “fails to state a claim on which relief
13 may be granted” as used in §1915(g), parallels the language of Fed. R. Civ. P.
14 12(b)(6) and carries the same interpretation; that the word “frivolous” refers to a case
15 that is “of little weight or importance: having no basis in law or fact”; and the word
16 “malicious” refers to a case “filed with the ‘intention or desire to harm another.’” *See*
17 *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) (explaining the terms used in
18 §1915(g)). In addition, the Ninth Circuit has held that the prior denial of IFP status
19 on the basis of frivolity or failure to state a claim constitutes a strike for purposes of
20 §1915(g). *See O’Neal v. Price*, 531 F.3d 1146, 1153-54 (9th Cir. 2008) (also stating
21 that a dismissal without prejudice may count as a strike). Additionally, appellate
22

23 ¹ The Ninth Circuit has held that, pursuant to the language of the statute and other relevant
24 definitions of “prisoner,” “a court may screen a complaint pursuant to 28 U.S.C. §1915A only if,
25 at the time the plaintiff files the complaint, he is ‘incarcerated or detained in any facility [because
26 he] is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal
27 law or the terms and conditions of parole, probation, pretrial release, or diversionary program.’”
28 *Olivas*, 856 F.3d at 1284 (alteration in original); *Page v. Torrey*, 201 F.3d 1136, 1139-40 (9th Cir.
2000). Plaintiff entered a prison number on his Complaint, and he filed an IFP Request stating that
he is a “prisoner-plaintiff” who presently is housed at the RPDC. (ECF No. 1 at 1; ECF No. 2 at 1,
4.) It appears to the Court that plaintiff was a “prisoner” for purposes of §1915A and §1915(g) at
the time that he filed this action.

1 affirmances do not count as strikes when the appeal affirms the decision of the district
2 court, but an appeal of a dismissal will count as a separate strike if the appellate court
3 “expressly states that the appeal itself was frivolous, malicious or failed to state a
4 claim.” *El-Shaddai v. Zamora*, 833 F.3d 1036, 1045-46 (9th Cir. 2016).

5 Once plaintiff has accumulated three strikes, he is prohibited from pursuing
6 any subsequent civil action without prepayment of the filing fees, unless he makes a
7 showing that he was “under imminent danger of serious physical injury” based on
8 the circumstances “at the time the complaint was filed, not at some earlier or later
9 time.” *Andrews v. Cervantes*, 493 F.3d 1047, 1052-53 (9th Cir. 2007); 28 U.S.C.
10 § 1915(g). Further, “the prisoner bears the ultimate burden of persuading the court
11 that § 1915(g) does not preclude IFP status.” *Richey v. Dahne*, 807 F.3d 1202, 1206
12 (9th Cir. 2015).

13 In light of the foregoing standards, the Court takes judicial notice of the
14 following prior civil actions filed by plaintiff in the District Courts of California or
15 in the Ninth Circuit Court of Appeal that qualify as strikes for purposes of §1915(g).
16 *See* Fed. R. Evid. 201(b)(2), (c)(1):

17 (1) *Cormier v. Liggins*, Case No. CV 01-00364-K (LSP), in the Southern
18 District of California, in which the case was dismissed on May 8, 2001, for
19 failure to state a claim. (No. 01-00364, ECF No. 2 at 4-7; No. 3.) The
20 district court also found in *Liggins* that plaintiff already had three prior
21 strikes within the meaning of §1915(g). (No. 01-00364, ECF No. 2 at 4.)
22 On Appeal, in Case No. 01-55857, the Ninth Circuit affirmed the district
23 court’s dismissal in *Liggins*. (No. 01-00364, ECF Nos. 15-16.) The
24 *Liggins* case, as well as the three earlier cases cited in that case (*see* below),
25 all count as separate strikes, constituting four prior strikes.

26 a. *Cormier v. People of the State of California*, Case No. CV 00-00249-
27 L (RBB), in the Southern District of California, in which the case
28 was dismissed on March 21, 2000, for failure to state a claim and as

1 barred by *Heck*. The District Court indicated the dismissal may
2 count as a strike. (No. 00-00249, ECF No. 7 at 10-11, No. 8.) The
3 District Court’s dismissal was affirmed on appeal. (No. 00-00249,
4 ECF No. 18.)

5 b. *Cormier v. Manny*, Case No. CV 00-00025-W (CGA), in the
6 Southern District of California, in which the case was dismissed on
7 May 1, 2000, for failure to state a claim. The District Court indicated
8 the dismissal may count as a strike. (No. 00-00025, ECF No. 16.)

9 c. *Cormier v. California*, Case No. CV 00-00004-L (RBB), in the
10 Southern District of California, in which the case was dismissed on
11 May 11, 2000, for failure to state a claim and as barred by *Heck*. (No.
12 00-00004, ECF No. 14 at 7-8, No. 15.)

13 (2) *Cormier v. Suter*, Case No. EDCV 11-00801-UA (MLG), in the Central
14 District of California, in which plaintiff’s request to proceed IFP was
15 denied and the case was dismissed as frivolous on June 3, 2011. (No. 11-
16 00801, ECF No. 2.) In addition, the Ninth Circuit affirmed the district
17 court’s dismissal and found that plaintiff’s appeal was frivolous. (No. 11-
18 00801, ECF Nos. 9, 12.)

19 (3) *Cormier v. Siegler*, Case No. CV 11-04907-ABC (MLG), in the Central
20 District of California, in which, on July 22, 2011, plaintiff’s request to
21 proceed IFP was denied as frivolous, malicious, or for failing to state a
22 claim, and the district judge indicated the dismissal may count as a strike.
23 (No. 11-04907, ECF No. 4 at 1). On Appeal, the Ninth Circuit affirmed
24 the district court and found that the appeal was frivolous. (*See* No. 11-
25 04907, ECF Nos. 10, 16; 530 Fed. Appx. 624 (9th Cir. 2013).)

26 (4) *Cormier v. Comey*, Case No. 20-55320, in the Ninth Circuit, in which
27 plaintiff’s request to proceed IFP was denied and the appeal was dismissed
28 on August 21, 2020, “as frivolous pursuant to 28 U.S.C. § 1915(e)(2).”

1 (See Case No. EDCV 19-01198-SVW (AFM), ECF Nos. 26, 29, 31.)

2 Accordingly, because plaintiff had already accumulated more than three
3 strikes before he initiated this action, plaintiff is precluded from proceeding IFP
4 herein unless he can show that, at the time he initiated this action, he was “under
5 imminent danger of serious physical injury.” 28 U.S.C. §1915(g). The availability
6 of the “imminent danger” exception “turns on the conditions a prisoner faced at the
7 time the complaint was filed, not at some earlier or later time.” See *Andrews*, 493
8 F.3d at 1053. Here, plaintiff was detained at the RPDC at the relevant time, but
9 plaintiff does not name as defendants any official at the RPDC. Nor does the
10 Complaint in this action raise allegations concerning the conditions that plaintiff
11 faced at the RPDC at the time that he filed the Complaint. Accordingly, nothing in
12 the factual allegations in the Complaint raises a reasonable inference that plaintiff
13 faced “imminent danger of serious physical injury” at the time that he initiated this
14 action. 28 U.S.C. §1915(g). The Court, however, must allow a prisoner the
15 opportunity to be heard on the matter before denying a request to proceed IFP or
16 dismissing an action pursuant to 28 U.S.C. §1915(g).

17 IT THEREFORE IS ORDERED that, on or before **October 15, 2020**, plaintiff
18 shall pay the full filing fees in this action, or he shall show cause in writing why he
19 should not be denied leave to proceed IFP and why this action should not be
20 dismissed pursuant to 28 U.S.C. §1915(g).

21 Plaintiff’s failure to comply with this Order will be deemed by the Court as
22 plaintiff’s consent to the dismissal of this action.

23 IT IS SO ORDERED.

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25 DATED: 9/10/2020

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28 ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE