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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY C. BONTEMPS,

No. 2:12-cv-02185 AC P

Plaintiff,

v.

ORDER

SALINAS, et al.,

Defendants.

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. On November 26, 2012, the undersigned granted plaintiff’s request to proceed in forma pauperis. ECF No. 10. The complaint was ordered served on defendants Neves, Abbott and Shillford on June 3, 2013. ECF No. 22. Before the court is defendants’ August 26, 2013 motion to revoke plaintiff’s in forma pauperis status and dismiss this action on the ground that plaintiff is a “three strikes” inmate under 28 U.S.C. § 1915(g). ECF No. 25. Plaintiff has failed to oppose the motion, and defendants have filed a reply indicating the same. ECF No. 27. For the reasons set forth below, the undersigned will revoke plaintiff’s in forma pauperis status and order plaintiff to pay the filing fee or face dismissal of this action.

I. Motion to Revoke

28 U.S.C. § 1915 permits any court of the United States to authorize the commencement and prosecution of any suit without prepayment of fees by a person who submits an affidavit

1 indicating that the person is unable to pay such fees. However,

2 [i]n no event shall a prisoner bring a civil action or appeal a  
3 judgment in a civil action or proceeding under this section if the  
4 prisoner has, on 3 or more prior occasions, while incarcerated or  
5 detained in any facility, brought an action or appeal in a court of the  
6 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.

7 28 U.S.C. § 1915(g).

8 In forma pauperis status may be acquired and lost during the course of litigation.

9 Stehouwer v. Hennessey, 841 F.Supp. 316, 321 (N.D. Cal., 1994), vacated on other grounds by  
10 Olivares v. Marshall, 59 F.3d 109 (9th Cir. 1995). The plain language of the statute (§ 1915(g))  
11 makes clear that a prisoner is precluded from bringing a civil action or an appeal in forma  
12 pauperis if the prisoner has brought three frivolous actions and/or appeals (or any combination  
13 thereof totaling three). See Rodriguez v. Cook, 169 F.3d 1176, 1178 (9th Cir. 1999). 28 U.S.C. §  
14 1915(g) should be used to deny a prisoner’s in forma pauperis status only upon a determination  
15 that each action reviewed (as a potential strike) is carefully evaluated to determine that it was  
16 dismissed as frivolous, malicious or for failure to state a claim. Andrews v. King, 398 F.3d 1113,  
17 1121 (9th Cir. 2005). Defendant has the burden to “produce documentary evidence that allows  
18 the district court to conclude that the plaintiff has filed at least three prior actions . . . dismissed  
19 because they were ‘frivolous, malicious or fail[ed] to state a claim.’” Id., at 1120 (quoting  
20 § 1915(g)). Once defendants meet their initial burden, it is plaintiff’s burden to explain why a  
21 prior dismissal should not count as a strike. Id. If the plaintiff fails to meet that burden,  
22 plaintiff’s IFP status should be revoked under § 1915(g). Id.

23 In Silva v. Di Vittorio, 658 F.3d 1090, 1098-99 (9th Cir. 2011), the Ninth Circuit found  
24 that “a dismissal must be final before it counts as a ‘strike’ for § 1915(g) purposes.” Thus, “a  
25 district court’s dismissal of a case does not count as a ‘strike’ under § 1915(g) until the litigant  
26 has exhausted or waived his opportunity to appeal. This means a dismissal ripens into a ‘strike’  
27 for § 1915(g) purposes on the date of the Supreme Court’s denial or dismissal of a petition for  
28 writ of certiorari, if the prisoner filed one, or from the date when the time to file a petition for writ

1 of certiorari expired, if he did not.” Id. at 1100 (internal quotation omitted). “If a prisoner does  
2 not appeal a dismissal, the dismissal counts as a ‘strike’ from the date when his time to file a  
3 direct appeal expired.” Id., n.6.

4 II. Discussion

5 Defendants contend in their motion that plaintiff’s litigation history shows that he has  
6 three prior strikes. Per defendants’ request, the undersigned takes judicial notice of the following  
7 cases<sup>1</sup>:

8 1. Bontemps v. Kramer, No. 2:06-cv-2483 JAM GGH (E.D. Cal.). On November 8,  
9 2006, plaintiff filed a pro se civil rights complaint against correctional staff and, two weeks later,  
10 a purported amended complaint. In his screening order, the Magistrate Judge found that “plaintiff  
11 has set forth no factual allegations supporting a claim of a violation of plaintiff’s rights . . . and  
12 names no individual who has personally subjected him to” unconstitutional conditions. Id., ECF  
13 No. 9 at 4. As plaintiff failed to state a cognizable claim for relief, his complaints were dismissed  
14 with leave to amend. Id., ECF No. 9 at 6. On December 22, 2008, the action was dismissed for  
15 failure to timely file an amended complaint. Id., ECF Nos. 12, 14.

16 2. Bontemps v. Kramer, No. 2:06-cv-2580 GEB GGH (E.D. Cal.). On November 17,  
17 2006, while the above action was pending, plaintiff filed a pro se civil rights complaint against a  
18 correctional officer and a prison warden. In the screening order, the Magistrate Judge found that  
19 plaintiff’s allegations were “insufficient” to comply with the notice requirement of Rule 8 of the  
20 Federal Rules of Civil Procedure; that plaintiff made no allegations at all against the warden; and  
21 that plaintiff’s “conclusory” allegations against the correctional officer failed to state a  
22 constitutional claim. Id., ECF No. 9. As plaintiff failed to state a cognizable claim for relief, his  
23 complaint was dismissed with leave to amend. Id. On August 30, 2007, the action was dismissed  
24 for failure to timely file an amended complaint. Id., ECF Nos. 11, 12.

25 3. Bontemps v. Gray, No. 2:07-cv-0710 MCE CMK (E.D. Cal.). On April 16, 2007,  
26 while the above action was pending, plaintiff filed a pro se civil rights complaint challenging

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27 <sup>1</sup> A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F.2d  
28 500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

1 prison officials' failure to file a staff complaint submitted by plaintiff. In the screening order, the  
2 Magistrate Judge concluded that plaintiff "fails to state a claim under the civil rights act, for there  
3 is no constitutional right to a prison grievance process." Id., ECF No. 3 at 3. As plaintiff failed to  
4 state a cognizable claim for relief, his complaint was dismissed with leave to amend. Id. On July  
5 5, 2007, the action was dismissed for failure to timely file an amended complaint. Id., ECF Nos.  
6 6, 7.<sup>2</sup>

7 Plaintiff failed to file any opposition to defendants' motion to revoke in forma pauperis  
8 status. The undersigned finds that plaintiff is precluded from proceeding in forma pauperis in this  
9 action unless plaintiff is under imminent danger of serious physical injury. See 28 U.S.C.  
10 1915(g); Canell v. Lightner, 143 F.3d 1210, 1212 (9th Cir. 1998). To meet the exception,  
11 plaintiff must have alleged facts that demonstrate that he was under imminent danger at the time  
12 of filing the complaint. See Andrews v. Cervantes, 493 F.3d 1047 (9th Cir. 2007) (recognizing  
13 the general consensus among federal courts that "[p]risoners qualify for the [imminent danger]  
14 exception based on the alleged conditions at the time the complaint was filed."); Abdul -Akbar v.  
15 McKelvie, 239 F.3d 307, 312-14 (3rd Cir. 2001) (en banc); Medberry v. Butler, 185 F.3d 1189,  
16 1192-93 (11th Cir. 1999); Ashley v. Dilworth, 147 F.3d 715 (8th Cir.1998); Banos v. O'Guin, 144  
17 F.3d 883, 884 (5th Cir. 1998). Plaintiff's allegations in the original complaint concerning a  
18 search of his person on June 2, 2012 by defendants Neves, Abbott, and Shillford do not satisfy the  
19 "imminent danger" exception.<sup>3</sup>

20 Because the court concludes that plaintiff is a "three strikes" litigant, it need not reach

21  
22 <sup>2</sup> The court also notes that plaintiff filed twelve pro se prisoner actions in the Northern District of  
23 California in 1994 and 1995, all of which were dismissed before he filed the instant action. ECF  
24 No. 25, Exhibits 4-8, 10-16. In four of those cases, the district court denied plaintiff's application  
25 to proceed in forma pauperis. Id., Exhibits 7, 10, 12, 13.

26 <sup>3</sup> After the time to file an amended complaint had expired and the original complaint was ordered  
27 served on defendants Neves, Abbott, and Shillford, plaintiff filed a first amended complaint on  
28 August 1, 2013. ECF No. 24. The amended complaint names an additional 10 defendants and  
alleges various acts of retaliation before, during, and after an ICC hearing in October 2012 that  
concerned plaintiff's housing status and request for transfer out of High Desert State Prison.  
While plaintiff alleges that he is in imminent danger in the first amended complaint, the court's  
analysis focuses on the time of filing of the original complaint. Andrews v. Cervantes, 493 F.3d  
1047 (9th Cir. 2007).

1 defendants' alternative arguments for revoking plaintiff's IFP status. Defendants also request that  
2 the court impose sanctions against plaintiff for his false representations to this court concerning  
3 the number of prior lawsuits that he has filed as a prisoner. See Fed. R. Civ. P. 11(c), 41(b).  
4 Prior to filing a separate motion for sanctions, defendants were required to provide notice to  
5 plaintiff that they intended to seek sanctions pursuant to Rule 11(c) unless he modified his  
6 averment in the original complaint that he has only filed two prior lawsuits. See ECF No. 1 at 1;  
7 see also Fed. R. Civ. P. 11(c)(2). If plaintiff failed to correct this averment within 21 days then  
8 defendants were permitted to file a formal motion for sanctions with the court. Fed. R. Civ. P.  
9 11(c)(2). That procedure was not followed in the instant case. For that reason, the court will  
10 exercise its discretion and not impose sanctions against plaintiff. While the court has the inherent  
11 power to sanction parties for improper conduct, Chambers v. Nasco, Inc., 501 U.S. 32, 43–46  
12 (1991), and such sanctions may include dismissal, Combs v. Rockwell Intern. Corp., 927 F.2d  
13 486, 488 (9th Cir. 1991), the court will not do so in the instant case since plaintiff indicated in his  
14 first amended complaint that he has filed "several" previous lawsuits as a prisoner. See ECF No.  
15 24 at 1.

16 Accordingly, IT IS HEREBY ORDERED that defendants' motion to revoke in pauperis  
17 status, ECF No. 25, is granted to the following extent:

- 18 1. Plaintiff's in forma pauperis status is REVOKED pursuant to 28 U.S.C. § 1915(g);
- 19 2. The order granting plaintiff's application to proceed in forma pauperis (ECF No. 10) is  
20 VACATED;
- 21 3. The order directing the CDCR to make payments to the court from plaintiff's prison  
22 trust account for payment of the filing fee for this action (ECF No. 11) is VACATED;
- 23 4. The Clerk of Court is directed to serve a copy of this order on:
  - 24 (1) the Director of the CDCR; and
  - 25 (2) the Financial Department, U.S. District Court, Eastern District of California,  
26 Sacramento Division;
- 27 5. Plaintiff shall submit, within 30 days from the date of this order, the \$350.00 filing fee  
28 for this action;

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6. Plaintiff's failure to comply with this order will result in a recommendation that this action be dismissed.

7. Defendants' request for terminating sanctions is denied.

DATED: November 6, 2013

  
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ALLISON CLAIRE  
UNITED STATES MAGISTRATE JUDGE