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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SEAVON PIERCE,

 Plaintiff,

 v.

SACRAMENTO NEWS AND REVIEW,
et al.,

 Defendants.

No. 2:15-cv-2691-JAM-EFB P

FINDINGS AND RECOMMENDATIONS

Plaintiff Seavon Pierce is a state prisoner proceeding without counsel in a civil action. He seeks leave to proceed in forma pauperis. See 28 U.S.C. § 1915(a). For the reasons explained below, the court finds that plaintiff has not demonstrated that he is eligible to proceed in forma pauperis.

A prisoner may not proceed in forma pauperis:

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

28 U.S.C. § 1915(g). Court records reflect that on at least three prior occasions, plaintiff has brought actions while incarcerated that were dismissed as frivolous, malicious, or for failure to

1 state a claim upon which relief may be granted. *See* (1) *Pierce v. Gonzales*, No. 1:10-cv-285-JLT
2 (E.D. Cal. Dec. 3, 2012) (order dismissing action for failure to state a claim); (2) *Pierce v.*
3 *Gonzales*, No. 13-15114 (9th Cir.) (March 28, 2013 order denying motion to proceed in forma
4 pauperis on ground that appeal was frivolous, and May 7, 2013 order dismissing appeal for failure
5 to prosecute after plaintiff failed to pay the filing fee)¹; (3) *Pierce v. Unknown*, No. 1:15-cv-650-
6 DAD-DLB (E.D. Cal. Dec. 1, 2015) (order dismissing action for failure to state a claim). *See*
7 *also Pierce v. Birotte*, No. 2:15-cv-7552-VAP-CW (C.D. Cal. Oct. 4, 2015) (order designating
8 plaintiff a three-strikes litigant for purposes of § 1915(g) and listing four additional “strikes”
9 incurred by plaintiff).

10 The section 1915(g) exception applies if the complaint makes a plausible allegation that
11 the prisoner faced “imminent danger of serious physical injury” at the time of filing. 28 U.S.C.
12 § 1915(g); *Andrews v. Cervantes*, 493 F.3d 1047, 1055 (9th Cir. 2007). For the exception to
13 apply, the court must look to the conditions the “prisoner faced at the time the complaint was
14 filed, not at some earlier or later time.” *Andrews*, 493 F.3d at 1053, 1056 (requiring that prisoner
15 allege “an ongoing danger” to satisfy the imminency requirement). Courts need “not make an
16 overly detailed inquiry into whether the allegations qualify for the exception.” *Id.* at 1055.

17 In the complaint (ECF No. 1), plaintiff complains that various records have been
18 “falsified.” His allegations do not demonstrate that he suffered from an ongoing or imminent
19 danger of serious physical injury at the time he filed his complaint. Thus, the imminent danger
20 exception does not apply. Plaintiff’s application for leave to proceed in forma pauperis must
21 therefore be denied pursuant to § 1915(g).

22 ¹ The dismissal of this appeal, though styled as one for failure to prosecute, also qualifies
23 as a strike. *See O’Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008) (complaint is “dismissed”
24 for purposes of § 1915(g) even if dismissal is styled as denial of application to file the action
25 without prepayment of the full filing fee); *see also, e.g., Lamon v. Junious*, No. 1:09-cv-00484-
26 AWI-SAB, 2014 U.S. Dist. LEXIS 9778, at *9-10 (E.D. Cal. Jan. 27, 2014) (dismissal of appeal
27 for failure to prosecute counted as “strike” where underlying ground for dismissal was that appeal
28 was frivolous); *Thomas v. Beutler*, No. 2:10-cv-01300-MCE-CKD P, 2012 U.S. Dist. LEXIS
159943, at *5-6 (E.D. Cal. Nov. 6, 2012) (same, and citing similar cases); *Braley v. Wasco State
Prison*, No. 1:07-cv-01423-AWI-BAM, 2012 U.S. Dist. LEXIS 133285 (E.D. Cal. Sept. 14,
2012) (“Plaintiff became subject to section 1915(g) . . . when the appeal of the dismissal of his
third action as frivolous was dismissed for failure to prosecute”).

1 Because plaintiff has not paid the filing fee and cannot proceed in forma pauperis, it is
2 hereby RECOMMENDED that:

- 3 1. Plaintiff's application to proceed in forma pauperis (ECF No. 2) be denied; and
4 2. This action be dismissed without prejudice to re-filing upon pre-payment of the \$400
5 filing fee.

6 These findings and recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
8 after being served with these findings and recommendations, any party may file written
9 objections with the court and serve a copy on all parties. Such a document should be captioned
10 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
11 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
12 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

13 Dated: May 16, 2016.

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15 EDMUND F. BRENNAN
16 UNITED STATES MAGISTRATE JUDGE
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