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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
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10 JEFF S. HARNDEN,

11 Plaintiff,

12 vs.

13 O. SMITH, et al.,

14 Defendants.
15

1:15-cv-00461-LJO-GSA-PC

ORDER DISMISSING ACTION UNDER 28
U.S.C. § 1915(g), WITHOUT PREJUDICE TO
REFILING WITH SUBMISSION OF \$400.00
FILING FEE IN FULL
(Doc. 1.)

ORDER FOR CLERK TO CLOSE CASE

16 **I. BACKGROUND**

17 Jeff S. Harnden ("Plaintiff") is a state prisoner proceeding pro se with this civil rights
18 action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on
19 March 25, 2015. (Doc. 1.) Plaintiff has not paid the \$400 filing fee for this action or submitted
20 an application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

21 **II. THREE-STRIKES PROVISION OF 28 U.S.C. § 1915**

22 28 U.S.C. § 1915 governs proceedings in forma pauperis. Section 1915(g) provides that
23 "[i]n no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3
24 or more prior occasions, while incarcerated or detained in any facility, brought an action or
25 appeal in a court of the United States that was dismissed on the grounds that it is frivolous,
26 malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is
27 under imminent danger of serious physical injury." Therefore, if a plaintiff has three qualifying
28 dismissals or "strikes," he may bring a civil action without complete prepayment of the \$400.00

1 filing fee only if he alleges that he is in *imminent* danger of serious physical injury. 28 U.S.C.
2 § 1915(g) (emphasis added).

3 At least three of Plaintiff's prior actions were dismissed as frivolous, as malicious
4 and/or for failure to state a claim.¹ See Harnden v. Scribner, No. CV F-05-1274-LJO-WMW,
5 2008 WL 818932 at *1 (E.D. Cal. March 24, 2008) (denying in forma pauperis status based on
6 three strikes under § 1915(g) and citing cases)²; Harnden v. Fitzsimmons, No. CV 96-01500-JE
7 (D. Or. Dec. 13, 1996) (same); Harnden v. Campbell, No. CV 96-06086-PA (D. Or. Sept. 9,
8 1996) (dismissed as frivolous). Therefore, Plaintiff cannot proceed in this case without paying
9 the filing fee unless he alleges in the Complaint that he is in imminent danger of serious
10 physical injury.

11 **III. FAILURE TO ALLEGE IMMINENT DANGER**

12 The Court has reviewed Plaintiff's Complaint and finds that Plaintiff does not meet the
13 imminent danger exception. See Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007).
14 The gravamen of Plaintiff's Complaint is that on May 30, 2014, he was attacked and stabbed by
15 another inmate, Garafalo, who attempted to murder Plaintiff, causing serious injuries. Plaintiff
16 claims that defendants (correctional officers) are responsible for the attempted murder because
17 they failed to properly document Plaintiff's known enemies, including Garafalo, instigated the
18 attempted murder, and watched, doing nothing, as Plaintiff was attacked. Plaintiff claims there
19 is an imminent threat to his life because correctional officers have "complete ability to do it
20 again." Complaint, Doc. 1 at 3:17-18. Plaintiff requests monetary damages as relief.

21 In Andrews, the Ninth Circuit adopted the view that "requiring a prisoner to 'allege []
22 an ongoing danger' - the standard adopted by the Eighth Circuit - is the most sensible way to
23 interpret the imminency requirement." Andrews, 493 F.3d at 1056, citing Ashley v. Dilworth,
24 147 F.3d 715, 717 (8th Cir. 2003). Andrews held that the imminent danger faced by the

25
26 ¹ Plaintiff has filed more than 40 cases in California and Oregon District Courts.

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28 ² The cases identified as dismissed for failure to state a claim are: Harnden v. Ayers, No. C 99-
2138 (N.D. Cal. June 23, 1999); Harnden v. Arcata, No. C 97-4210 CW (N.D. Cal. Jan. 13, 1998); Harnden v. Del
Norte County Sheriff's Dept., No. C 96-4086 CW (N.D. Cal. May 15, 1997).

1 prisoner need not be limited to the time frame of the filing of the complaint, but may be
2 satisfied by alleging a danger that is ongoing. Therefore, Plaintiff can satisfy the imminent
3 danger exception by alleging an ongoing threat. Where Plaintiff fails, however, is that he fails
4 to allege facts indicating that the threat he is under is ongoing within the meaning of Andrews,
5 or more than speculative.

6 The plaintiff in Andrews alleged facts indicating a particular, present, threat to his life.
7 He alleged that he was at risk of contracting HIV and that he had already contracted hepatitis C,
8 because of his exposure to other prisoners who had those contagious diseases due to prison
9 officials' policy of not screening prisoners for such diseases. In contrast, the threat Plaintiff
10 alleges was speculative at the time he commenced this action, based on his fear that he will, at
11 some time in the future, be subject to harm by correctional officers or another inmate. These
12 facts do not support the existence of an imminent danger of serious physical injury. "[T]he
13 availability of the exception turns on the conditions a prisoner faced at the time the complaint
14 was filed, not at some earlier or later time." Andrews, 493 F.3d at 1053.

15 Moreover, Plaintiff's allegations in the Complaint are vague and conclusory, without
16 alleging specific facts indicating he is under imminent danger. Plaintiff alleges "eminent
17 (*sic*) threat to my life. CDC records enemies at least 100 then deletes the enemies, to house in a
18 prison of their choice in attempt to cause murder [and] attempted murder by an inmate (for
19 cops CDC officers with complete ability to do it again (simply watched)." Complaint at 3:15-
20 18. However, Plaintiff fails to allege facts sufficient to demonstrate that he was under actual
21 threat of harm at the time he filed the Complaint. While Plaintiff alleges that correctional
22 officers and other inmates are capable of causing him harm, he does not allege specific facts
23 indicating that he has recently been threatened or has knowledge of a planned attack, or other
24 facts supporting his claim of imminent danger. Plaintiff claims that correctional officers want
25 him to be assaulted or murdered, but no factual allegations support this. Further, Plaintiff
26 makes no request for relief from imminent danger and requests only monetary damages.

27 "[A]ssertions of less obviously injurious practices may be rejected as overly speculative
28 or fanciful." Andrews, 493 F.3d at 1057 n. 11. Based on the foregoing, the court finds that

1 Plaintiff fails to allege the imminent danger of serious physical injury necessary to bypass §
2 1915(g)'s restriction on his filing suit without prepayment of the filing fee.

3 Accordingly, Plaintiff may not proceed in forma pauperis in this action, and must
4 submit the appropriate filing fee in order to proceed with this action. This action shall be
5 dismissed, without prejudice to refiling with the submission of the \$400.00 filing fee in full.

6 **IV. CONCLUSION**

7 Based on the foregoing, it is HEREBY ORDERED that:

- 8 1. Pursuant to 28 U.S.C. § 1915(g), Plaintiff may not proceed in forma pauperis
9 with this case;
- 10 2. This action is DISMISSED, without prejudice to refiling with the submission of
11 the \$400.00 filing fee in full; and
- 12 3. The Clerk is directed to CLOSE this case.

13 IT IS SO ORDERED.

14 Dated: March 27, 2015

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE