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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARVIN GLENN HOLLIS,

Plaintiff,

No. CIV S-09-1627 DAD (TEMP) P

vs.

A. GORBY, et al.,

Defendants.

ORDER

_____ /

Plaintiff is a California prisoner proceeding pro se and in forma pauperis (IFP) with an action for violation of civil rights under 42 U.S.C. § 1983. Several matters are now pending before the court and will be addressed in order below.

I. Defendants’ Motion To Have Plaintiff’s In Forma Pauperis Status Revoked

Defendants’ have filed a motion seeking to have plaintiff’s IFP status revoked pursuant to 28 U.S.C. § 1915(g). That statute reads as follows:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding 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 can be granted, unless the prisoner is under imminent danger of serious physical injury.

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1 “[T]he plain language of § 1915(g) requires that the court look at cases dismissed prior to the
2 enactment of the [Prison Litigation Reform Act] to determine when a prisoner has used his three
3 strikes.” Rodriguez v. Cook, 169 F.3d 1176, 1181 (9th Cir. 1999).

4 For purposes of § 1915(g), the court must determine whether plaintiff has, on three
5 or more occasions prior to the filing of this new action, brought a civil action or appeal that was
6 dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which
7 relief could be granted. Where a court denies a prisoner’s application to file an action without
8 prepayment of fees on the grounds that the submitted complaint is frivolous, malicious or fails to
9 state a claim upon which relief may be granted, the complaint has been “dismissed” for purposes
10 of § 1915(g). O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008).

11 Defendants point to five cases which they assert qualify as so-called “strikes”
12 against plaintiff under § 1915(g).¹ The court agrees that Hollis v. Villanueus, 3:07-cv-04538
13 THE, dismissed by the United States District Court for the Northern District of California on
14 February 2, 2009, for “failure to state a claim” (Doc. No. 11)² counts as a “strike” for purposes of
15 applying § 1915(g). That dismissal occurred well before plaintiff brought this action on June 8,
16 2009, by submitting his complaint to prison officials for mailing. See Houston v. Lack, 487 U.S.
17 266, 270 (1988) (notice of appeal in habeas action deemed filed on the day the habeas petitioner
18 handed the notice to prison officials for mailing).

19 The court also agrees that Hollis v. Mazon-Alec, 1:03-cv-06842 REC DLB P from
20 the Fresno division of this court constitutes a second “strike” under § 1915(g). In that case, on
21

22 ¹ With their motion, defendants include a request that the court take judicial notice of
23 several court documents. The court does judicially notice all of the facts identified herein
24 derived from the dockets of this court, the United States District Court for the Northern District
of California and the Ninth Circuit Court of Appeals or documents filed in those courts. See
Fed. R. Evid. 201.

25 ² Copies of all of the dockets of other courts referenced in this order and court documents
26 from other courts which are referenced are attached to defendants’ motion to have plaintiff’s IFP
status revoked.

1 December 1, 2004, the assigned magistrate judge recommend dismissal of plaintiff's third
2 amended complaint without leave to amend because plaintiff failed to state a claim upon which
3 relief could be granted despite having previously been informed of the deficiencies in his prior
4 complaints filed in that action. That recommendation was adopted on January 27, 2005 and the
5 case was dismissed for failure to state a claim upon which relief could be granted .

6 The other three cases identified by defendants, however, do not qualify as strikes
7 under § 1915(g). The appeal of Hollis v. Villanueus, Ninth Circuit Case No. 09-15523, was
8 dismissed on August 26, 2009 (Doc. No. 9) after this action was brought by plaintiff.
9 Furthermore, that appeal was dismissed for failure to prosecute, not for failure to state a claim or
10 because the appeal was frivolous or malicious.

11 The case Hollis v. Evans, 3:07-cv-05389 THE, was a habeas action brought in the
12 United States District Court for the Northern District of California. Habeas actions generally can
13 not constitute strikes. Andrews v. King, 398 F.3d 1113, 1122 (9th Cir. 2005). There is a limited
14 exception to this rule:

15 We recognize, however, that some habeas petitions may be little
16 more than 42 U.S.C. § 1983 actions mislabeled as habeas petitions
17 so as to avoid the penalties imposed by 28 U.S.C. § 1915(g). In
18 such cases, the district court may determine that the dismissal of
19 the habeas petition does in fact count as a strike for purposes of
20 1915(g).

19 Id. at 1123 n. 12. However, the exception noted by the court in Andrews is not applicable here
20 because the district court judge who dismissed Hollis v. Evans did not find that plaintiff presented
21 his claims in a habeas action rather than in a § 1983 action to avoid any penalty or a more onerous
22 filing requirement applicable in a § 1983 action, such as the higher filing fee. See December 3,
23 2007 Order (Doc. No. 4). Furthermore, defendants fail to point to anything suggesting that this
24 court should find that plaintiff's purpose in bringing his petition in Hollis v. Evans as a habeas
25 action was to avoid a penalty or requirement associated with a § 1983 action.

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1 Finally, the appeal of the dismissal of Hollis v. Evans, Ninth Circuit Case No. 08-
2 15037, was, again, dismissed due to plaintiff's failure to prosecute that appeal (Doc. No. 11)
3 which is not a ground qualifying as a "strike" under § 1915(g). Andrews, 398 F.3d at 1122.

4 Because defendants fail to point to a third "strike" necessary for a determination by
5 this court that plaintiff "struck out" under 28 U.S.C. § 1915(g) before he filed his complaint in
6 this action, defendants' motion to revoke plaintiff's IFP status will be denied.

7 II. Defendants' Motion To Have Plaintiff Declared A "Vexatious Litigant"

8 Next, defendants ask that plaintiff be declared a "vexatious litigant" pursuant to
9 Local Rule 151(b) and, as a result, be required to post security before proceeding to trial. Local
10 Rule 151(b) provides:

11 On its own motion or on motion of a party, the Court may at any
12 time order a party to give a security, bond, or undertaking in such
13 amount as the Court may determine to be appropriate. The
14 provisions of Title 3A, part 2, of the California Code of Civil
15 Procedure, relating to vexatious litigants, are hereby adopted as a
16 procedural Rule of this Court on the basis of which the Court may
17 order the giving of a security, bond, or undertaking, although the
18 power of the Court shall not be limited thereby.

19 In turn, Section 391(b) of the California Code of Civil Procedure provides:

20 (b) "Vexatious litigant" means a person who does any of the
21 following:

22 (1) In the immediately preceding seven-year period has commenced,
23 prosecuted, or maintained in propria persona at least five litigations
24 other than in a small claims court that have been (I) finally
25 determined adversely to the person or (ii) unjustifiably permitted to
26 remain pending at least two years without having been brought to
trial or hearing.

(2) After a litigation has been finally determined against the person,
repeatedly relitigates or attempts to relitigate, in propria persona,
either (I) the validity of the determination against the same
defendant or defendants as to whom the litigation was finally
determined or (ii) the cause of action, claim, controversy, or any of
the issues of fact or law, determined or concluded by the final
determination against the same defendant or defendants as to whom
the litigation was finally determined.

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1 (3) In any litigation while acting propria persona, repeatedly files
2 unmeritorious motions, pleadings, or other papers, conducts
3 unnecessary discovery, or engages in other tactics that are frivolous
4 or solely intended to cause unnecessary delay.

5 (4) Has previously been declared to be a vexatious litigant by any
6 state or federal court of record in any action or proceeding based
7 upon the same or substantially similar facts, transaction, or
8 occurrence.

9 Finally, Section 391.1 of the California Code of Civil Procedure provides:

10 In any litigation pending in any court of this state, at any time until
11 final judgment is entered, a defendant may move the court, upon
12 notice and hearing, for an order requiring the plaintiff to furnish
13 security. The motion must be based upon the ground, and supported
14 by a showing, that the plaintiff is a vexatious litigant and that there
15 is not a reasonable probability that he will prevail in the litigation
16 against the moving defendant.

17 The Ninth Circuit has counseled caution in declaring plaintiffs “vexatious.” That
18 court has explained that “orders restricting a persons’s access to the courts must be based on
19 adequate justification supported in the record and narrowly tailored to address the abuse
20 perceived.” DeLong v. Hennessey, 912 F.2d 1144, 1149 (9th Cir. 1990). Strictly speaking,
21 plaintiff brought at least five unsuccessful lawsuits in the seven years prior to the filing of his
22 original complaint in this action.³ However, based on defendants’ motion, this court cannot say
23 that plaintiff’s filings have been so “numerous or abusive” or “inordinate” to warrant a “vexatious
24 litigant” order. Id. at 1147-48 (examples of “numerous or abusive” filings include plaintiffs who
25 have filed 35 related complaints, more than 50 frivolous cases, or more than 600 complaints).
26 Nor can this court say that plaintiff’s litigation activity reflects a “pattern of harassment.” Id. at
1140.

Moreover, it is not clear that plaintiff has no reasonable probability of succeeding
on the merits of this case, something which must be shown before plaintiff can be declared
“vexatious.” See Hollis v. Dezember, No. CIV S-08-2810 KJN P, 2010 WL 4220535, at *2 (E.D.

³ Based on court records identified by defendants, the court takes judicial notice of this fact pursuant to Federal Rule of Evidence 201.

1 Cal. Oct. 20, 2010) (denying defendants’ motion to declare plaintiff a “vexatious litigant” because
2 the court could not determine at that juncture that there was no reasonable probability that
3 plaintiff would not prevail against any defendant). In fact, in screening plaintiff’s complaint on
4 November 24, 2009,⁴ the court determined that it appeared to state cognizable claims for relief
5 pursuant to 42 U.S.C. § 1983. In that screening order, the court also noted that if plaintiff proved
6 the allegations in his complaint, he had a reasonable opportunity to prevail on the merits of this
7 action. Defendants’ fail to point to anything arising from plaintiff’s complaint which would
8 compel the court to reconsider that ruling.

9 In light of all of these facts, the court will deny defendants’ motion to have plaintiff
10 declared a “vexatious litigant.”

11 III. Response To Request For Admissions

12 On February 28, 2011, plaintiff filed a request for an extension of time to respond
13 to defendants’ request for admissions. The discovery requests in question were served by
14 defendants on October 29, 2010. Under the discovery order filed in this case on September 27,
15 2010, plaintiff’s response was due within 45 days of service. Defendants’ did not receive
16 plaintiff’s responses until February 22, 2011. Plaintiff asserts his responses were late because he
17 spent time in the hospital at his institution of confinement between November, 2010, and February
18 of this year. He also asserts he has been denied law library access at his institution of confinement
19 between December 20, 2010 and present.

20 Under Rule 6(b) of the Federal Rules of Civil Procedure, the court may extend a
21 deadline pursuant to a request made after the deadline has passed only if the person requesting the
22 extension failed to act in a timely manner because of excusable neglect. Plaintiff does not allege
23 he missed the deadline to serve responses to defendants’ request for admissions because of
24 excusable neglect. He suggests he was aware of the deadline, but simply could not comply with

25 ⁴ The court amended the screening order on March 31, 2010, to add one additional
26 defendant against whom this action could proceed.

1 it. This is not an adequate reason to now extend the deadline. Furthermore, the court finds that
2 plaintiff's suggestion that he could not serve a timely-response to the request for admissions, or at
3 least a timely-request for an extension of time to do so, to be disingenuous considering that
4 defendants identify twenty-four documents filed by plaintiff in this court and in the Ninth Circuit
5 in this and other cases between November 1, 2010 and February 24, 2011. For all these reasons,
6 plaintiff's request for an extension of time to file his responses to defendants' request for
7 admissions will be denied.

8 In his motion, plaintiff also asks that he be allowed to withdraw any admissions
9 made pursuant to Federal Rule of Civil Procedure 36(a)(3) due to his failure to file timely
10 responses to a request for admissions. Under Rule 36(b), the court can deem an admission
11 withdrawn if it is established that withdrawal would "promote the presentation of the merits" of
12 the claims before the court, and "if the court is not persuaded that it would prejudice the
13 requesting party in . . . defending the action on the merits." Because neither party has submitted
14 the requests for admission—now admissions—at issue, the court is unable to determine if
15 defendants would be prejudiced by the requested withdrawal. Therefore, plaintiff's motion for
16 withdrawal will be denied at this time without prejudice. Plaintiff may renew his motion within
17 twenty-one days of the date of service of this order and must submit the admissions at issue with
18 any renewed motion for withdrawal that he may elect to file.

19 IV. Scheduling

20 Defendants have requested an extension of time to file a motion for summary
21 judgment. Since defendants' motion for summary judgement was timely-filed on April 29, 2011,
22 the request for an extension will be denied. The court will, however, vacate the previously set
23 deadlines for the filing of pretrial statements. Those dates will be reset, if necessary, after the
24 court rules on defendants' pending motion for summary judgment.

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CONCLUSION

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED that:

1. Defendants' November 12, 2010, motion requesting that plaintiff's in forma pauperis status in this case be revoked pursuant to 28 U.S.C. § 1915(g) (Doc. No. 39) is denied.

2. Defendants' November 12, 2010, motion that plaintiff be declared a "vexatious litigant" (Doc. No. 39) is denied.

3. Plaintiff's February 28, 2011, request for an extension of time to serve responses to defendants' request for admissions (Doc. No. 47) is denied.

4. Plaintiff's February 28, 2011, motion to withdraw admissions (Doc. No. 47) is denied without prejudice to renewal within 21 days of the date of service of this order. Plaintiff must submit a copy of the admissions he seeks to withdraw with any renewed motion he elects to file.

5. Defendants' April 19, 2011, motion for an extension of the deadline to file pretrial motions (Doc. No. 50) is denied.

6. The deadlines established in the October 19, 2010, scheduling order for the filing of pretrial statements are vacated.

DATED: July 14, 2011.



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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