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

WALTER SHANE LANGSTON,  
Plaintiff,  
v.  
WILLIAMS,  
Defendant.

No. 2:16-CV-2365-JAM-DMC-P

FINDINGS AND RECOMMENDATIONS

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendant’s unopposed motion to revoke plaintiff’s in forma pauperis status (ECF No. 19). Defendant contends in forma pauperis status should be revoked pursuant to the Prison Litigation Reform Act (PLRA).

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.

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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  
27 “[h]e must pay the filing fee at the time he *initiates* the suit.” Id. at 1236 (emphasis in original).  
28 The Fifth and Sixth Circuits follow the same rule. See Adepegba v. Hammons, 103 F.3d 383 (5th

1 Cir. 1996); In re Alea, 86 F.3d 378 (6th Cir. 2002).

2 This court has previously determined plaintiff has three or more “strikes.” See  
3 Langston v. Sharma, No. 2:15-CV-1437-GEB-KJN. The court takes judicial notice of this prior  
4 determinations, see Chandler v. U.S., 378 F.2d 906, 909 (9th Cir. 1967), and likewise concludes  
5 plaintiff has three or more “strikes.” The court also finds plaintiff has not faced imminent danger  
6 of serious bodily physical injury at the time the action was filed. See Andrews v. Cerbantes, 493  
7 F.3d 1047, 1055 (9th Cir. 2007). Plaintiff claims of constitutional violations when he was housed  
8 at the California Health Care Facility (CHCF) and the California Training Facility (CTF). See  
9 ECF No. 1. When plaintiff filed this action, however, he was housed at Valley State Prison. See  
10 id. Therefore, he was not under imminent danger of physical harm from prison officials at either  
11 CHCF or CTF at the time he filed this lawsuit.

12 Based on the foregoing, the undersigned recommends that defendant’s unopposed  
13 motion to revoke plaintiff’s in forma pauperis status (ECF No. 19) be granted and that this action  
14 be dismissed without prejudice to re-filing upon pre-payment of the full filing fee.

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

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23 Dated: June 18, 2019



24 DENNIS M. COTA  
25 UNITED STATES MAGISTRATE JUDGE  
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