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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN E. MITCHELL,
Plaintiff,
v.
WARDEN D. DAVEY, et al.,
Defendants.

No. 1:16-cv-01148-DAD-EPG (PC)
ORDER ADOPTING FINDINGS AND RECOMMENDATIONS; VACATING ORDER GRANTING PLAINTIFF'S APPLICATION TO PROCEED IN FORMA PAUPERIS AND REVOKING PLAINTIFF'S IN FORMA PAUPERIS STATUS; REQUIRING PLAINTIFF TO PAY FILING FEE; DIRECTING CLERK TO SERVE THIS ORDER ON THE COURT FINANCIAL DEPARTMENT AND THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION
(Doc. Nos. 6, 33, 43)

Plaintiff John E. Mitchell is a state prisoner proceeding pro se and *in forma pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

Plaintiff filed the complaint commencing this action on August 5, 2016. (Doc. No. 1.) The assigned magistrate judge granted plaintiff's application to proceed *in forma pauperis* on August 23, 2016. (Doc. No. 6.) On December 20, 2016, the magistrate judge screened plaintiff's complaint, and found that it stated a cognizable claim against defendants Robicheaux and Thompson for violation of plaintiff's free exercise rights under the First Amendment. (Doc. No. 16.) The action is now proceeding on that claim. (Doc. No. 26.)

1 On March 24, 2017, defendant Thompson filed a motion for an order revoking plaintiff's
2 *in forma pauperis* status. (Doc. No. 33.) On April 11, 2017, defendant Robicheaux filed a notice
3 of joinder in that motion. (Doc. No. 39.) On April 17, 2017, plaintiff filed an opposition. (Doc.
4 No. 40.) On April 24, 2017, defendant Thompson filed a reply. (Doc. No. 41.)

5 On May 2, 2017, the assigned magistrate judge entered findings and recommendations,
6 recommending that defendant Thompson's motion for an order revoking plaintiff's *in forma*
7 *pauperis* status pursuant to 28 U.S.C. § 1915(g) be granted, that plaintiff's *in forma pauperis*
8 status be revoked, and that plaintiff be ordered to pay the \$400 filing fee in full within forty-five
9 days of the date of service of the order adopting the findings and recommendations. (Doc. No. 43
10 at 5.)

11 All parties were given an opportunity to object to the findings and recommendations.
12 Plaintiff filed objections. (Doc. No. 53.) Defendant Thompson filed a reply to plaintiff's
13 objections (Doc. No. 55.), as well as a request for judicial notice in support of the reply (Doc. No.
14 56).

15 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(B) and Local Rule 304, this
16 court has conducted a de novo review of this case. Having carefully reviewed the entire file, the
17 court finds the findings and recommendations to be supported by the record and proper analysis.

18 In his objections, plaintiff makes the following arguments regarding why the findings and
19 recommendations are erroneous in concluding that he is barred from proceeding *in forma*
20 *pauperis* by 28 U.S.C. § 1915(g) because prior to filing this action he had filed three or more
21 cases that were dismissed on the grounds that they were frivolous, malicious, or failed to state a
22 claim upon which relief could be granted: (i) *Mitchell v. Marshall*, C.D. Cal. No. 2:10-cv-07351-
23 UA-SH ("*Marshall 1*"), does not constitute a strike because plaintiff ultimately paid the filing fee
24 in that case; (ii) *Marshall 1* also does not constitute a strike because the attachment to that order,
25 which indicated that the complaint failed to state a claim upon which relief could be granted, did
26 not represent part of the order; (iii) *Mitchell v. Beard*, Ninth Circuit No. 16-15470, is not a strike
27 because the Ninth Circuit did not itself dismiss the action, but instead affirmed the district court's
28 dismissal; and *Mitchell v. Marshall*, C.D. Cal. 2:12-cv-02048-ABC-SH ("*Marshall 2*"), is not a

1 strike because the § 1983 claim in that action should have been construed as a habeas petition
2 under 28 U.S.C. § 2254. (Doc. No. 53.)

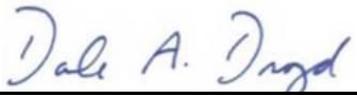
3 Plaintiff's arguments concerning *Marshall 1* and *Beard* were fully considered by the
4 assigned magistrate judge and addressed in the findings and recommendations (Doc. No. 43 at 3-
5 4), and do not present grounds for concluding that petitioner is entitled to proceed *in forma*
6 *pauperis*. Plaintiff's arguments concerning *Marshall 2* are unpersuasive—" [t]he fact Plaintiff
7 may disagree with the prior findings regarding his prior actions is not grounds to find these
8 actions were not dismissed as frivolous or for failure to state a claim." *Stephens v. Castro*, No.
9 1:04cv06716 AWI SMS P, 2006 WL 1530265, at *1 (E.D. Cal. May 31, 2006).

10 Accordingly:

- 11 1. The findings and recommendations issued by the magistrate judge on May 2, 2017, are
12 adopted;
- 13 2. Defendant Thompson's motion for an order revoking plaintiff's *in forma pauperis* status
14 pursuant to 28 U.S.C. § 1915(g) is granted;
- 15 3. The order granting plaintiff's application to proceed *in forma pauperis* (Doc. No. 6.) is
16 vacated and plaintiff's *in forma pauperis* status in this action is revoked;
- 17 4. Plaintiff shall pay the \$400.00 filing fee in full within forty-five days of the date of service
18 of this order. Failure to pay the filing fee within this period will result in the dismissal of
19 this action;
- 20 5. The Clerk of Court is directed to serve a copy of this order on the Financial Department,
21 U.S. District Court, Eastern District of California, Fresno Division; and
- 22 6. The Clerk of the Court is directed to serve a copy of this order on the Director of the
23 California Department of Corrections and Rehabilitation, via the court's electronic case
24 filing system (CM/ECF).

25 IT IS SO ORDERED.

26 Dated: August 4, 2017

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28 _____
UNITED STATES DISTRICT JUDGE