

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

HORACE A. BELL, CASE NO. 1:12-cv-1925-MJS PC

Plaintiff, ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND DISMISSING ACTION, WITHOUT PREJUDICE TO REFILE WITH SUBMISSION OF \$350.00 FILING FEE

STILES, et al.,

## Defendants.

(ECF No. 8)

I. 28 U.S.C. 1915(g)

Plaintiff Horace A. Bell, a state prisoner proceeding pro se, filed this civil rights action pursuant to 42 U.S.C. § 1983 on November 2, 2012. He seeks leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. (ECF No. 8.) Plaintiff has consented to Magistrate Judge jurisdiction. (ECF No. 6.)

Plaintiff is subject to section 1915(g), which 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.”<sup>1</sup> 28 U.S.C. § 1915(g).

<sup>1</sup> The Court takes judicial notice of case numbers : 2:09-cv-8808-UA-RC PC Bell v. Judge John Reid (C.D. Cal.) (dismissed 12/23/2009 as frivolous, malicious, and/or failing to state a claim since Plaintiff's action was barred by Heck v. Humphrey, 512 U.S. 477 (1994)); 1:10-cv-01762-SKO PC Bell v. Lopez (E.D. Cal.) (dismissed 08/26/2011 for failure to state a claim); and 1:10-cv-0310-LJO-GSA (E.D. Cal.) (dismissed 07/12/2012 for failure to state a claim).

The determination whether Plaintiff is under imminent danger of serious physical injury is made based on the conditions at the time the complaint is filed, Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007), and the allegation of imminent danger must be plausible, *id.* at 1054.

## **II. Plaintiff's Allegations**

Plaintiff is currently incarcerated at Kern Valley State Prison ("KVSP") and he alleges claims for relief against Sargent Stiles, facility officer at KVSP, and Officer Ortiz, an officer at KVSP. Plaintiff appears to allege Defendants violated his rights under the First Amendment to the United States Constitution and Americans with Disabilities Act ("ADA").

Plaintiff alleges that in September 2012 Defendant Ortiz threatened Plaintiff after Plaintiff filed an administrative appeal. Defendant Ortiz retaliated against Plaintiff in October 2012 by refusing to provide Plaintiff with an ADA shower. Also that month Defendant Stiles laughed at the smell in Plaintiff's housing unit.

### III. Discussion

In his complaint, Plaintiff alleges that he has been retaliated against because he was not provided with an ADA shower after he filed administrative appeals. Plaintiff does not allege that at the time he filed the suit he was facing imminent danger of serious physical injury at KVSP, and his allegations do not indicate he was in imminent danger of serious physical injury when he filed this suit.

## IV. Order

For the reasons set forth herein, it is ORDERED that Plaintiff is denied leave to proceed in forma pauperis in this action. The action is dismissed, without prejudice to refiling along with submission of the \$350.00 filing fee.

IT IS SO ORDERED.

Dated: January 29, 2013

/s/ *Michael J. Seng*  
UNITED STATES MAGISTRATE JUDGE