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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

MATTHEW B. CRAMER,  
  
                                Plaintiff,  
  
          v.  
  
TARGET CORPORATION, et al.,  
  
                                Defendants.

CASE NO. 1:08-cv-01693-OWW-SMS  
  
FINDINGS AND RECOMMENDATION  
RECOMMENDING DENIAL OF  
DEFENDANT’S MOTION TO REVOKE  
PLAINTIFF’S STATUS IN FORMA  
PAUPERIS AND TO IMPOSE STATUS OF  
VEXATIOUS LITIGANT

\_\_\_\_\_/ (Doc. 43)

Plaintiff Matthew Cramer is a prisoner proceeding pro se in a civil rights action pursuant to 42 U.S.C. § 1983, arising from his injuries inflicted during his detention for shoplifting by store security personnel and local police. By order filed December 9, 2008, 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 statutory filing fee has been paid in full. Defendant Eric Heller<sup>1</sup> moves (1) to revoke plaintiff’s *in forma pauperis* status under 28 U.S.C. § 1915(g); (2) to declare plaintiff a vexatious litigant under Title 31, part 2 of the California Code of Civil Procedure; (3) to prohibit plaintiff from filing new litigation without first obtaining leave of court; and (4) to require plaintiff to furnish bond, in an amount to be determined by the court, for defendant’s benefit. Plaintiff counters that, with one exception, his previous cases have had merit.

The undersigned declines to withdraw the prior *in forma pauperis* order or to recommend that plaintiff be declared a vexatious litigant required to post bond and to submit future complaints

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<sup>1</sup> Plaintiff alleges that Heller is an asset protection specialist at Target as well as a Tulare police officer (doc. 10, page 3).

1 for pre-filing review. First, although plaintiff is now barred from *in forma pauperis* filings under 28  
2 U.S.C. §1915(g), he was not so barred when he filed this action. Second, although Heller arguably  
3 can satisfy the requirement that plaintiff is a frivolous litigant, he does not contend that “there is not  
4 a reasonable probability that [plaintiff] will prevail in the litigation against [Heller].” Cal. Code  
5 Civil Procedure § 391.1.

6 **I. Factual and Procedural Findings**

7 Plaintiff has filed at least twelve cases in the Eastern District of California since 1999:

- 8 1. *Cramer v. California Department of Corrections*, 2:99-cv-01605-LKK-GGH (filed  
9 August 17, 1999). Action dismissed May 31, 2005 (doc. 187).
- 10 2. *Cramer v. Ty Warner, Inc.*, 2:00-mc-00099-FCD-GGH (filed March 24, 2000).  
11 Action dismissed July 26, 2001, for failure to state a claim upon which relief may be  
12 granted (doc. 21)(a strike under 28 U.S.C. § 1915(g)).
- 13 3. *Cramer v. California Department of Justice*, 2:00-cv-02374-DFL-DAD (filed  
14 October 25, 2000). Dismissed as legally frivolous on September 26, 2001 (doc. 11)(a  
15 strike under 28 U.S.C. § 1915(g)).
- 16 4. *Cramer v. Kushner*, 2:01-mc-00232-LKK-GGH (filed November 29, 2001).  
17 Dismissed with leave to amend on November 29, 2001 (doc. 4).
- 18 5. *Cramer v. Kushner*, 2:01-cv-02193-LKK-GGH (PS)(filed November 29,  
19 2001)(renumbering of 2:01-mc-00232-LKK-GGH). Dismissed without prejudice on  
20 plaintiff’s motion (doc. 47).
- 21 6. *Cramer v. Cooper*, 2:02-cv-00885-WBS-PAN (filed April 23, 2002). Dismissed on  
22 plaintiff’s motion, February 28, 2003 (doc. 11).
- 23 7. *Cramer v. Davis*, 2:02-cv-02234-WBS-JFM (filed October 10, 2002). Dismissed on  
24 plaintiff’s motion, January 31, 2003 (doc. 9).
- 25 8. *Cramer v. Tulare County Sheriff*, 1:04-cv-05834-REC-LJO (filed June 14, 2004).  
26 Dismissed on plaintiff’s motion January 28, 2005 (doc. 9).
- 27 9. *Cramer v. Christ*, 1:04-cv-06364-AWI-SMS (filed October 5, 2004). Dismissed on  
28 plaintiff’s motion, December 8, 2004 (doc. 6).

- 1           10.    *Cramer v. State of California*, 2:04-cv-02441-MCE-GGH (filed November 16, 2004).  
2                   Dismissed without prejudice, September 1, 2005 (doc. 15).
- 3           11.    *Cramer v. Bush*, 1:05-cv-00355-REC-DLB (transferred from District of District of  
4                   Columbia on March 16, 2005). Dismissed on September 8, 2005, for plaintiff’s  
5                   failure to obey court’s order (doc. 8).
- 6           12.    *Cramer v. Schwarzenegger*, 2:07-cv-00125-JKS-GGH (filed January 18, 2007).  
7                   Dismissed without prejudice on June 13, 2008 (doc. 18).
- 8           13.    *Cramer v. Schwarzenegger*, 2:08-cv-1356-EFB (filed June 16, 2008). Transferred to  
9                   Fresno on September 5, 2008 (doc. 4).
- 10          14.    *Cramer v. Schwarzenegger*, 1:08-cv-01310-GSA (filed June 16, 2008). Dismissed  
11                   with prejudice for failure to state a claim on April 24, 2009 (doc. 16)(a strike under  
12                   28 U.S.C. § 1915(g)).

13          Plaintiff filed this action on October 24, 2008.

14    **II.    *In Forma Pauperis***

15          A prisoner who satisfies statutory standards may bring a lawsuit *in forma pauperis* without  
16          the prepayment of fees or security. 28 U.S.C. § 1915. Prisoners who repeatedly file meritless or  
17          malicious suits lose the privilege of filing *in forma pauperis*, however.

18                 In no event shall a prisoner bring a civil action or appeal a judgment in a civil action  
19                 or proceeding under this section if the prisoner has, on three or more occasions, while  
20                 incarcerated or detained in any facility, brought an action or appeal in a court of the  
21                 United States that was dismissed on the grounds that it is frivolous, malicious, or fails  
22                 to state a claim upon which relief may be granted, unless the prisoner is under  
23                 imminent danger of serious physical injury.

24                 28 U.S.C. §1915(g) (sometimes referred to as the “three-strikes” provision).

25          Court records reveal that, pursuant to 28 U.S.C. § 1915(g), plaintiff became ineligible to  
26          proceed *in forma pauperis* on April 24, 2009, and thereafter will be required to submit the filing fee  
27          in full to proceed with any new case that he files. The three specific cases constituting a strike under  
28          § 1915(g) are (1) *Cramer v. Ty H. Warner*, 2:00-mc-00099-FCD-GGH; (2) *Cramer v. California  
Department of Justice*, 2:00-cv-02374-DFL-DAD PC; and (3) *Cramer v. Schwarzenegger*, 1:08-cv-  
01310-GSA PC. Section 1915(g) did not bar plaintiff from filing *in forma pauperis* when he filed

1 this action on October 24, 2008.

2 Even when § 1915(g) does not apply, “[a] district court may deny leave to proceed [*in forma*  
3 *pauperis*] at the outset if it appears from the face of the complaint that the action is frivolous or  
4 without merit.” *Tripati v. First Nat’l Bank & Trust*, 821 F.2d 1368, 1370 (9<sup>th</sup> Cir. 1987). An action is  
5 frivolous if it has “no arguable basis in fact or law.” *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9<sup>th</sup>  
6 Cir. 1984). Plaintiff’s complaint, which alleges an assault in the course of an arrest for shoplifting, is  
7 not apparently frivolous or meritless. Accordingly, the undersigned declines to revoke the prior order  
8 permitting plaintiff to file this action *in forma pauperis* or to recommend that the District Court  
9 revoke the order.

10 **III. Vexatious Litigants**

11 Defendant Heller also urges this court to find plaintiff to be a vexatious litigant under  
12 California Code (Civil Procedure) § 391(b)(1), which provides

- 13 (b) “Vexatious litigant” means a person who does any of the following:  
14 (1) In the immediately preceding seven-year period has commenced, prosecuted, or  
15 maintained in propria persona at least five litigations other than in a small claims court  
16 that have been (I) finally determined adversely to the person or (ii) unjustifiably  
17 permitted to remain pending at least two years without having been brought to trial or  
18 hearing.

19 Local Rule 65.1-151(b) adopts Title 3A, part 2, of the California Code (Civil Procedure), relating to  
20 vexatious litigants, as part of its provisions addressing security for lawsuits. Because this action was  
21 filed on October 24, 2008, all cases that plaintiff filed after October 24, 2003, are relevant in  
22 determining whether plaintiff is a vexatious litigant. In this five-year period, five cases were  
23 dismissed without prejudice (two of these on plaintiff’s motion), and one case was dismissed for  
24 failure to state a claim.

25 Heller contends that plaintiff has satisfied the requirements for a vexatious litigant simply by  
26 bringing five cases that were dismissed within the past seven-year period: (1) *Cramer v. Tulare*  
27 *County Sheriff*, 1:04-cv-05834-REC-LJO; (2) *Cramer v. Christ*, 1:04-cv-06364-AWI-SMS; (3)  
28 *Cramer v. State of California*, 2:04-cv-02441-MCE-GGH; (4) *Cramer v. Bush*, 1:05-cv-00355-REC-  
DLB; and (5) *Cramer v. Schwarzenegger*, 2:07-cv-00125-JKS-GGH. He contends that, under  
California law, voluntarily dismissed cases count as adverse decisions for purposes of the state’s

1 vexatious litigant statute. *Tokerud v. Capitolbank Sacramento*, 38 Cal.App.4th 775, 779 (Cal. App.  
2 1995), *cert. denied*, 518 U.S. 1007 (1996). The California appellate court reasoned:

3 An action which is ultimately dismissed by the plaintiff, with or without prejudice, is  
4 nevertheless a burden on the target of the litigation and the judicial system, albeit less  
5 of a burden than if the matter had proceeded to trial. A party who repeatedly files  
baseless actions only to dismiss them is no less vexatious than the party who follows  
the actions through to completion.

6 *Id.*

7 Federal courts have been more cautious in declaring plaintiffs vexatious litigants. “To  
8 maintain general access to the courts while safeguarding against abusively excessive litigation, a court  
9 must satisfy four prerequisites before entering a vexatious litigant order: ‘(1) a plaintiff must be given  
10 adequate notice to oppose a restrictive pre-filing order before it is entered; (2) a trial court must  
11 present an adequate record for review by listing the case filings that support its order; (3) the trial  
12 court must further make substantial findings as to the frivolousness or harassing nature of the  
13 plaintiff’s filings; and (4) the order must be narrowly tailored to remedy only the plaintiff’s particular  
14 abuses.’” *Monaghan v. Trebex*, 35 Fed.Appx. 651, 651 (9<sup>th</sup> Cir.), *cert. denied*, 537 U.S. 974 (2002),  
15 *quoting O’Loughlin v. Doe*, 920 F.2d 614, 617 (9<sup>th</sup> Cir. 1990). A court must make detailed findings  
16 sufficient to support its conclusion that the plaintiff’s court actions are frivolous or harassing. *De*  
17 *Long v. Hennessey*, 912 F.2d 1144, 1148 (9<sup>th</sup> Cir.), *cert. denied*, 498 U.S. 1001 (1990). Making such  
18 findings requires the court to examine both the number and content of the plaintiff’s filings for  
19 frivolity, bad faith, or harassment. *Id.*

20 Although federal courts have the inherent power to “regulate the activities of abusive litigants  
21 by imposing carefully tailored restrictions under appropriate circumstances,” courts should rarely  
22 issue orders requiring the review of a litigant’s pleadings before their filing. *De Long*, 912 F.2d at  
23 1147, *quoting Tripathi v. Beaman*, 878 F.2d 351, 352 (10<sup>th</sup> Cir. 1989). Because a pre-filing order such  
24 as the one Heller advocates interferes with the plaintiff’s constitutional right of court access, it is “an  
25 extraordinary remedy that should be narrowly tailored and rarely used.” *See Moy v. United States*,  
26 906 F.2d 467, 470 (9<sup>th</sup> Cir. 1990). “An order limiting a prisoner’s access to the courts must be  
27 designed to preserve his right to adequate, effective and meaningful access [to the courts] . . . . while  
28 preserving the court from abuse.” *Franklin*, 745 F.2d at 1231-32. Because a pre-filing order violates

1 the basic right of court access, it “cannot issue merely upon a showing of litigiousness.” *Moy*, 906  
2 F.2d at 470. The review of the plaintiff’s claims must establish that they were both numerous and  
3 without merit. *Id.*

4 The undersigned submits that the district court need not reach the question of whether  
5 plaintiff’s prior cases were sufficiently numerous and meritless to justify a finding of vexatiousness.  
6 To establish that plaintiff is a vexatious litigant from whom security must be required, the moving  
7 defendant must establish that “there is not a reasonable probability that [plaintiff] will prevail in the  
8 litigation against the moving defendant.” Cal. Code Civil Procedure § 391.1. Because Heller does  
9 not address this requirement, the court cannot analyze whether plaintiff is a vexatious litigant from  
10 whom bail must be required.

11 Based on the foregoing, the undersigned HEREBY RECOMMENDS that defendant Eric  
12 Heller’s motion be denied in its entirety.

13 These Findings and Recommendations will be submitted to the United States District Judge  
14 assigned to the case pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen (15) days  
15 after being served with these Findings and Recommendations, defendant Heller may file written  
16 objections with the court. The document should be captioned “Objections to Magistrate Judge’s  
17 Findings and Recommendations.” Heller is advised that failure to file objections within the specified  
18 time may waive the right to appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9<sup>th</sup> Cir.  
19 1991).

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21 IT IS SO ORDERED.

22 **Dated: January 5, 2010**

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE

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