

FILED

APR 12 2010

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

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

LIONELL THOLMER,

Plaintiff,

vs.

L.L. SCHULTEIS, et al.,

Defendants.

CASE NO. 1:08-cv-00926-SMS PC

ORDER VACATING ORDER GRANTING
PLAINTIFF LEAVE TO PROCEED IN
FORMA PAUPERIS AND ORDER
DIRECTING COLLECTION OF FILING
FEE FROM PLAINTIFF'S TRUST ACCOUNT

(Doc. 7)

ORDER DIRECTING CLERK'S OFFICE
TO REFUND TO PLAINTIFF THE PORTION
OF THE FILING FEE COLLECTED TO DATE

Plaintiff Lionell Tholmer ("Plaintiff") is a prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff consented to jurisdiction by United States Magistrate Judge on June 19, 2009. By order filed January 21, 2009, the Court granted Plaintiff leave to proceed in forma pauperis and directed the California Department of Corrections to begin collecting payments from Plaintiff's trust account until the \$350.00 filing fee had been paid in full.

28 U.S.C. § 1915(g) provides that a prisoner shall not "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."

As stated in the Order to Show Cause (hereinafter "the OSC") which issued on June 29, 2009, Plaintiff has had three actions dismissed for failure to state a claim upon which relief may be

1 granted (hereinafter “the three strike cases”) and became subject to section 1915(g) on February 26,
2 2008.¹ Therefore, Plaintiff is precluded from proceeding in forma pauperis in this action unless he
3 was, at the time the complaint was filed, under imminent danger of serious physical injury. Andrews
4 v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007). As also discussed in the OSC, Plaintiff’s claims
5 arise from an incident of excessive force at Pleasant Valley State Prison in 2007 which does not meet
6 the imminent danger exception to allow Plaintiff to proceed in forma pauperis despite having three
7 strikes. Andrews, 493 F.3d at 1053.

8 In response to the OSC, Plaintiff requested and received multiple extensions of time to
9 respond, as well as copies of the findings and recommendations and orders adopting and dismissing
10 for failure to state a claim in the three strike cases. On April 5, 2010, Plaintiff filed a response to the
11 OSC wherein he argued that two of the three strike cases should not count as strikes since he had
12 voluntarily dismissed both of those actions upon receipt of findings and recommendations. (Doc. 25,
13 p. 1.) However, review of the three strike cases shows that all three of them were dismissed by order
14 adopting findings and recommendations for failure to state a claim – not by voluntary dismissal.

15 Plaintiff also appears to argue that two of the three strikes cases should not count as strikes
16 because they were dismissed without prejudice. However, this argument is flawed as two of the
17 cases were dismissed with prejudice and only one was dismissed without prejudice. Further, “a
18 dismissal without prejudice counts as a strike, so long as the dismissal is made because the action is
19 frivolous, malicious, or fails to state a claim.” *O’Neal v. Price*, 531 F.3d 1146, 1154 (9th Cir. 2008)
20 quoting *Day v. Maynard*, 200 F.3d 665, 667 (10th Cir.1999). “If Congress had intended to limit
21 strikes to dismissals with prejudice, it could have said so.” *O’Neal*, ref. *United States v. Miller*, 151
22 F.3d 957, 960 (9th Cir.1998). Whether the three strike cases were dismissed with or without
23 prejudice is of no consequence when counting strikes under section 1915(g) since all of the three
24 strikes cases were dismissed for Plaintiff’s failure to state a claim.

25 Thus, Plaintiff is ineligible to proceed in forma pauperis and should be required to submit the

26
27 ¹ The Court takes judicial notice of case numbers 2:95-cv-01417-GEB-GGH PC Tholmer v. Henderson, et al.
28 (dismissed 04/30/1996 for failure to state a claim); 2:95-cv-01464-WBS-GGH PC Tholmer v. Smith, et al. (dismissed
08/16/1996 for failure to state a claim); and 1:06-cv-01592-AWI-DLB PC Tholmer v. Yates, et al. (dismissed 02/26/2008
for failure to state a claim).

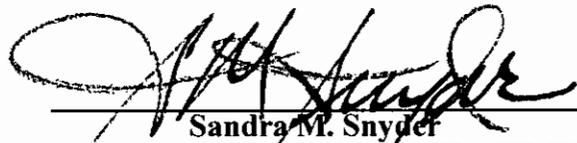
1 filing fee in full in order to proceed with this action such that: the order granting Plaintiff leave to
2 proceed in forma pauperis should be vacated; Plaintiff should be denied leave to proceed in forma
3 pauperis; and this action should be dismissed if Plaintiff fails to pay the \$350.00 filing fee in full
4 within thirty (30) days from the date of service of this order.

5 Accordingly, based on the foregoing, it is HEREBY ORDERED that:

- 6 1. The January 21, 2009 order granting Plaintiff leave to proceed in forma pauperis is
7 VACATED;
- 8 2. The California Department of Corrections is to cease collecting partial payments from
9 Plaintiff's account for this action;
- 10 3. The Clerk's Office shall review its records and refund to Plaintiff the portion of the
11 filing fee that has been collected from Plaintiff to date;
- 12 4. Pursuant to 28 U.S.C. § 1915(g), Plaintiff is denied leave to proceed in forma
13 pauperis;
- 14 5. Plaintiff must pay the \$350.00 filing fee in full within thirty (30) days from the date of
15 service of this order; and
- 16 6. If Plaintiff fails to pay the \$350.00 filing fee in full within thirty (30) days, this action
17 will be dismissed, without prejudice.

18
19 IT IS SO ORDERED.

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21 Dated: April 12, 2010

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23 Sandra M. Snyder
24 UNITED STATES MAGISTRATE JUDGE
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