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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WHITTIER BUCHANAN,¹

Plaintiff,

v.

P. PLATA, et al.,

Defendants.

No. 1:22-cv-01353 JLT GSA (PC)

ORDER FINDING PLAINTIFF’S SHOWING
OF CAUSE SUFFICIENT TO CONTINUE TO
ENABLE HIM TO PROCEED WITH IN
FORMA PAUPERIS STATUS

(ECF Nos. 29, 30)

Plaintiff, a state prisoner proceeding pro se and in forma pauperis, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

Per a court order issued April 29, 2024 (ECF No. 29), Plaintiff has filed a showing of cause why his in forma pauperis status should not be revoked (ECF No. 30) given that he is a three strikes litigant within the meaning of 28 U.S.C. § 1915(g). For the reasons stated below, the Court finds that Plaintiff’s showing is sufficient to permit him to continue to proceed with in forma pauperis status in this action.

¹ The Court notes that in the complaint, Plaintiff lists another inmate as a plaintiff in this action. See ECF No. 8 at 2. Plaintiff is informed that as someone who is appearing in propria persona, he is unable to represent anyone other than himself in this case. Russell v. United States, 308 F.2d 78, 79 (9th Cir. 1962). Therefore, all mention of the additional individual and the facts related to him, will not be considered in this order. If the other individual wishes to pursue claims in this Court against Defendants, he must file his own complaint.

1 I. RELEVANT PROCEDURAL HISTORY

2 On April 29, 2024, after reviewing Plaintiff’s complaint, he was ordered to show cause
3 why his in forma pauperis status should not be revoked consistent with 28 U.S.C. § 1915(g).
4 ECF No. 29. In support of the order the Court took judicial notice of the fact that: (1) in
5 November 1999, Plaintiff had been identified as a three strikes litigant within the meaning of 28
6 U.S.C. § 1915(g); (2) since that 1999 finding, and prior to Plaintiff filing this case, Plaintiff had
7 had yet another fully adjudicated matter dismissed for failure to state a claim, and (3) in
8 Plaintiff’s complaint, he concedes that he is a three strikes litigant within the meaning of Section
9 1915(g).² Id. at 4.

10 On May 10, 2024, Plaintiff’s showing of cause was docketed. ECF No. 30. The Court
11 considers it herein.

12 II. IN FORMA PAUPERIS STATUS

13 “[In forma pauperis] status is not a constitutional right.” Rodriguez v. Cook, 169 F.3d
14 1176, 1180 (9th Cir. 1999) (brackets added); Smart v. Heinze, 347 F.2d 114, 116 (9th Cir. 1965)
15 (“To proceed in forma pauperis is a privilege not a right.”). An inmate’s in forma pauperis status
16 may be revoked *at any time* if the court, either sua sponte or on a motion, determines that the
17 status was improvidently granted. Keeton v. Marshall, No. CV 17-01213 FMO (KS), 2018 WL
18 4381543, at *6 (C.D. Cal. June 8, 2018) (citation omitted) (italics added); Owens v. Matthews,
19 No. CV 16-07755 JFW (KS), 2017 WL 603183, at *2 (C.D. Cal. Jan. 6, 2017) (stating same).
20 The grant or refusal of permission to proceed in forma pauperis is left to the sound discretion of
21 the district court. Smart, 347 F.2d 114, 116 (9th Cir. 1963) (citing Weller v. Dickson, 314 F.2d
22 598 (9th Cir. 1963)). The latitude given a district court in such matters is especially broad in civil
23 actions by prisoners against their wardens and other officials. Smart, 347 F.2d at 116 (footnote
24 citation omitted); Shobe v. People of State of California, 362 F.2d 545, 546 (9th Cir. 1966) (citing
25 Smart).

26 _____
27 ² Plaintiff states as much in the complaint he filed. In it, he writes, “Although [I have] filed
28 Section 1983 actions on three or more occasions that were dismissed as frivolous, malicious, or
for failure to state a claim, [I am] compelled to file this action as [I am] under imminent danger of
serious physical injury.” See ECF No. 8 at 5-6 (brackets added).

1 III. THREE STRIKES RULE: 28 U.S.C. § 1915(g)

2 28 U.S.C. § 1915(g) states:

3
4 In no event shall a prisoner bring a civil action or appeal a judgment in a civil action
5 or proceeding under this section if the prisoner has, on 3 or more prior occasions,
6 while incarcerated or detained in any facility, brought an action or appeal in a
7 court of the United States that was dismissed on the grounds that it is frivolous,
8 malicious, or fails to state a claim upon which relief may be granted, unless the
9 prisoner is under imminent danger of serious physical injury.

10 “It is well-settled that, in determining a [Section] 1915(g) ‘strike,’ the reviewing court
11 looks to the dismissing court’s action *and the reasons underlying it.*” Knapp v. Hogan, 738
12 F.3d 1106, 1109 (9th Cir. 2013) (brackets added) (emphasis added) (citation omitted).

13 “[Section] 1915(g) should be used to deny a prisoner’s in forma pauperis status only when, after
14 careful evaluation of the order dismissing an action, and other relevant information, the district
15 court determines that the action was dismissed because it was frivolous, malicious or failed to
16 state a claim.” Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2006) (brackets added).

17 “[W]hen a district court disposes of an in forma pauperis complaint ‘on the grounds that [the
18 claim] is frivolous, malicious, or fails to state a claim upon which relief may be granted,’ such a
19 complaint is ‘dismissed’ for purposes of § 1915(g) even if the district court styles such dismissal
20 as denial of the prisoner’s application to file the action without prepayment of the full filing fee.”
21 O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008) (second alteration in original). Dismissal
22 also counts as a strike under § 1915(g) “when (1) a district court dismisses a complaint on the
23 ground that it fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff then
24 fails to file an amended complaint” regardless of whether the case was dismissed with or without
25 prejudice. Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017).

26 An inmate who has accrued three strikes is precluded from proceeding in forma pauperis
27 unless he is “under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g). To
28 satisfy the exception, the plaintiff must have alleged facts that demonstrate that he was “under
 imminent danger of serious physical injury” at the time of filing the complaint. Andrews v.

1 Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007) (“[I]t is the circumstances at the time of the
2 filing of the complaint that matters for purposes of the ‘imminent danger’ exception to §
3 1915(g).”); see Abdul-Akbar v. McKelvie, 239 F.3d 307, 312-14 (3rd Cir. 2001); Medberry v.
4 Butler, 185 F.3d 1189, 1192-93 (11th Cir. 1999); Ashley v. Dilworth, 147 F.3d 715, 717 (8th
5 Cir. 1998); Banos v. O’Guin, 144 F.3d 883, 885 (5th Cir. 1998); Lipsey v. Allison, No. 1:21-cv-
6 00912 GSA, 2021 WL 2390424, at *3 (E.D. Cal. June 11, 2021) (“The availability of the
7 imminent danger exception turns on the conditions a prisoner faced at the time the complaint
8 was filed, not at some earlier or later time.”).

9 The danger faced by a prisoner at the time of filing must be imminent or ongoing. See,
10 e.g., Medberry, 185 F.3d at 1193 (finding plaintiff was not in either imminent or ongoing
11 danger and denying him ability to proceed in forma pauperis as three strikes litigant).
12 “Imminent danger of serious physical injury must be a real and present threat, not merely
13 speculative or hypothetical.” Lipsey, 2012 WL 2390424, at *3; Blackman v. Mjening, No.
14 1:16-cv-01421 LJO GSA, 2016 WL 5815905, at *1 (E.D. Cal. Oct. 4, 2016). In addition, “the
15 imminent danger exception to the [Prison Litigation Reform Act’s] three strikes provision
16 requires a nexus between the alleged imminent danger and the violations of law alleged in the
17 complaint.” Ray v. Lara, 31 F.4th 692, 695 (9th Cir. 2022) (brackets added).

18 IV. PLAINTIFF’S PRIOR STRIKES

19 The Court takes judicial notice of the fact that in November 1999, in Buchanan v. Chavez,
20 4:99-cv-03991 CW (N.D. Cal. Nov. 3, 1999) (“Chavez”), Plaintiff’s motion to proceed in forma
21 pauperis was denied, and his case was dismissed with prejudice “pursuant to the ‘three strikes’
22 provision of 28 U.S.C. [§] 1915(g).” Chavez, ECF No. 2 (brackets added). At that time, the
23 Chavez Court also certified that any appeal taken by Plaintiff would not be done in good faith.
24 Id. Since then, Plaintiff has incurred another strike in Buchanan v. Williams, 1:06-cv-01532 LJO
25 DLB (E.D. Cal. Oct. 24, 2008) (“Williams”) (dismissed for failure to state a claim). See
26 generally Williams, ECF Nos. 25, 27, 28 (findings and recommendation, judgment, order,
27 respectively). In the complaint, Plaintiff also concedes that he is a three strikes litigant within the
28 meaning of 28 U.S.C. § 1915(g). ECF No. 8 at 5-6.

1 Given these clearly established facts, there is no question that Plaintiff is a three strikes
2 litigant within the meaning of 28 U.S.C. § 1915(g). Consequently, the Court need only consider
3 whether Plaintiff stated a viable claim of imminent danger of serious physical harm when he
4 brought the instant matter to the Court. See 28 U.S.C. § 1915(g).

5 V. PLAINTIFF’S SHOWING OF CAUSE

6 In the order to show cause, the Court considered the statements Plaintiff had made in his
7 complaint related to being in imminent danger at the time he filed the complaint. See ECF No. 29
8 at 5-6. After doing so it found that the facts Plaintiff had provided in support of the assertion
9 were not plausible and were insufficient. See id. at 6.

10 In Plaintiff’s showing of cause he argues that he made a sufficient showing that he was in
11 imminent danger of serious physical harm in the complaint. See generally ECF No. 30.
12 Specifically, he states that in the complaint he alleged that on May 17, 2022, and on July 17,
13 2022, Defendant Plata caused him to be under imminent danger of serious physical harm when he
14 shouted orders at him which, if followed, “serious physical injury to his person [was] ‘ready to
15 take place’ and [was] ‘hanging threateningly over [his] head’.” Id. at 2 (brackets added)
16 (quotation marks in original). These assertions, he argues, are sufficient to establish that he was
17 in imminent danger of serious physical harm. Id.

18 In further support of his imminent danger claim, Plaintiff states that the prison where he
19 was housed when he filed the complaint, California Substance Abuse Treatment Facility
20 (“CSATF”), did not provide him with the medical care that he needed. ECF No. 30 at 3. As a
21 result, a prison official attempted to send him to Stockton Health Care, but that attempt was
22 unsuccessful. Id. Eventually, Plaintiff claims, he was returned to CSATF but is now at the R.J.
23 Donovan Facility, neither of which is able to provide him with the treatment that he needs. Id.

24 Finally, Plaintiff argues that his new status of “DPW,” which means that he must have and
25 use a wheelchair and must travel in a special van that has a lift in it, further supports his imminent
26 danger of serious physical harm assertion. ECF No. 30 at 3. Currently, he states, he can only
27 walk a short distance with his walker and he is in extreme pain while doing so. Id. He further
28 states that he has been denied adequate medical care for more than two years and he argues that

1 he should not be made to pay the filing fees. ECF No. 30 at 4.

2 VI. DISCUSSION

3 A. Applicable Law

4 “A prisoner who alleges that prison officials continue with a practice that has injured him
5 or others similarly situated in the past will satisfy the ‘ongoing danger’ standard and meet the
6 imminence prong of the three strikes exception.” Andrews, 493 F.3d at 1056-57 (citations
7 omitted). When reviewing a prisoner’s assertion of imminent danger, a court need not determine
8 whether a prisoner’s allegations are serious enough. Ciarpaglini v. Saini, 352 F.3d 328, 331 (7th
9 Cir. 2003); Hall v. United States, 44 F.4th 218, 232 (4th Cir. 2022) (citing Ciarpaglini); Stephen
10 v. Montejo, No. 1:18-cv-01796 KJM DB P, 2020 WL 3120004, at *2 (E.D. Cal. June 12, 2020)
11 (citing Andrews, 493 F.3d at 1055 and Ciarpaglini). The imminent danger exception applies if, at
12 the time of filing, the complaint makes a plausible allegation that the prisoner was in imminent
13 danger of serious physical injury. Andrews, 493 F.3d at 1055.

14 B. Analysis

15 1. Assertions In Complaint

16 In light of Plaintiff’s showing of cause, and the Court’s resulting reconsideration of the
17 allegations in Plaintiff’s complaint, whether Plaintiff sufficiently alleged that he was in imminent
18 danger of serious physical harm when he brought this action is a very close determination for the
19 Court to make. The claims in the complaint allege that Defendants violated his First Amendment
20 right to be free from retaliation and his Fourteenth Amendment right to protection under the
21 Americans with Disabilities Act (“ADA”) when they threatened to write him up for walking too
22 slowly and when he was repeatedly forced to walk continuously without brief, but necessary rest
23 breaks. ECF No. 8 at 2-7. Plaintiff states that the rest breaks were needed because he had
24 previous back surgery which resulted in him being prescribed a walker with a seat so that he
25 could sit down when his back pain became unbearable. Id. at 3. He claims that constantly being
26 told to “keep moving” “will cause [him] further mental anguish.” Id. at 4 (brackets added). He
27 further asserts that Defendants’ actions have caused him to further injure himself because they
28 force him to continue to walk when he is in pain and needs to sit momentarily. Id. at 5. Plaintiff

1 also argues that if Defendants’ actions continue, his health will continue to worsen.³ Id. at 5-6.

2 2. Assertions In Showing of Cause

3 In Plaintiff’s showing of cause, first, he claims that in his complaint, he stated that on May
4 17, 2022, and on July 17, 2022, Defendant Plata placed him under imminent danger of serious
5 physical injury when he shouted orders to Plaintiff, which, if followed, “serious physical injury to
6 his person [would be] ready to take place, and that [this was] ‘hanging threateningly over [his]
7 head’.” ECF No. 30 at 2 (brackets added) (internal quotation marks in original). Plaintiff further
8 argues that because these incidents occurred at the time he filed the complaint, he has met the
9 imminent danger exception. Id.

10 A second review of the complaint confirms the Court’s initial finding that Plaintiff made
11 no direct imminent danger of serious physical harm claims in the complaint with respect to those
12 two dates. See generally ECF No. 8 at 2-4 (Plaintiff referencing 5/17/22 and 7/17/22 dates).
13 Instead, in the complaint, Plaintiff simply takes issue with the fact that on those dates, Defendant
14 Plata threatened to write him up for moving too slowly, and he opines that this “will prolong[]
15 his mental anguish” and extend his time in prison because write ups are an indication that an
16 inmate is not trying to rehabilitate. See id. at 2-4 (brackets added). Pages later, Plaintiff throws
17 in his imminent danger argument, in what almost appears to be an afterthought. When he does,
18 he writes that he is under imminent danger of serious physical injury because he is being
19 threatened and forced to continue walking, despite the fact that he needs to rest on his walker
20 periodically. Id. at 5-6. This, he asserts, causes his present injuries to worsen. Id. at 6.

21 3. Court’s Determination In Light of Other Cases

22 Despite the general non-specific nature of Plaintiff’s statements in the complaint,

23 _____
24 ³ To the extent that Plaintiff includes in the complaint a discussion about the fact that he is not
25 receiving proper medical care because CSATF is not a “real” medical facility or that he “does not
26 receive enough or proper incontinent [sic] supplies” (see ECF No. 8 at 6) (brackets added), these
27 do not bear upon the issue of imminent danger. See generally ECF No. 8 at 7 (Plaintiff’s stated
28 causes of action). They are not linked to any imminent danger assertions. See id. The same can
be said about his assertion in the showing of cause that he now has “DPW status.” See ECF No.
30 at 3. Additionally, because there must be a link between the claims raised and the imminent
danger assertion, the Court does not consider these arguments. See, Ray v. Lara 2022 US App
Lexis 9615

1 construing it liberally,⁴ it could be argued that Plaintiff's assertion that Defendants' continued
2 practice of requiring Plaintiff to walk faster and to do so without rest at the time he filed the
3 complaint, and in light of the allegation that he was an ADA inmate who had prior back surgery
4 and who was experiencing mobility issues related to it, placed Plaintiff in imminent danger of
5 serious physical harm. A prisoner who alleges that prison officials continue with a practice that
6 has injured him will satisfy the "ongoing danger" requirement and meet the imminent danger
7 prong of the three strikes exception. See generally Andrews, 493 F.3d at 1056-57; see, e.g.,
8 Ciarpaglini, 352 F.3d at 330-31 (finding prisoner's assertions met imminent danger requirement
9 when prison's decision to stop providing medications caused number of physical ailments);
10 McAlphin v. Toney, 281 F.3d 709, 710 (8th Cir. 2002) (finding allegations about prison's failure
11 to provide tooth extraction sufficient to meet imminent danger requirement when delay
12 previously allowed infection to spread in inmate's mouth).

13 In sum, the Ninth Circuit has stated that an overly detailed inquiry into whether Plaintiff's
14 allegations qualify for the imminent danger exception should not be done. See Andrews, 493
15 F.3d at 1055; see generally Ciarpaglini, 352 F.3d at 331. Instead, the exception applies if the
16 complaint makes a plausible allegation that a prisoner faced imminent danger of serious physical
17 injury at the time of filing. Andrews, 493 F.3d at 1055; Williams v. Paramo, 775 F.3d 1182,
18 1187 n.8 (9th Cir. 2015) (citation omitted) (stating Plaintiff was required to demonstrate
19 imminent danger only at time complaint was filed).

20 Therefore, this being a close call on the issue, the Court finds that Plaintiff has made a
21 sufficient and plausible threshold showing that when he filed his complaint he was in imminent
22 danger of serious physical harm and he will be permitted to continue to proceed in this case with
23 his in forma pauperis status.

24
25 ⁴ See Hughes v. Rowe, 449 U.S. 5, 9 (1980) (stating pro se plaintiff's pleading held to less
26 stringent standards than those drafted by lawyers); Estelle v. Gamble, 429 U.S. 97, 106 (1976)
27 (stating pro se documents are to be liberally construed); Haines v. Kerner, 404 U.S. 519, 520
28 (1972) (stating pro se pleadings are held to less stringent standard than those drafted by lawyers);
see also Draper v. Coombs, 792 F.2d 915, 924 (9th Cir. 1986) (providing "great leniency" when
evaluating pro se plaintiff's compliance with technical rules of civil procedure); Hansen v. May,
502 F.2d 728, 730 (9th Cir. 1974).

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Accordingly, IT IS HEREBY ORDERED that:

1. The Clerk of Court shall FORMALLY IDENTIFY Plaintiff as a three strikes litigant within the meaning of 28 U.S.C. § 1915(g) in the Court’s docketing system, and
2. Plaintiff’s SHOWING OF CAUSE (ECF No. 30) is SUFFICIENT to permit him to continue to proceed with in forma pauperis status, despite his three strikes litigant status.

The Court will screen Plaintiff’s complaint in due course.

IT IS SO ORDERED.

Dated: June 6, 2024

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE