

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ANTHONY SCOTT BERRINGER,

1:18-cv-00269-AWI-GSA-PC

Plaintiff,

VS.

S. URIATE,

Defendant.

FINDINGS AND RECOMMENDATIONS, RECOMMENDING THAT PLAINTIFF'S APPLICATION TO PROCEED IN FORMA PAUPERIS BE DENIED PURSUANT TO 28 U.S.C. § 1915(g), AND THAT THIS ACTION BE DISMISSED, WITHOUT PREJUDICE, ALLOWING PLAINTIFF TO REFILE PROVIDED IT IS WITH THE SUBMISSION OF THE \$400.00 FILING FEE (ECF Nos. 1, 2.)

### OBJECTIONS, IF ANY, DUE IN 14 DAYS

## I. BACKGROUND

Anthony Scott Berringer (“Plaintiff”) is a state prisoner proceeding *pro se* with this civil rights action pursuant to 42 U.S.C. § 1983. On February 26, 2018, Plaintiff filed the Complaint commencing this action, together with a motion to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. (ECF Nos. 1, 2.)

## II. THREE-STRIKES PROVISION OF 28 U.S.C. § 1915(g)

28 U.S.C. § 1915 governs proceedings *in forma pauperis*. Section 1915(g) 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

1 or appeal in a court of the United States that was dismissed on the grounds that it is frivolous,  
2 malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is  
3 under imminent danger of serious physical injury.”

4 “This subdivision is commonly known as the ‘three strikes’ provision.” Andrews v.  
5 King, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (hereafter “Andrews”). “Pursuant to § 1915(g),  
6 a prisoner with three strikes or more cannot proceed IFP.” Id.; see also Andrews v. Cervantes,  
7 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter “Cervantes”) (under the PLRA, “[p]risoners  
8 who have repeatedly brought unsuccessful suits may entirely be barred from IFP status under  
9 the three strikes rule[.]”). The objective of the PLRA is to further “the congressional goal of  
10 reducing frivolous prisoner litigation in federal court.” Tierney v. Kupers, 128 F.3d 1310, 1312  
11 (9th Cir. 1997).

12 “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner, which  
13 were dismissed on the ground that they were frivolous, malicious, or failed to state a claim,”  
14 Andrews, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the district court styles  
15 such dismissal as a denial of the prisoner’s application to file the action without prepayment of  
16 the full filing fee.” O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008). Once a prisoner has  
17 accumulated three strikes, he is prohibited by section 1915(g) from pursuing any other IFP  
18 action in federal court unless he can show he is facing “imminent danger of serious physical  
19 injury.” See 28 U.S.C. § 1915(g); Cervantes, 493 F.3d at 1051-52 (noting § 1915(g)’s  
20 exception for IFP complaints which “make[] a plausible allegation that the prisoner faced  
21 ‘imminent danger of serious physical injury’ at the time of filing”).

22 While the PLRA does not require a prisoner to declare that § 1915(g) does not bar his  
23 request to proceed IFP, Andrews, 398 F.3d at 1119, “[i]n some instances, the district court  
24 docket records may be sufficient to show that a prior dismissal satisfies at least one of the  
25 criteria under § 1915(g) and therefore counts as a strike.” Id. at 1120. When applying 28  
26 U.S.C. § 1915(g), however, the court must “conduct a careful evaluation of the order  
27 dismissing an action, and other relevant information,” before determining that the action “was  
28

1 dismissed because it was frivolous, malicious or failed to state a claim," since "not all  
2 unsuccessful cases qualify as a strike under § 1915(g)." Id. at 1121.

3 The Ninth Circuit has held that "the phrase 'fails to state a claim on which relief may be  
4 granted,' as used elsewhere in § 1915, 'parallels the language of Federal Rule of Civil  
5 Procedure 12(b)(6).'" Id. (quoting Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998)).  
6 Andrews further holds that a case is "frivolous" for purposes of § 1915(g) "if it is of little  
7 weight or importance" or "ha[s] no basis in law or fact." 398 F.3d at 1121 (citations omitted);  
8 see also Neitzke v. Williams, 490 U.S. 319, 325 (1989) ("[A] complaint, containing as it does  
9 both factual allegations and legal conclusions, is frivolous [under 28 U.S.C. § 1915] where it  
10 lacks an arguable basis in either law or in fact . . . . [The] term 'frivolous,' when applied to a  
11 complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual  
12 allegation.").

13 "A case is malicious if it was filed with the intention or desire to harm another."  
14 Andrews, 398 F.3d at 1121 (quotation and citation omitted). A duplicative complaint may be  
15 malicious in some circumstances. Martinez v. United States, 812 F. Supp. 2d 1052, 1057 (C.D.  
16 Cal. 2010) (citing see Bailey v. Johnson, 846 F.2d 1019, 1021 (5th Cir. 1988) (per curiam)  
17 ("[R]epetitious litigation of virtually identical causes of action is subject to dismissal . . . as  
18 malicious.""). In Cato v. U.S., 70 F.3d 1103, 1105 n. 2 (9th Cir. 1995), the Ninth Circuit, citing  
19 Bailey, agreed that where a complaint repeats pending or previously litigated claims, it is  
20 subject to dismissal under the *in forma pauperis* statute as being frivolous or malicious.

### 21 **III. ANALYSIS**

22 A review of the actions filed by Plaintiff reveals that Plaintiff is subject to 28 U.S.C. §  
23 1915(g) and is precluded from proceeding *in forma pauperis* unless Plaintiff was, at the time  
24 the Complaint was filed, under imminent danger of serious physical injury. Court records  
25 reflect that on at least three prior occasions, Plaintiff has brought actions while incarcerated that  
26 were dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be  
27 granted. See 1) Berringer v. Salinas Valley State Prison, et al., Civil Case No. 06cv2839 CW  
28 (N.D. Cal. November 1, 2006 Order dismissing action as duplicative and abusive) (strike one);

1 2) Berringer v. California Dep't of Corrections, Civil Case No. 07cv3353 CW (PR) (N.D. Cal.  
2 July 13, 2007 Order of Dismissal as duplicative and abusive) (strike two); 3) Berringer v.  
3 Salinas Valley State Prison, et al., Civil Case No. 06cv0270 CW (N.D. Cal. January 8, 2008  
4 Order of Dismissal for failing to state a claim for which relief may be granted) (strike three); 4)  
5 Berringer v. Meza, et al., Civil Case No. 11cv1439 PJH (PR) (N.D. Cal. July 5, 2011 Order of  
6 Dismissal as duplicative) (strike four).

7 The availability of the imminent danger exception turns on the conditions a prisoner  
8 faced at the time the complaint was filed, not at some earlier or later time. See Andrews v.  
9 Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007). “[A]ssertions of imminent danger of less  
10 obviously injurious practices may be rejected as overly speculative or fanciful.” Id. at 1057  
11 n.11. Imminent danger of serious physical injury must be a real, present threat, not merely  
12 speculative or hypothetical. To meet his burden under § 1915(g), an inmate must provide  
13 “specific fact allegations of ongoing serious physical injury, or a pattern of misconduct  
14 evidencing the likelihood of imminent serious physical injury.” Martin v. Shelton, 319 F.3d  
15 1048, 1050 (8th Cir. 2003). “Vague and utterly conclusory assertions” of harm are insufficient.  
16 White v. Colorado, 157 F.3d 1226, 1231–32 (10th Cir. 1998). That is, the “imminent danger”  
17 exception is available “for genuine emergencies,” where “time is pressing” and “a threat . . . is  
18 real and proximate.” Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002).

19 The court has reviewed Plaintiff’s Complaint for this action and finds that Plaintiff does  
20 not meet the imminent danger exception. See Andrews, 493 F.3d at 1053. In the Complaint  
21 Plaintiff alleges that on October 8, 2017, Plaintiff was pale and ill, and Defendant refused to  
22 immediately check Plaintiff’s vital signs after which Plaintiff was rushed to the emergency  
23 room at Corcoran State Prison. (ECF No. 1 at 3.) The Complaint is devoid of any showing that  
24 Plaintiff was under imminent danger of serious physical injury at the time he filed the  
25 Complaint.

26 Therefore, the court finds that Plaintiff may not proceed *in forma pauperis* in this  
27 action, and must submit the appropriate filing fee in order to proceed with this action.  
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1 Accordingly, Plaintiff's motion to proceed *in forma pauperis* should be denied, and this action  
2 be dismissed, without prejudice to refiling with the submission of the \$400.00 filing fee in full.

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4 **IV. CONCLUSION AND RECOMMENDATIONS**

5 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 6 1. Pursuant to 28 U.S.C. § 1915(g), Plaintiff's motion to proceed *in forma pauperis*  
7 in this action be DENIED;
- 8 2. This action be DISMISSED, without prejudice to refiling with the submission of  
9 the \$400.00 filing fee in full; and
- 10 3. The Clerk be directed to CLOSE this case.

11 These findings and recommendations are submitted to the United States District Judge  
12 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**  
13 (**14**) days after the date of service of these findings and recommendations, Plaintiff may file  
14 written objections with the court. Such a document should be captioned "Objections to  
15 Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file  
16 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.  
17 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394  
18 (9th Cir. 1991)).

19 IT IS SO ORDERED.

20 Dated: March 23, 2018

21 /s/ Gary S. Austin

22 UNITED STATES MAGISTRATE JUDGE