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

DESHAWN DAVIS,

No. 2:15-CV-2027-JAM-CMK-P

Plaintiff,

vs.

FINDINGS AND RECOMMENDATIONS

D. REAMES, et al.,

Defendants.

_____ /

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendants’ motion to revoke plaintiff’s in forma pauperis status (Doc. 30).

The PLRA’s “three strikes” provision, found at 28 U.S.C. § 1915(g), provides as follows:

In no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on three or more prior occasions, while incarcerated or detained . . . , brought an action . . . in a court of the United 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.

Id.

1 Thus, when a prisoner plaintiff has had three or more prior actions dismissed for one of the
2 reasons set forth in the statute, such “strikes” preclude the prisoner from proceeding in forma
3 pauperis unless the imminent danger exception applies. Dismissals for failure to exhaust
4 available administrative remedies generally do not count as “strikes” unless the failure to exhaust
5 is clear on the face of the complaint. See Richey v. Dahne, 807 F.3d 1202, 1208 (9th Cir. 2015).
6 Dismissed habeas petitions do not count as “strikes” under § 1915(g). See Andrews v. King, 398
7 F.3d 1113, 1122 (9th Cir. 2005). Where, however, a dismissed habeas action was merely a
8 disguised civil rights action, the district court may conclude that it counts as a “strike.” See id. at
9 n.12.

10 When in forma pauperis status is denied, revoked, or otherwise unavailable under
11 § 1915(g), the proper course of action is to dismiss the action without prejudice to re-filing the
12 action upon pre-payment of fees at the time the action is re-filed. In Tierney v. Kupers, the Ninth
13 Circuit reviewed a district court’s screening stage dismissal of a prisoner civil rights action after
14 finding under § 1915(g) that the plaintiff was not entitled to proceed in forma pauperis. See 128
15 F.3d 1310 (9th Cir. 1998). Notably, the district court dismissed the entire action rather than
16 simply providing the plaintiff an opportunity to pay the filing fee. The Ninth Circuit held that the
17 plaintiff’s case was “properly dismissed.” Id. at 1311. Similarly, in Rodriguez v. Cook, the
18 Ninth Circuit dismissed an inmate’s appeal in a prisoner civil rights action because it concluded
19 that he was not entitled to proceed in forma pauperis on appeal pursuant to the “three strikes”
20 provision. See 169 F.3d 1176 (9th Cir. 1999). Again, rather than providing the inmate appellant
21 an opportunity to pay the filing fee, the court dismissed the appeal without prejudice and stated
22 that the appellant “may resume this appeal upon prepaying the filing fee.”

23 This conclusion is consistent with the conclusions reached in at least three other
24 circuits. In Dupree v. Palmer, the Eleventh Circuit held that denial of in forma pauperis status
25 under § 1915(g) mandated dismissal. See 284 F.3d 1234 (11th Cir. 2002). The court specifically
26 held that “the prisoner cannot simply pay the filing fee after being denied IFP status” because

1 “[h]e must pay the filing fee at the time he *initiates* the suit.” Id. at 1236 (emphasis in original).
2 The Fifth and Sixth Circuits follow the same rule. See Adepegba v. Hammons, 103 F.3d 383
3 (5th Cir. 1996); In re Alea, 86 F.3d 378 (6th Cir. 2002).

4 In this case, defendants have identified three prior cases which were dismissed as
5 frivolous, malicious, or for failure to state a claim. See Davis v. Wu, No. 2:16-CV-1598 (C.
6 Dist. Cal. 2016); Davis v. J. Asadoorian, No. 2:17-CV-4423 (C. Dist. Cal. 2017); and Davis v.
7 Khodabakhshyan, No. 2:17-CV-2806 (C. Dist. Cal. 2018). Given these prior dismissals, and
8 because plaintiff is not claiming imminent danger of serious physical injury, the court agrees with
9 defendants that plaintiff’s in forma pauperis status should be revoked.

10 Based on the foregoing, the undersigned recommends that this action be dismissed
11 without prejudice to re-filing upon pre-payment of the filing fees.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
14 after being served with these findings and recommendations, any party may file written
15 objections with the court. Responses to objections shall be filed within 14 days after service of
16 objections. Failure to file objections within the specified time may waive the right to appeal.
17 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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19 DATED: August 16, 2018

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21 **CRAIG M. KELLISON**
22 UNITED STATES MAGISTRATE JUDGE
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