

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH ALAN SIERRA,

Plaintiff,

v.

DIRECTOR OF DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, et al.,

Defendants.

No. 2: 16-cv-1067 MCE KJN P

ORDER

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. On July 28, 2016, the undersigned recommended that plaintiff's application to proceed in forma pauperis be denied on grounds that plaintiff had three prior actions dismissed which qualified as strikes under 28 U.S.C. § 1915(g). (ECF No. 24.)

In the findings and recommendations, the undersigned also found that plaintiff did not meet the imminent injury exception to 28 U.S.C. § 1915(g):

Plaintiff's complaint is difficult to understand. However, it appears that plaintiff alleges that prison officials have failed to treat him for lower back problems. Plaintiff appears to allege that he suffered these back problems as long ago as 1985. Plaintiff raised similar, if not the same claims, in Sierra v. Moon, 1:11-cv-1214 LJO MJS (PC). In that action, plaintiff alleged that defendants planned to move him from an acute care hospital housing unit to a housing unit with a lower level of care and failed to diagnose his alleged paraplegia as other than a faked disability. (See 1:11-cv-1214 LJO

1 MJS (PC) at ECF No. 16 at 2.) In 1:11-cv-1214 LJO MJS (PC),
2 plaintiff also claimed that he suffered from paraplegia from injuries,
3 possibly sustained in 1982, leaving him with a painful nerve
4 disorder unnoticed by defendants who wrongly accused him of
5 having an acute mental disorder. (Id. at 3.)

6 The district court in 1:11-cv-1214 LJO MJS (PC), found that
7 plaintiff's claims alleging an untreated back injury were frivolous
8 because they were combined with patently frivolous claims alleging
9 plaintiff's legal ownership of Nike business worldwide, etc. (Id. at
10 3-5.) While plaintiff's instant complaint does not include other
11 patently frivolous claims, the fact that plaintiff raised the same
12 claims regarding his alleged back problems in 1:11-cv-1214 LJO
13 MJS (PC) indicates that plaintiff is not in imminent danger of
14 serious physical injury. For these reasons, the undersigned finds
15 that plaintiff has not met the imminent danger exception to 28
16 U.S.C. § 1915(g).

17 (Id. at 2-3.)

18 On August 23, 2016, plaintiff filed objections to the findings and recommendations. (ECF
19 No. 26.) Attached as an exhibit to the objections is a form titled "Disability Placement Program
20 Verification." (Id. at 65.) This document indicates that plaintiff is allowed an "intermittent
21 wheelchair," meaning he may use it outside of his cell only. (Id.) Plaintiff has written on this
22 document that Correctional Officer Walker handed him this document on April 13, 2016. (Id.)
23 Thus, it appears that plaintiff may have been allowed to use the wheelchair in his cell prior to
24 April 13, 2016.

25 A claim by plaintiff challenging the denial of a wheelchair for in-cell use may meet the
26 imminent injury exception to 28 U.S.C. § 1915(g) if plaintiff is able to allege that he suffers a
27 serious risk of harm, or has suffered serious harm, as a result of not being able to use his
28 wheelchair in his cell. For this reason, the July 28, 2016 findings and recommendations are
vacated and plaintiff is granted leave to file an amended complaint raising his claim alleging
denial of access to a wheelchair for in-cell use. The amended complaint must name as defendants
those prison officials responsible for allegedly restricting his use of a wheelchair to out-of-cell
only.


Plaintiff is cautioned that his amended complaint should contain a short and plain
statement of his claims, as required by Federal Rule of Civil Procedure 8. In other words, the
amended complaint may not include claims unrelated to the claim regarding plaintiff's use of the

1 wheelchair in his cell, i.e., claims unrelated to his claim alleging an imminent danger of serious
2 physical injury. If the amended complaint does not allege an imminent danger of serious physical
3 injury, the undersigned will again recommend that plaintiff's application to proceed in forma
4 pauperis be denied.

5 Accordingly, IT IS HEREBY ORDERED that:

- 6 1. The July 28, 2016 findings and recommendations are vacated;
- 7 2. Plaintiff is granted twenty-one days from the date of this order to file an amended
8 complaint; if plaintiff does not file an amended complaint, the July 28, 2016 findings and
9 recommendations will be reinstated;
- 10 3. The Clerk of the Court is directed to send plaintiff the form for a civil rights complaint
11 by a prisoner pursuant to 42 U.S.C. § 1983.

12 Dated: September 1, 2016

13 
14 _____
15 KENDALL J. NEWMAN
16 UNITED STATES MAGISTRATE JUDGE

17 Ser1067.vac
18
19
20
21
22
23
24
25
26
27
28