UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY C. BONTEMPS, Plaintiff, v. SOTAK, et al., Defendants.	No. 2:09-cv-2115-MCE-EFB P FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Defendants move to revoke plaintiff's *in forma pauperis* status, and to declare him a three-strikes litigant, and to dismiss his complaint. ECF Nos. 74, 75. For the reasons stated below, it is recommended that the motion be granted.

I. Background

Plaintiff alleges that defendants provided inadequate medical care during his incarceration in the Sacramento County Jail. ECF No. 24. Plaintiff was granted leave to proceed in forma pauperis ("IFP status") on February 1, 2010, ECF No. 9, and after a series of amended complaints and service issues, defendant Smith, joined by defendant Sotak, filed a motion to revoke that status. ECF Nos. 40, 49. The motion to revoke was denied based on a finding that Smith had not met his burden of producing evidence showing that plaintiff had three prior cases that fell within the "three strikes" language of 28 U.S.C. § 1915(g). ECF Nos. 59, 61. Defendant Sotak now returns with another motion to revoke plaintiff's IFP status, which defendant Smith joins. ECF Nos. 74, 75.

II. Motion to Revoke In Forma Pauperis Status

Defendants contend in their new motion that since the denial of the prior motion, "there have been four subsequent recommendations recommending that IFP status be revoked in plaintiff's other Eastern District cases, two of which have already been reviewed de novo by the District Judge and adopted in full." ECF No. 74-1 at 3. According to defendants, the four subsequent recommendations and orders all counted as strikes, the following three previous cases which this court did not count as strikes in ruling on the prior motion. Those cases are:

1. *Bontemps v. Kramer et al.*, E.D. Cal. Case No. 2:06-cv-02483 (*Kramer I*);
2. *Bontemps v. Kramer et al.*, E.D. Cal. Case No. 2:06-cv-02580 (*Kramer II*); and
3. *Bontemps v. Gray et al.*, E.D. Cal. Case No. 2:07-cv-00710 (*Gray*).

Defendants argue that the analysis in the four Eastern District cases counting *Kramer I & II* and *Gray* as strikes should be applied here. Although review of those cases reveals that the question of plaintiff's "three strikes" status is not as simple as defendants represent, the undersigned concludes that defendant Sotak has made the requisite showing that these cases should qualify as "strikes," as discussed more fully below.

In two of the four recommendations in the other cases that defendants rely on, the district judge dismissed plaintiff's actions after determining him to be a three strikes litigant. Those cases are: *Bontemps v. Bayne, et al.*, E.D. Cal. Case No. 2:12-cv-2791 (*Bayne*) and *Bontemps v. Barnes*, E.D. Cal. Case No. 2:12-cv-02250 (*Barnes*).[1] In the other two cases, the court reached the opposite conclusion. In *Bontemps v. Salinas*, E.D. Cal. Case No. 2:12-cv-02185 (*Salinas*), the magistrate judge initially recommended that the motion to revoke IFP status be granted. Shortly thereafter, the Ninth Circuit issued its opinion in *Knapp v. Hogan*, 738 F.3d 1106 (9th Cir. 2013), which clarified the circumstances under which a prior case may be deemed a "strike" under § 1915(g). In light of *Knapp*, District Judge Nunley returned the case to the magistrate judge for reconsideration. After analyzing the case under the reasoning of *Knapp*, the magistrate judge

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[1] The court takes judicial notice of the records in plaintiff's other court actions. Fed. R. Evid. 201(b).

concluded that *Kramer II* could not be counted as a strike. She accordingly recommended that the motion to revoke IFP status be denied, and Judge Nunley adopted that recommendation.

In *Bontemps v. Callison*, E.D. Cal. Case No. 2:13-cv-0360 (*Callison*), the same magistrate judge also recommended, pre-*Knapp*, that plaintiff's IFP status be revoked. District Judge Mueller declined to adopt the recommendation, concluding that the dismissals in plaintiff's prior cases—where the complaint had been dismissed for failure to state a claim, plaintiff had been given leave to amend, plaintiff had failed to amend, and the case had consequently been dismissed—could not be considered strikes under § 1915(g) because they were dismissed for "failure to prosecute" rather than "failure to state a claim." Judge Mueller noted that the type of conduct displayed by plaintiff in his prior cases (filing an inadequate complaint and then failing to amend it) could be regulated through the court's discretionary authority to deny IFP status, but concluded that plaintiff's past litigation did not amount to abuse and consequently allowed the case to proceed.

Thus, the determinations of other judges regarding Bontemps's "three strikes" status, while helpful, is not entirely uniform and provides conflicting guideposts for addressing the circumstance presented here. In the two cases where plaintiff was found to be a three strikes litigant, the magistrate judges' recommendations (on which the final order was based) all pre-dated *Knapp*. And, as defense counsel is undoubtedly aware, there are differing opinions from the Eastern District of California regarding whether a case that is dismissed after a plaintiff fails to amend a complaint that had been found insufficient constitutes a strike under § 1915(g). *See Bontemps v. Barnes*, No. 2:12-cv-2249 DAD P, 2014 U.S. Dist. LEXIS 123595, at *4 (E.D. Cal. Sept. 3, 2014) ("The undersigned notes that a myriad of issues surrounding the determination of which dismissals count as a strike under § 1915(g) has, of late, consumed considerable judicial resources in both the trial and appellate courts."), and *compare Bontemps v. Callison*, No. S-13-0360 KJM AC P, 2014 U.S. Dist. LEXIS 67186, at *6-10 (E.D. Cal. May 15, 2014) (finding that prior dismissals for "failure to prosecute" after the complaint had been found not to state a claim, plaintiff had been given leave to amend, and plaintiff had failed to amend were not strikes under § 1915(g)) *with Hudson v. Bigney*, No. 2:11-cv-3052 LKK AC P, 2013 U.S. Dist. LEXIS 167444, at *7 (E.D. Cal. Nov. 22, 2013) ("A dismissal for failure to prosecute an action constitutes a strike when it is based upon the plaintiff's failure to file an amended complaint after the original complaint is dismissed for failure to state a claim.") (adopted in full by 2014 U.S. Dist. LEXIS 10539 (E.D. Cal. Jan. 28, 2014)). The Ninth Circuit has addressed this issue directly only in a non-precedential unpublished opinion, upholding a district court order that found such a case to be a strike. *Baskett v. Quinn*, 225 F. App'x 639, 640 (9th Cir. 2007); *see* Ninth Circuit Rule 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent[.]").

The court will accordingly review the cases submitted by defendants as purported strikes under the language of § 1915(g) and the guidance provided by *Knapp* and other relevant precedent.[2] Section 1915(g) provides:

> 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 may be granted, unless the prisoner is under imminent danger of serious physical injury.

Pursuant to that section, a prisoner with three "strikes"—that is, three prior cases or appeals that were dismissed as frivolous, malicious, or for failure to state a claim—cannot proceed in forma pauperis. *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005). To determine the reason for a prior dismissal, a court must look at the order of dismissal and any other relevant information. *Id.* at 1121; *Knapp*, 738 F.3d at 1109. "[T]he procedural mechanism or Rule by which the dismissal is accomplished, while informative, is not dispositive." *Knapp*, 738 F.3d at 1109. The party challenging IFP status bears the burden of establishing that the prisoner has three strikes. *Id.* at 1110. If that party makes a prima facie showing of three strikes, the burden shifts to the prisoner to rebut it. *Id.*

In *Knapp*, the Ninth Circuit explained that it interprets dismissal for "'fail[ure] to state a claim upon which relief may be granted,' to be essentially synonymous with a Federal Rule of

[2] It is no small irony that a rule presumably intended to preserve scarce resources has consumed so much attention. It would appear that in some instances addressing the merits in a dispositive motion would have consumed less time and effort.

Civil Procedure 12(b)(6) dismissal." *Id*. (citing *Moore v. Maricopa Cnty. Sheriff's Office*, 657 F.3d 890, 893 (9th Cir. 2011)). It then addressed the question of whether and when a dismissal for violation of Federal Rule of Civil Procedure 8(a)'s "short and plain statement" requirement could constitute a strike under § 1915(g). *Id.* at 1110-11. The court noted that "there are multiple ways that [Rule 8(a)] can be violated." 738 F.3d at 1109. The court observed that a complaint can violate the rule by saying too little (pointing to the threshold allegations required under the *Iqbal* line of cases), or by saying too much (pointing to cases in which dismissal under Rule 8 was affirmed because of "[p]rolix, confusing complaints" which "impose unfair burdens on litigants and judges."). *Id.* The court emphasized that it looks to the underlying reason for the dismissal to determine whether it falls within Section 1915(g)'s three strikes rule. "This means that the procedural mechanism or Rule by which the dismissal is accomplished, while informative, is not dispositive." *Id*. at 1109. Thus, as the court in *Knapp* instructs, a Rule 8(a) dismissal is neither categorically included nor excluded from counting as a § 1915(g) "strike." Rather, each dismissal under Rule 8(a) must be assessed independently: did the dismissal "result from the court's appraisal of the merits of the case (i.e., was it 'frivolous' or did it 'fail to state a claim'), or did the dismissal result from an appraisal of the prisoner's state of mind (i.e., 'malicious')?" *Id*. at 1109-10. As discussed below, the dismissals at issue here resulted from the dismissing court's appraisal of the merits.

As for the dismissals at issue in *Knapp,* in each instance Knapp was informed that the complaint violated the "short and plain statement" requirement of Rule 8(a) but failed to correct the violation. *Id.* at 1110. The Ninth Circuit concluded that a dismissal for violation of that aspect of Rule 8(a) constitutes a strike if the violation has been repeated after leave to amend has been granted:

> [A]fter an incomprehensible complaint is dismissed under Rule 8 and the plaintiff is given, but fails, to take advantage of the leave to amend, the judge is left with a complaint that, being irremediably unintelligible, gives rise to an inference that the plaintiff could not state a claim. When a litigant knowingly and repeatedly refuses to conform his pleadings to the requirements of the Federal Rules, it is reasonable to conclude that the litigant simply *cannot* state a claim.

738 F.3d at 1110 (internal quotation marks and citations omitted, emphasis in original).

With these principles in mind, the court turns to the three prior cases filed by plaintiff at issue here:

- *Bontemps v. Kramer*, E.D. Cal. Case No. 2:06-cv-2483 (*Kramer I*). In *Kramer I*, the court dismissed the complaint on screening with leave to amend. ECF No. 74-2 at 29. Plaintiff had filed two complaints. The original complaint named defendants Kramer, Poole, and Pulley. *Id.* at 26. The court determined that plaintiff had made no allegations in either complaint against Kramer and Poole. *Id.* His factual allegations against Pulley failed to state a cognizable claim under the governing legal standard. *Id.* at 27. Accordingly, the complaint was dismissed. *Id.* at 29. When plaintiff failed to file an amended complaint, the action was dismissed with citation to Local Rule 11-110[3] and Federal Rule of Civil Procedure 41(b).[4] *Id.* at 31, 35. Thus, both an original and amended complaint were found to fail to state a claim upon which relief could be granted, but the procedural rules cited in the order terminating the case were for failure to prosecute by not filing another amended complaint.
- *Bontemps v. Kramer*, E.D. Cal. Case No. 2:06-cv-2580 (*Kramer II*). In *Kramer II*, the court again dismissed plaintiff's complaint on screening, giving leave to amend. ECF No. 74-2 at 46. The court found that the complaint failed to make any factual allegations against defendant Kramer. *Id.* at 43. Plaintiff's allegations failed to state a viable

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[3] That rule is now renumbered as Local Rule 110.

[4] Local Rule 11-110 provided:

> Failure of counsel or of a party to comply with these Rules or with any order of the Court may be grounds for imposition by the Court of any and all sanctions authorized by statute or Rule or within the inherent power of the Court.

Federal Rule of Civil Procedure 41(b) provides:

> If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

retaliation claim against defendant Pulley. *Id.* at 43-44. Plaintiff had also failed to state a viable claim under the Americans with Disabilities Act. *Id.* at 44. Plaintiff's claim for injunctive relief had been rendered moot by a transfer to a new prison. *Id.* at 45. Because the complaint failed to state a claim it was dismissed, but the dismissal was with leave to amend. Plaintiff again failed to file an amended complaint. *Id.* at 48. The order finally ending the action cited to Local Rule 11-110 and Federal Rule of Civil Procedure 41(b). *Id.* at 51-52.

- *Bontemps v. Gray*, E.D. Cal. Case No. 2:07-cv-2115 (*Gray*). As in both *Kramer* cases, the court in *Gray* dismissed plaintiff's complaint with leave to amend for failure to state a claim. *Id.* at 61. The court concluded that the facts alleged failed to state a claim under the Constitution. *Id.* at 59-60. Once again, plaintiff failed to file an amended complaint, and the case was dismissed with citation to Local Rule 11-110 and Federal Rule of Civil Procedure 41(b). *Id.* at 63-67.

Each of the three cases involved complaints that were dismissed after the court's appraisal of the sufficiency of the allegations to state a claim upon which relief may be granted. They were found insufficient and the complaints were dismissed with leave to amend. Plaintiff failed to submit any further amended complaints and the orders finally terminating those three cases cited to Local Rule 11-110 and Federal Rule of Civil Procedure 41(b) (rules which address dismissal for failure to obey a court order or prosecute a case). Thus, the question presented is whether they qualify as strikes for having been dismissed failure to state a claim even though leave to amend was granted but not pursued.

Knapp makes clear that the citations in the dismissal orders are to the procedural mechanism by which the cases were ultimately terminated but are not determinative of the "strikes" question. *Knapp*, 738 F.3d at 1109-10. Rather, the court must consider the reason underlying the dismissal order. *Id.* On that question, it is undeniable that the underlying reason for the dismissals in all three cases turned on the dismissing court's appraisal of the merits of the

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complaint under a Rule 12(b)(6) standard.[5] The language of the initial screening orders on which final dismissal was based is plainly stated—the complaints were dismissed because the facts alleged in those complaints failed to state a claim upon which relief could be granted, a fundamental threshold of merit that any plaintiff must satisfy to proceed with a case.

In each instance, plaintiff was afforded the opportunity to cure the defects. If there were additional facts that could have made plaintiff's claims viable, plaintiff was given the opportunity to present them. He did not. The rub of the problem is determining which way, if any, that cuts for purposes of Section 1915(g). The analysis adopted in *Bontemps v. Salinas,* E.D. Cal. Case No. 2:12-cv-2185 (*"Salinas"*) (*see* ECF Nos. 40 and 44 therein) focuses on the fact that by not filing an amended complaint the plaintiff does not repeat the Rule 8 violation within the same case. In concluding that Bontemps's filings in *Kramer I* should not constitute a strike, *Salinas* reads *Knapp* as dictating that only where there the previously dismissed case under consideration "involved persistent filing of non-compliant complaints despite repeated warnings about the requirements of Rule 8" should the ultimate dismissal of the action count as a strike under the statute. *Salinas,* ECF No. 40 at 5. There is support for that view in *Knapp.* The *Salinas* analysis emphasizes the "repeated and knowing" language of *Knapp*[6] in concluding that the dismissal of Bontemps's complaint in *Kramer I* is not a strike. *Salinas,* ECF No. 40 at 5 (noting that Bontemps received a "single warning and did not thereafter file complaints that continued to violate Rule 8" and concluding that "[a]ccordingly, the dismissal of the action amounted to a simple dismissal for failure to prosecute, rather than a dismissal for repeated disobedience of Rule 8 and of the district court's orders, as in *Knapp*.). But *Knapp* admonishes

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[5] Had the dismissing court found plaintiff's complaint to state a claim, there never would have been a question of whether he must file an amended complaint, nor the ancillary question of whether his failure to do so provides a second reason for the dismissal, i.e. failure to prosecute and failure to comply with the court's order to file the amended complaint.

[6] "We hold that dismissals following the repeated violation of Rule 8(a)'s 'short and plain statement' requirement, following leave to amend, are dismissals for failure to state a claim under § 1915(g). While past cases have found that this type of strike is accrued by a Rule 12(b)(6) dismissal, they do not hold that this is the only possible way." *Knapp,* 738 F.3d at 1110 (citing *Moore v. Maricopa Cnty. Sheriff's Office*, 657 F.3d 890, 893 (9th Cir. 2011)).

that that the procedural mechanism or Rule by which the dismissal is accomplished is not dispositive, and ultimately instructs that the determinative question is instead whether the reason underlying the ultimate dismissal involved "the court's appraisal of the merits of the case (i.e., was it 'frivolous' or did it 'fail to state a claim')." 738 F.3d at 1109. Indeed, in the sentences immediately following the "repeated and knowing" language, the Ninth Circuit adopted as "persuasive" the Seventh Circuit's analysis in *Paul v. Marberry,* stating that "after an incomprehensible complaint is dismissed under Rule 8 and the plaintiff is given, but fails, to take advantage of the leave to amend, 'the judge [is] left with [ ] a complaint that, being irremediably unintelligible, [gives] rise to an inference that the plaintiff could not state a claim.'" *Knapp,* 738 F.3d at 1110 (quoting *Paul v. Marberry*, 658 F.3d 702, 705 (7th Cir. 2011)). The analysis of *Paul* adopted by the Ninth Circuit further clarifies: "But when, as in each of the three cases on which the judge in the present case based his three-strike finding, the plaintiff is told to amend his unintelligible complaint and fails to do so, the proper ground of dismissal is not want of prosecution but failure to state a claim, one of the grounds in section 1915(g) for calling a strike against a prisoner plaintiff." *Paul v. Marberry*, 658 F.3d at 705.

Applying *Knapp* and *Paul* here, the fact that each of the previously-dismissed complaints was reviewed for potential merit and assessed by the court as failing to state a claim is unavoidable. This court, in evaluating each previously-dismissed actions for purposes of the three strikes rule under the statute, cannot ignore that each of the earlier complaints was specifically found to have failed to state a claim. While the procedural rules cited in the orders finally terminating the actions relate to failure to prosecute (rather than failure to state a claim), the complaints in all three actions were evaluated on initial screening, found to be inadequate because their allegations did not articulate facts that could present a cognizable claim, and the cases were finally terminated because plaintiff – in spite of the opportunity to do so – never did file a complaint that satisfied Rule 12(b)(6). Neither can the court ignore that the screening of each complaint consumed court resources that the statue purports to preserve under the three strikes rule. While Bontemps did not submit amended complaints, that fact does not undo what transpired leading to the dismissal for failure to state a claim. The repeated filing of non-cognizable claims and abandonment of those claims as soon as they are deemed non-cognizable imposes significant burdens on the courts. Section 1915(g) was enacted to address just such activity:

> In assessing the constitutionality of § 1915(g), we recognized that the Act's three-strike rule 'was enacted to curtail the extraordinary costs of frivolous prisoner suits and minimize such costs to the taxpayers.' *Rodriguez v. Cook*, 169 F.3d 1176, 1181 (9th Cir. 1999) ("[P]risoners file a disproportionate number of frivolous suits…because of 'potential gains and low opportunity costs.'… Requiring prisoners to pay filing fees for suits will force them to go through the same thought process non-inmates go through before filing suit, i.e., is filing this suit worth the costs?" (internal citation omitted)). The animating concern was obvious: too many prisoner lawsuits were wastes of the courts' valuable time. H.R. Rep. No. 104-21 (1995), at 7 ("Too many frivolous lawsuits are clogging the courts, seriously undermining the administration of justice.").

Knapp, 738 F.3d at 1110-11.

Looking to each of the prior dismissals involved here, at bottom lies a complaint in each case with allegations that could not support a cognizable claim and therefore could not proceed under a Rule 12(b)(6) standard which, under the reasoning of *Knapp*, is the very core of the three strikes provision in Section 1915(g). Accordingly, the undersigned finds that *Kramer I*, *Kramer II*, and *Gray* should count as "strikes" under § 1915(g); each having been dismissed because plaintiff failed to state a claim upon which relief could be granted.

Defendants have met their burden of establishing that plaintiff's IFP status should be revoked, and plaintiff has presented no evidence or argument rebutting that conclusion. (Plaintiff simply argues that the court has already denied the prior motion to revoke IFP status and should similarly deny this one. ECF No. 79.)

III. Recommendation

For the reasons stated above, it is hereby RECOMMENDED that:

1. Defendant Sotak's March 4, 2014 motion to revoke plaintiff's IFP status (ECF No. 74) be granted;
2. The court's order of February 1, 2010 (ECF No. 9) granting IFP status be vacated and plaintiff's IFP status revoked; and

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3. Plaintiff be required to furnish the statutory filing fee of $350[7] to proceed with this action and be admonished that failure to pay the filing fee within thirty days of any order adopting this recommendation will result in dismissal of this action.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: February 25, 2015.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

[7] Although the civil case filing fee is now $400.00, it was $350.00 at the time that plaintiff initiated this action.