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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LEON E. MORRIS,
Plaintiff,
v.
SGT. JENNINGS, et al.,
Defendants.

No. 2:13-cv-1134 AC P

ORDER

Plaintiff, a state prisoner proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C. § 1983, and has moved to proceed in forma pauperis.

In his complaint, plaintiff seeks money damages against employees of the California State Prison – Sacramento (“CSP-Sac”) who have allegedly served plaintiff unsanitary food, exposing plaintiff to disease and sickness. See ECF No. 1 at 4.

Motion to Proceed In Forma Pauperis

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

[i]n 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,

1 malicious, or fails to state a claim upon which relief may be
2 granted, unless the prisoner is under imminent danger of serious
physical injury.

3 28 U.S.C. § 1915(g).

4 The plain language of the statute (§ 1915(g)) makes clear that a prisoner is precluded from
5 bringing a civil action or an appeal in forma pauperis if the prisoner has brought three frivolous
6 actions and/or appeals (or any combination thereof totaling three). See Rodriguez v. Cook, 169
7 F.3d 1176, 1178 (9th Cir.1999). 28 U.S.C. § 1915(g) should only be used to deny in forma
8 pauperis status upon a determination that each potential strike is carefully evaluated to determine
9 that it was dismissed as frivolous, malicious, or for failure to state a claim. Andrews v. King, 398
10 F.3d 1113, 1121 (9th Cir. 2005).

11 The Court of Appeals for the Ninth Circuit has further held that a dismissal for failure to
12 state a claim constitutes a strike, whether dismissal is with or without prejudice. O’Neal v. Price,
13 531 F.3d 1146, 1155-56 (9th Cir. 2008). However, a district court strike is not final until any
14 appeal taken from the strike is resolved. Silva v. Di Vittorio, 658 F.3d 1090 (9th Cir. 2011).

15 “Under the PLRA, prisoners who have three complaints dismissed under section
16 1915(e)(2) are barred from filing additional in forma pauperis complaints unless they are ‘under
17 imminent danger of serious physical injury.’” 28 U.S.C. § 1915(g). See also Lopez v. Smith, 203
18 F.3d 1122, 1129 (9th Cir. 2000). To meet the exception, plaintiff must have alleged facts that
19 demonstrate that he was “under imminent danger” at the time of filing the complaint. Andrews v.
20 Cervantes, 493 F.3d 1047, 1052-53 (9th Cir. 2007).

21 A review of the court’s records reflects that, on December 10, 2012, in a similar § 1983
22 action, the court revoked plaintiff’s in forma pauperis status pursuant to 28 U.S.C. § 1915(g). See
23 Morris v. Jennings, No. 2:12-cv-2240 GEB CKD (the “2012 Action”), ECF No. 11. The court
24 noted that

25 [o]n April 3, 2008 in a case brought by plaintiff in the United States
26 District Court for the Northern District of California, Morris v.
27 Woodford, 3:07-cv-4198 MJJ, the judge determined that plaintiff
28 had “struck out” under § 1915(g) and dismissed the case. Plaintiff
appealed the decision. On August 4, 2008, the Ninth Circuit denied
plaintiff’s request to proceed in forma pauperis on appeal without
explanation and ordered plaintiff₂ to pay the filing fee. Plaintiff’s

1 appeal was dismissed on September 4, 2008 for failure to pay the
2 filing fee and the mandate with respect to that decision was issued
3 that day as well. Accordingly, the decision that plaintiff had
4 “struck out” under § 1915(g) was final well before this action was
5 filed in 2012.

6 Id.

7 Therefore, this court finds that plaintiff is precluded from proceeding in forma pauperis
8 unless plaintiff “is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g). To
9 meet this exception, the complaint must allege facts demonstrating that plaintiff was under
10 imminent danger of serious physical injury at the time of filing the complaint. Andrews v.
11 Cervantes, 493 F.3d at 1053 (availability of the exception turns on conditions prisoner faced at
12 the time the complaint was filed, not at some earlier or later time). The complaint currently does
13 not do so. Instead, the complaint generally alleges that defendants served plaintiff food under
14 unsanitary conditions, including defendants’ failure to wear a hair net, and that defendants
15 retaliated against plaintiff when plaintiff filed grievances about the condition of his food. The
16 only symptom described by plaintiff is that he “had to see the Dr. more than once due to stomach
17 problems.” However, plaintiff fails to identify the nature of the problems, to link the unnamed
18 problems to defendants’ actions, or to advise the court of the severity of his “stomach problems.”

19 Accordingly, IT IS HEREBY ORDERED THAT

- 20 1. Plaintiff, within twenty-eight days, must show cause why he should not be barred,
21 pursuant to 28 U.S.C. § 1915(g), from proceeding in forma pauperis in this action;
- 22 2. In the alternative, plaintiff must submit the entire filing fee of \$350.00, within twenty-
23 eight days of the date of this order; and
- 24 3. Failure to show cause, or to pay the filing fee, within twenty eight days of the filing
25 date of this order, will result in a recommendation that this action be dismissed
26 without prejudice.

27 DATED: June 28, 2013

28 _____/s/_____
ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE