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

WILLIE WEAVER,

Plaintiff,

No. CIV S-09-2164 JAM DAD P

vs.

SACRAMENTO COUNTY
MAIN JAIL, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se, has filed a civil rights complaint seeking relief under 42 U.S.C. § 1983. Plaintiff has not paid the required filing fee. This proceeding was referred to the undersigned magistrate judge by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

28 U.S.C. § 1915(g)

The federal in forma pauperis statute includes a limitation on the number of actions in which a prisoner can proceed in forma pauperis.

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under [§ 1915] 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

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1 be granted, unless the prisoner is under imminent
2 danger of serious physical injury.

3 28 U.S.C. § 1915(g). “[T]he plain language of § 1915(g) requires that the court look at cases
4 dismissed prior to the enactment of the [Prison Litigation Reform Act] to determine when a
5 prisoner has used his three strikes.” Rodriguez v. Cook, 169 F.3d 1176, 1181 (9th Cir. 1999).

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

13 **DISCUSSION**

14 Here, plaintiff suffered his first strike for purposes of § 1915(g) on July 17, 2006,
15 when the district court dismissed Weaver v. California Correctional Institution Confinement
16 SHU, Case No. CIV F-06-0671 OWW SMS P (E.D. Cal.) for failure to state a claim and
17 frivolousness. Plaintiff suffered his second strike on July 17, 2006, when the district court
18 dismissed Weaver v. California Correctional Institution - Third Watch Sergeant, Case No. CIV
19 F-06-0775 OWW LJO P (E.D. Cal.) for failure to state a claim and frivolousness. Finally,
20 plaintiff suffered his third strike on August 1, 2006, when the district court dismissed Weaver v.
21 California Correctional Institution Law Library, Case No. CIV F-06-0863 OWW SMS P (E.D.
22 Cal.) for failure to state a claim and frivolousness. In fact, as far back as 2006, in Weaver v.
23 California Correctional Institution Building A-4A-4 et al., Case No. CIV F-06-1429 OWW SMS
24 P, U.S. District Judge Oliver W. Wanger of the Fresno Division of this court dismissed plaintiff’s
25 action as frivolous and malicious, noting that plaintiff had filed 124 actions in this district, many
26 of which have been dismissed as frivolous or duplicative.

1 Plaintiff commenced this action on August 5, 2009, by filing a civil rights
2 complaint. Subsequently, plaintiff filed an application to proceed in forma pauperis. As noted
3 above, however, court records reflect that plaintiff filed this action after having brought three or
4 more prior federal cases that were dismissed on the grounds specified in 28 U.S.C. § 1915(g).
5 Accordingly, the undersigned will recommend that plaintiff's application to proceed in forma
6 pauperis be denied and that this action be dismissed without prejudice to the filing of a fee-paid
7 action.¹

8 CONCLUSION

9 Accordingly, IT IS HEREBY RECOMMENDED that:

- 10 1. Plaintiff's September 30, 2009 motion to submit an application to proceed in
11 forma pauperis without a certified trust account statement (Doc. No. 6) be denied as unnecessary;
- 12 2. Plaintiff's October 1, 2009 application to proceed in forma pauperis (Doc. No.
13 7) be denied; and
- 14 3. This action be dismissed without prejudice to the filing of a new action
15 accompanied by full payment of the required filing fee.

16 These findings and recommendations are submitted to the United States District
17 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
18 one days after being served with these findings and recommendations, plaintiff may file written
19 objections with the court. Any document containing objections should be titled "Objections to
20

21 ¹ There is an exception to the three-strike bar of § 1915(g) which allows a prisoner to use
22 IFP status to bring a civil action despite three prior dismissals where the prisoner is under
23 imminent danger of serious physical injury. See Andrews v. Cervantes, 493 F.3d 1047, 1056-57
24 (9th Cir. 2007) ("[A] prisoner who alleges that prison officials continue with a practice that has
25 injured him or others similarly situated in the past will satisfy the 'ongoing danger' standard and
26 meet the imminence prong of the three-strikes exception."). However, in his brief complaint
now before this court, plaintiff merely alleges that correctional officers in the property room at
Rio Consumnes Correctional Center refuse to provide him with addresses and telephone numbers
that were in his property. (Compl. at 3.) Plaintiff has not alleged that he was "under imminent
danger of serious physical injury" when he filed this action. Accordingly, the imminent danger
exception under 28 U.S.C. § 1915(g) is not available to plaintiff.

1 Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file
2 objections within the specified time may waive the right to appeal the District Court's order. See
3 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: February 10, 2010.

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7 _____
8 DALE A. DROZD
9 UNITED STATES MAGISTRATE JUDGE

8 DAD:9
9 weav2164.56

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