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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GILBERT OSUNA,
Plaintiff,
v.
M. WADLE, *et al.*,
Defendant.

Case No. 1:19-cv-00412-JDP
FINDINGS AND RECOMMENDATIONS
DENYING MOTION TO PROCEED IN
FORMA PAUPERIS AND REQUIRING
PAYMENT OF FILING FEE IN FULL
WITHIN TWENTY-ONE DAYS
ECF No. 2
OBJECTIONS DUE WITHIN 14 DAYS
ORDER TO ASSIGN CASE TO DISTRICT
JUDGE

Plaintiff Gilbert Osuna is a state prisoner proceeding without counsel in this civil rights action brought under 42 U.S.C. § 1983. On April 12, 2019, plaintiff filed an application to proceed *in forma pauperis* under 28 U.S.C. § 1915. ECF No. 2.

The Prison Litigation Reform Act provides that “[i]n no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more 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.” 28 U.S.C. § 1915(g). Plaintiff has had three or more actions dismissed as frivolous, as malicious, or

1 for failing to state a claim upon which relief maybe granted.¹ Plaintiff has been informed in at
2 least one other case that he is subject to § 1915(g).²

3 Plaintiff has not satisfied the imminent danger exception to § 1915(g). *See Andrews v.*
4 *Cervantes*, 493 F.3d 1047, 1053-55 (9th Cir. 2007). Plaintiff alleges that correctional officers
5 “maliciously beat [him] on [his] head and face and left [him] in a standing cage overnight without
6 medical attention” in April 2017. ECF No. 1 at 4-5. Plaintiff’s allegation is only about the past;
7 he does not allege that he is currently at risk.

8 Accordingly, plaintiff’s *in forma pauperis* application should be denied, and he should
9 pay the filing fee in full, since he has accrued three or more strikes and was not under imminent
10 danger of serious physical harm at the time this action was initiated. *See* 28 U.S.C. § 1915(g).

11 **Order**

12 The clerk of court is directed to assign this case to a district judge who will review the
13 findings and recommendations.

14 **Findings and Recommendation**

15 Based on the foregoing, it is hereby recommended that:

- 16 1. plaintiff’s *in forma pauperis* application, ECF No. 2, be DENIED;
- 17 2. plaintiff be required to pay the \$400 filing fee in full within twenty-one days of adoption
18 of these findings and recommendations; and

19 ¹ The cases include *Osuna v. M. Wadle, et al.*, No. 2:17-cv-05818-PA-JCG (C.D. Cal.) (dismissed
20 on September 20, 2017 as frivolous or malicious on the grounds that it is a duplicative lawsuit); (2)
21 *Osuna v. Manzanalez, et al.*, No. 1:18-cv-00719-LJO-SAB (E.D. Cal.) (dismissed on November
22 29, 2018 for failure to exhaust administrative remedies, following a screening order stating
23 plaintiff’s failure to exhaust administrative remedies was clear from the face of the operative
24 complaint); (3) *Osuna v. M. Wadle, et al.*, No. 1:18-cv-00717-LJO-GSA (E.D. Cal.) (dismissed on
25 February 8, 2019, following an order stating plaintiff’s failure to exhaust administrative remedies
26 was clear from the face of his complaint and plaintiff conceded that he had not exhausted prior to
27 filing suit). *See Harris v. Mangum*, 863 F.3d 1133, 1142 (9th Cir. 2017) (“[W]hen we review a
28 dismissal to determine whether it counts as a strike, the style of the dismissal or the procedural
posture is immaterial. Instead, the central question is whether the dismissal rang the PLRA bells
of frivolous, malicious, or failure to state a claim.”) (citation and internal quotation marks omitted);
El-Shaddai v. Zamora, 833 F.3d 1036, 1044 (9th Cir. 2016) (stating that a dismissal for failure to
exhaust administrative remedies counts as a strike under § 1915(g) if the failure to exhaust is
apparent from the face of the complaint).

² *See Osuna v. Manzanalez*, No. 1:19-cv-00419-BAM (E.D.Cal. 2019).

1 3. if plaintiff fails to pay the \$400 filing fee in full within twenty-one days of adoption of
2 these findings and recommendations, all pending motions be terminated and this action
3 be dismissed without prejudice.

4 The undersigned submits the findings and recommendations to a district judge under 28
5 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District
6 Court, Eastern District of California. Within fourteen days of the service of the findings and
7 recommendations, plaintiff may file written objections to the findings and recommendations with
8 the court and serve a copy on all parties. That document should be captioned “Objections to
9 Magistrate Judge’s Findings and Recommendations.” The district judge will review the findings
10 and recommendations under 28 U.S.C. § 636(b)(1)(C). Plaintiff’s failure to file objections within
11 the specified time may result in the waiver of rights on appeal. *See Wilkerson v. Wheeler*, 772
12 F.3d 834, 839 (9th Cir. 2014).

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14 IT IS SO ORDERED.

15 Dated: April 12, 2019


UNITED STATES MAGISTRATE JUDGE

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19 No. 203

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