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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

EDWARD B. SPENCER,

 Plaintiff,

 v.

G. BEARD, et al.,

 Defendants.

No. 1:19-cv-01615-DAD-HBK (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND DENYING
DEFENDANT’S MOTION TO REVOKE
PLAINTIFF’S IN FORMA PAUPERIS
STATUS

(Doc. Nos. 19, 27)

Plaintiff Edward B. Spencer is a state prisoner proceeding *pro se* and *in forma pauperis* in 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.

On November 20, 2019, the then assigned magistrate judge granted plaintiff’s motion to proceed *in forma pauperis*. (Doc. No. 7.) On September 4, 2020, defendant C. Carlson filed a motion to revoke plaintiff’s *in forma pauperis* status. (Doc. No. 19.) Defendant alleges that plaintiff has accumulated at least three qualifying strike dismissals and should have been prohibited from proceeding *in forma pauperis* in this action. (*Id.*) Plaintiff filed an opposition to defendant’s motion on November 17, 2020, and defendant filed a reply thereto on November 19, 2020. (Doc. Nos. 24, 26.)

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1 On July 2, 2021, the assigned magistrate judge issued findings and recommendations
2 concluding that defendant Carlson had failed to identify three qualifying strike dismissals
3 incurred by plaintiff, and that plaintiff's *in forma pauperis* status should not be revoked. (Doc.
4 No. 27.) The findings and recommendations were served on all parties and contained notice that
5 any objections thereto were to be filed within fourteen (14) days. (*Id.* at 6.) Defendant filed
6 objections on July 16, 2021. (Doc. No. 28.)

7 In his objections, defendant argues that plaintiff received a third strike in *Spencer v.*
8 *Beeler, et al.*, 1:13-cv-01624-LJO-BAM (E.D. Cal.), despite that case terminating with plaintiff
9 voluntarily dismissing his claim. (*Id.* at 2–3.) In support of this argument, defendant relies on the
10 decision in *Harris v. Mangum*, 863 F.3d 1133 (9th Cir. 2017), the same case he cited in his
11 original motion. (*See id.* at 3; Doc. No. 19-1 at 4–5.) However, as noted in the findings and
12 recommendations, the Ninth Circuit in *Harris* ruled that a certain case counted as a strike where
13 the plaintiff had failed to amend a complaint despite being directed to do so after the court
14 determined the original complaint failed to state a claim. (Doc. No. 27 at 4.) In contrast,
15 plaintiff's prior case brought against defendant Beeler did not end with a dismissal due to
16 plaintiff's failure to prosecute or follow a court order; the case ended because plaintiff *voluntarily*
17 dismissed it. (*Id.*)

18 As stated in the pending findings and recommendations, the Ninth Circuit “has not
19 addressed whether a voluntary dismissal following a finding of failure to state a claim counts as a
20 strike, and federal courts across the nation are split.” (Doc. No. 27 at 5) (citations omitted).
21 However, in light of the well-recognized rule that a plaintiff has an absolute right to voluntarily
22 dismiss their action and concluding that nothing in the PLRA dictates a contrary conclusion, the
23 undersigned agrees with the findings and recommendations and “finds no reason to penalize a *pro*
24 *se* prisoner litigant who exercises his procedural right to elect a voluntary dismissal” by holding
25 that the voluntary dismissal constitutes a strike. (*Id.*) (citations omitted).

26 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), this court has conducted a
27 *de novo* review of this case. Having carefully reviewed the entire file, including the defendant's

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1 objections, the court finds the findings and recommendations to be supported by the record and
2 by proper analysis.

3 Accordingly,

- 4 1. The findings and recommendations issued on July 2, 2021 (Doc. No. 27) are
5 adopted in full;
- 6 2. Defendant's motion to revoke plaintiff's *in forma pauperis* status (Doc. No. 19) is
7 denied; and
- 8 3. This case is referred back to the assigned magistrate judge for further proceedings
9 consistent with this order.

10 IT IS SO ORDERED.

11 Dated: August 5, 2021

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14 UNITED STATES DISTRICT JUDGE
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