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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER I. SIMMONS,

Plaintiff,

v.

ANTHONY HEDGPETH,

Defendant.

CASE NO: 1:07-cv-01058-LJO-GBC (PC)

ORDER DISCHARGING THE ORDER TO
SHOW CAUSE FILED ON APRIL 27, 2011

(Doc. 27)

ORDER DIRECTING CLERK OF COURT TO
SEND CORRECT IFP FORM

ORDER DIRECTING PLAINTIFF TO SUBMIT
CORRECT IFP FORM

THIRTY DAY DEADLINE

_____/

Christopher Simmons (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis (“IFP”) in this civil rights action filed pursuant to 42 U.S.C. § 1983. On April 27, 2011, the Court issued an order to show cause as to why Plaintiff’s IFP status should not be revoked pursuant to 28 U.S.C. § 1915(g). (Doc. 27). After being granted three extensions of time, Plaintiff filed a response on September 6, 2011. (Docs, 35, 36, 37).

Section 1915(g) provides that:

[i]n no event shall a prisoner bring a civil action . . . under this section 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.

1 28 U.S.C. § 1915(g).¹ Plaintiff does not dispute the Court’s finding that Plaintiff has “three strikes”
2 pursuant to 28 U.S.C. § 1915(g), rather, Plaintiff argues that he falls within the imminent danger
3 exception. (Doc. 27). The Court agrees with Plaintiff that he falls within the imminent danger
4 exception of 28 U.S.C. § 1915(g). Prisoners qualify for the “imminent danger” exception in §
5 1915(g) “if the complaint makes a plausible allegation that the prisoner faced ‘imminent danger of
6 serious physical injury’ at the time of filing.” *Andrews v. Cervantes*, 493 F.3d 1047, 1055 (9th
7 Cir.2007). Moreover, the exception focuses on the risk presented in an “ongoing danger” that the
8 conduct complained of threatens continuing or future injury. *See Andrews v. Cervantes*, 493 F.3d
9 1047, 1056-57 (9th Cir.2007) (adopting Eighth Circuit “ongoing danger” standard).

10 In his complaint and his response to the order to show cause, Plaintiff alleges that he is a
11 disabled prisoner with hypertension and “medication that presents a high risk of a heat stroke from
12 high temperatures.” (Doc. 27 at 1-3 and 6; Doc. 1 at 6, 8). Plaintiff further alleges that in addition
13 to his hypertension medication which presents severe health risks with prolonged exposure to heat,
14 Plaintiff suffers from a mental illness that requires medications that further present a high risk of heat
15 stroke. (Doc. 27 at 1-3 and 6; Doc. 1 at 6, 8). Plaintiff alleges that there were heat waves during the
16 summer of 2007 and that: 1) his housing unit was in excess of 105 degrees; 2) there was no air
17 flowing from the ventilation; 3) the heat wave caused nineteen deaths in the region and the
18 temperature in the location of the prison climbs in excess of 110 and 118 degrees during the summer;
19 4) medical personnel were failing to monitor “heat risk patients” as required by providing ice, cold
20 showers and other remedies to protect against the risk of heat stroke; 5) at the time of filing the
21 complaint, Plaintiff was locked in the housing unit 85% of the time; and 6) prison officials measured
22 the temperature in the morning and not during the peak heat time of day. (Doc. 27 at 6-8, 10; Doc.
23 1 at 6-8, 11).

24 A prisoner with an existing medical vulnerability to heat strokes, remaining in his cell 85
25 percent of the time, in a region prone to excessively hot summers combined with persistent problems

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27 ¹ “This subdivision is commonly known as the ‘three strikes’ provision. ‘Strikes’ are prior cases or appeals,
28 brought while the plaintiff was a prisoner, which were dismissed ‘on the ground that [they were] frivolous, malicious,
or fail[] to state a claim’ are generically referred to as ‘strikes.’ Pursuant to § 1915(g), a prisoner with three strikes
or more cannot proceed [in forma pauperis].” *Andrews v. King*, 398 F.3d 1113, 1116 n.1(9th Cir. 2005).

1 with cooling and insufficient preventative medical response presents an ongoing danger and
2 therefore meets the imminent danger exception to § 1915(g). *See Andrews v. Cervantes*, 493 F.3d
3 1047, 1056-57 (9th Cir.2007).²

4 For the foregoing reasons, the Court finds that Plaintiff's complaint satisfied the imminent
5 danger exception to 28 U.S.C. § 1915(g) at the time he filed that complaint. However, as previously
6 noted in the Court's order to show cause, in forma pauperis status was erroneously granted as a
7 habeas case without requiring payment of the filing fee. (Doc. 27). Therefore, Plaintiff must re-
8 submit the correct in forma pauperis application. Therefore, the Court HEREBY ORDERS that:

- 9 1. The Court's Order to Show Cause filed on April 27, 2011 is DISCHARGED;
- 10 2. The Clerk's Office is Directed to send Plaintiff the correct IFP form for § 1983
11 prisoner cases; and
- 12 3. Plaintiff has THIRTY (30) days from receiving service of this order to submit the
13 correct IFP form.

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16 IT IS SO ORDERED.

17 Dated: November 3, 2011

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UNITED STATES MAGISTRATE JUDGE

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25 ² Although the Ninth Circuit has yet to address the specific issue of whether potential to suffer from heat
26 stroke amounts to imminent danger, the Eighth Circuit in *Martin v. Shelton*, applied the "ongoing danger" standard to
27 a claim similar to Plaintiff's. *See Martin v. Shelton*, 319 F.3d 1048, 1049-51 (8th Cir. 2003). In *Martin v. Shelton*,
28 the plaintiff alleged that prison staff forced the plaintiff to work for one day in humid 98-degree weather despite his
high blood pressure condition and plaintiff quit working out of fear of suffering from a heat related stroke. *Shelton*,
319 F.3d at 1049-50. The Eighth Circuit concluded that the one time past misconduct of exposing plaintiff to the
risk of heat stroke did not fall within the imminent danger exception. *Shelton*, 319 F.3d at 1050-51. The facts in this
action are distinguishable from those in *Shelton*.