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8   **IN THE UNITED STATES DISTRICT COURT**

9   **FOR THE EASTERN DISTRICT OF CALIFORNIA**

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11   LEON MORRIS,   No. 2:12-CV-1774-TLN-CMK

12   Plaintiff,

13   vs.   <u>FINDINGS AND RECOMMENDATION</u>

14   V. MINI, et al.

15   Defendants.

16   _____/

17   Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42

18   U.S.C. § 1983. On October 4, 2012, the undersigned order plaintiff to submit a complete

19   application for leave to proceed in forma pauperis, or pay the appropriate filing fee. If plaintiff

20   chose to file an application to proceed in forma pauperis, he was cautioned that it appeared he

21   would be barred from proceeding in forma pauperis and he would need to explain how he meets

22   the immanent danger standard pursuant to 28 U.S.C. § 1915(g). Plaintiff's application (Doc. 8)

23   is now pending before the court, but he has not explained how he would meet the imminent

24   danger exemption, as discussed below.

25   The PLRA's "three strikes" provision, found at 28 U.S.C. § 1915(g), provides as

26   follows:

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2   In no event shall a prisoner bring a civil action . . . under this
          section if the prisoner was, on three or more prior occasions, while
          incarcerated or detained . . ., brought an action . . . in a court of the United
3   States that was dismissed on the ground 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.

4   Id.

5   Thus, when a prisoner plaintiff has had three or more prior actions dismissed for

6   one of the reasons set forth in the statute, such "strikes" preclude the prisoner from proceeding in

7   forma pauperis unless the imminent danger exception applies. Dismissed habeas petitions do not

8   count as "strikes" under § 1915(g). See Andrews v. King, 398 F.3d 1113, 1122 (9th Cir. 2005).

9   Where, however, a dismissed habeas action was merely a disguised civil rights action, the district

10   court may conclude that it counts as a "strike." See id. at n.12.

11   When in forma pauperis status is denied or revoked under § 1915(g), the proper

12   course of action is to dismiss the action without prejudice to re-filing the action upon pre-

13   payment of fees at the time the action is re-filed. In Tierney v. Kupers, the Ninth Circuit

14   reviewed a district court's screening stage dismissal of a prisoner civil rights action after finding

15   under § 1915(g) that the plaintiff was not entitled to proceed in forma pauperis. See 128 F.3d

16   1310 (9th Cir. 1998). Notably, the district court dismissed the entire action rather than simply

17   providing the plaintiff an opportunity to pay the filing fee. The Ninth Circuit held that the

18   plaintiff's case was "properly dismissed." Id. at 1311. Similarly, in Rodriguez v. Cook, the

19   Ninth Circuit dismissed an inmate's appeal in a prisoner civil rights action because it concluded

20   that he was not entitled to proceed in forma pauperis on appeal pursuant to the "three strikes"

21   provision. See 169 F.3d 1176 (9th Cir. 1999). Again, rather than providing the inmate appellant

22   an opportunity to pay the filing fee, the court dismissed the appeal without prejudice and stated

23   that the appellant "may resume this appeal upon prepaying the filing fee."[1]

24   _____

25   [1]   It is unclear how the appellant would have been able to "resume" the appeal upon
     pre-payment of the filing fee because appellate filing fees are paid in the district court when the
     notice of appeal is filed. Had the appellant filed a new notice of appeal with the appropriate
26   filing fee, any such notice of appeal would have been untimely in that it would not have been

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1   This conclusion is consistent with the conclusions reached in at least three other

2   circuits. In <u>Dupree v. Palmer</u>, the Eleventh Circuit held that denial of in forma pauperis status

3   under § 1915(g) mandated dismissal. <u>See</u> 284 F.3d 1234 (11th Cir. 2002). The court specifically

4   held that "the prisoner cannot simply pay the filing fee after being denied IFP status" because

5   "[h]e must pay the filing fee at the time he *initiates* the suit." <u>Id.</u> at 1236 (emphasis in original).

6   The Fifth and Sixth Circuits follow the same rule. <u>See</u> <u>Adepegba v. Hammons</u>, 103 F.3d 383

7   (5th Cir. 1996); <u>In re Alea</u>, 86 F.3d 378 (6th Cir. 2002).

8   This court has found plaintiff ineligible to proceed in forma pauperis, as have

9   other district courts. <u>See e.g.</u>, <u>Morris v. Green</u>, Case No. 2:12-cv-2448-JAM-CKD, Morris v.

10   Woodford, No. C07-4198 MJJ (PR), 2008 WL 906560 (N.D. Cal. Apr. 2, 2008).

11   In this action, plaintiff complains about falsified documents used in a rules

12   violation report, as well as a classification committee decision as to whether to return plaintiff to

13   the yard or house him in the secured housing unit. He does not seek injunctive relief nor has he

14   suggested he is under any imminent danger of serious physical injury, even after the court

15   suggested that such an explanation was required.

16   Based on the foregoing, the undersigned recommends that plaintiff's motion to

17   proceed in forma pauperis (Doc. 8) be denied, plaintiff be barred from proceeding in forma

18   pauperis in this action under the three strikes provision of 28 U.S.C. § 1915(g), and this case be

19   dismissed without prejudice.

20   These findings and recommendations are submitted to the United States District

21   Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within 14 days

22   after being served with these findings and recommendations, any party may file written

23   objections with the court. Responses to objections shall be filed within 14 days after service of

24   objections. Failure to file objections within the specified time may waive the right to appeal.

25   _____

26   filed within 30 days of the final judgment being appealed. The Ninth Circuit did not address this
     problem.

See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 11, 2013

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CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE