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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SEDRIC EUGENE JOHNSON,

Plaintiff,

v.

HARMON, et al.,

Defendants.

Case No. 1:20-cv-00591-JLT (PC)

**FINDINGS AND RECOMMENDATIONS
TO GRANT DEFENDANTS' MOTION TO
REVOKE PLAINTIFF'S *IN FORMA
PAUPERIS* STATUS**

(Doc. 23)

14-DAY DEADLINE

Defendants have filed a motion to revoke Plaintiff's *in forma pauperis* status pursuant to 28 U.S.C. § 1915. (Doc. 23.) Plaintiff filed a response in opposition, and Defendants filed a reply. (Docs. 27, 28.) Because Plaintiff has three "strikes" under section 1915(g) and fails to show that he is in imminent danger of serious physical injury, the Court recommends that Defendant's motion be **GRANTED**, Plaintiff's *in forma status* revoked, and the case be **DISMISSED without prejudice** for refile with payment of the required \$402 filing fee.

I. Three-Strikes Provision of 28 U.S.C. § 1915

28 U.S.C. § 1915 governs proceedings *in forma pauperis* ("IFP"). The statute provides:

In 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 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.

1 28 U.S.C. § 1915(g). This section is commonly referred to as the “three strikes” provision.
2 *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (“*King*”). “Pursuant to § 1915(g), a
3 prisoner with three strikes or more cannot proceed IFP [or in forma pauperis].” *Id.*; *see also*
4 *Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (holding that “[p]risoners who have
5 repeatedly brought unsuccessful suits may entirely be barred from IFP status under the three
6 strikes rule”). The objective of the Prison Litigation Reform Act (“PLRA”) is to further “the
7 congressional goal of reducing frivolous prisoner litigation in federal court.” *Tierney v. Kupers*,
8 128 F.3d 1310, 1312 (9th Cir. 1997).

9 “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner, which
10 were dismissed on the ground that they were frivolous, malicious, or failed to state a claim,”
11 *Andrews*, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the district court styles
12 such dismissal as a denial of the prisoner’s application to file the action without prepayment of
13 the full filing fee.” *O’Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008). Once a prisoner has
14 accumulated three strikes, he is prohibited by section 1915(g) from pursuing any other IFP
15 action in federal court unless he can show he is facing “imminent danger of serious physical
16 injury.” *See* 28 U.S.C. § 1915(g); *Cervantes*, 493 F.3d at 1051-52 (noting § 1915(g)’s exception
17 for IFP complaints which “make[] a plausible allegation that the prisoner faced ‘imminent
18 danger of serious physical injury’ at the time of filing”). The danger he alleges to face must be
19 real, proximate, and/or ongoing. *Cervantes*, 493 F.3d at 1055; *see also Herbaugh v. San Diego*
20 *Sheriff’s Dep’t*, No. 3:18-cv-01899-JLS-NLS, 2018 WL 5024802, at *2 (S.D. Cal. Oct. 17,
21 2018) (citing *Blackman v. Mjening*, 1:16-cv-01421-LJO-GSA-PC, 2016 WL 5815905, at *1
22 (E.D. Cal. Oct. 4, 2016) (“Imminent danger of serious physical injury must be a real, present
23 threat, not merely speculative or hypothetical.”). “[V]ague and utterly conclusory assertions” of
24 imminent danger are insufficient. *Herbaugh*, 2018 WL 5024802, at *2 (quoting *White v.*
25 *Colorado*, 157 F.3d 1226, 1231–32 (10th Cir. 1998)).

26 When applying 28 U.S.C. § 1915(g), the court must evaluate the order dismissing an
27 action and other relevant information before determining that the action “was dismissed because
28 it was frivolous, malicious or failed to state a claim.” *King*, 398 F.3d at 1121. Not all dismissed

1 cases qualify as a strike under § 1915(g). *Id.*

2 Upon a finding that the plaintiff is barred by the three strikes provision of 28 U.S.C. §
3 1915(g), the proper procedure is to dismiss the case without prejudice because the filing fee is
4 required when the action is initiated. *Campbell v. Vance*, No. CIV S-05-1163 RRB, 2005 WL
5 3288400, at *1 (E.D. Cal. Nov. 30, 2005) (citing *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th
6 Cir. 2002)). A plaintiff may still pursue his claims if he pays the civil and administrative filing
7 fees required by 28 U.S.C. § 1914(a).

8 **II. DISCUSSION**

9 The Court may take judicial notice of court records. *United States v. Wilson*, 631 F.2d
10 118, 119 (9th Cir. 1980). Here, the Court takes judicial notice of four of Plaintiff's prior lawsuits
11 that were dismissed on the grounds that they failed to state a claim, is frivolous, or malicious:

12 (1) *Johnson v. Centinela State Prison*, Case No. 3:17-cv-02568-CAB-WVG (S.D. Cal.)

13 (dismissed on March 9, 2018, as frivolous because it was duplicative of another
14 civil action pending);

15 (2) *Johnson v. John Doe*, Case No. 3:17-cv-01309-WQH-WVG (S.D. Cal.) (dismissed on

16 February 12, 2018, for failure to state a claim and for seeking damages against a
17 defendant that is immune);

18 (3) *Johnson v. John Doe*, Case No. 3:17-cv-00889-LAB-JLB (S.D. Cal.) (dismissed on

19 November 27, 2017, for failure to state a claim); and

20 (4) *Johnson v. San Diego County Sheriff's Department*, Case No. 3:15-cv-02789-WQH-

21 KSC (S.D. Cal.) (dismissed on October 28, 2016, for failure to state a claim).

22 Each of these cases was dismissed before he filed the current action on April 8, 2020. Plaintiff is
23 therefore subject to the section 1915(g) bar, and he is precluded from proceeding IFP in this
24 action unless, at the time he filed his complaint, he was under imminent danger of serious
25 physical injury. *See Andrews v. Cervantes*, 493 F.3d 1047, 1052–53 (9th Cir. 2007).

26 The Court has reviewed Plaintiff's complaint, (Doc. 1), and finds that Plaintiff's
27 allegations do not meet the imminent danger exception. In the complaint, Plaintiff alleges that on
28 April 26, 2018, in his cell and without justification, Officers Harmon, Gonzales, and Perez pepper

1 sprayed Plaintiff, assaulted him, and placed a spit bag over his head. Plaintiff alleges that these
2 officers placed Plaintiff in wrist and leg constraints, and Officer Ayon and Sgt. Ruelas escorted
3 Plaintiff to the rotunda, where Officer Ayon assaulted Plaintiff again. He was placed in a
4 temporary holding cell, where LVN White examined Plaintiff and allegedly covered up facts
5 concerning the assault and Plaintiff's injuries. Thereafter, Plaintiff was placed in Administrative
6 Segregations, where he was subjected to numerous transfers, strip searches, and found guilty of a
7 rules violation report for assault on a peace officer.

8 These events occurred while Plaintiff was housed at Kern Valley State Prison. Plaintiff is
9 currently housed at California State Prison, Los Angeles County, away from the defendants.
10 Given that Plaintiff's allegations relate only to the events that occurred April 26, 2018, Plaintiff
11 has not argued or shown that he was in imminent danger when he filed his complaint almost two
12 years later.

13 In his response, Plaintiff argues that the Court has previously granted Plaintiff's motion to
14 proceed IFP and found service appropriate, and that he has paid the filing fee in full. (Doc. 27.)
15 Contrary to Plaintiff's assertion, the Court's order granting Plaintiff's application to proceed IFP
16 directs monthly payments. (Doc. 9.) More significantly, Plaintiff does not dispute that the four
17 cases referenced herein count as "strikes," and he does not argue that he was in imminent danger.
18 Under these circumstances, Plaintiff is precluded from proceeding IFP in this action.

19 **III. CONCLUSION AND RECOMMENDATIONS**

20 Based on the foregoing, the Court **RECOMMENDS** that:

21 1. Defendants' motion for order revoking Plaintiff's IFP status, (Doc. 23), be

22 **GRANTED**; and

23 2. This action be **DISMISSED** without prejudice to refiling upon prepayment of the
24 filing fee.

25 These Findings and Recommendations will be submitted to the United States District
26 Judge assigned to this case,¹ pursuant to the provisions of 28 U.S.C. § 636(b)(1). **Within 14 days**

27 _____
28 ¹ This case appears on the Unassigned/NONE civil case list and may not be heard pending the appointment of a new
district judge. (Doc. 30.) However, the Court will still require Plaintiff to file timely objections in order for the
objections to be considered by the assigned district judge in due course.

1 of the date of service of these Findings and Recommendations, Plaintiff may file written
2 objections with the Court. The document should be captioned, "Objections to Magistrate Judge's
3 Findings and Recommendations." Plaintiff's failure to file objections within the specified time
4 may result in waiver of his rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir.
5 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

6
7 IT IS SO ORDERED.

8 Dated: November 29, 2021

/s/ Jennifer L. Thurston
CHIEF UNITED STATES MAGISTRATE JUDGE

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