

1 in order to proceed with this action. The court denies plaintiff's request for appointment of
2 counsel as premature.

3 II. Plaintiff is a Three-Strikes Litigant

4 A. Legal Standards

5 Under 28 U.S.C. § 1915, a federal court may authorize commencement and prosecution of
6 a suit without prepayment of fees by a person who submits an affidavit demonstrating that he or
7 she is unable to pay such fees. However, under 28 U.S.C. § 1915(g):

8 In no event shall a prisoner bring a civil action or appeal a judgment
9 in a civil action or proceeding under this section if the prisoner has,
10 on 3 or more prior occasions, while incarcerated or detained in any
11 facility, brought an action or appeal in a court of the United States
12 that was dismissed on the grounds that it is frivolous, malicious, or
13 fails to state a claim upon which relief may be granted, unless the
14 prisoner is under imminent danger of serious physical injury.

15 A “three-strikes litigant” under this provision is precluded from proceeding in forma
16 pauperis in a new action unless he was “under imminent danger of serious physical injury” at the
17 time he commenced the new action. See 28 U.S.C. § 1915(g); Andrews v. Cervantes, 493 F.3d
18 1047, 1053 (9th Cir. 2007). The danger must be real, proximate, Ciarpaglini v. Saini, 352 F.3d
19 328, 330 (7th Cir. 2003), and ongoing, Andrews, 493 F.3d at 1056. Allegations that are overly
20 speculative or fanciful may be rejected. Id. at 1057 n.11. Courts need “not make an overly
21 detailed inquiry into whether the allegations qualify for the exception. . . . Instead, the exception
22 applies if the complaint makes a plausible allegation that the prisoner faced “imminent danger of
23 serious physical injury” at the time of filing.” Id. at 1055.

24 B. Findings that Plaintiff is a Three-Strikes Litigant

25 Review of court records² demonstrates that plaintiff has previously been designated a
26 “three-strikes litigant” under 28 U.S.C. § 1915(g), on the ground that three or more of plaintiff's
27 prior federal actions were dismissed because they were frivolous, malicious, or failed to state a
28

26 ² This court may take judicial notice of its own records and the records of other courts. See
27 United States v. Howard, 381 F.3d 873, 876 n.1 (9th Cir. 2004); United States v. Wilson, 631
28 F.2d 118, 119 (9th Cir. 1980); see also Fed. R. Evid. 201 (court may take judicial notice of facts
that are capable of accurate determination by sources whose accuracy cannot reasonably be
questioned).

1 claim upon which relief may be granted. In 2012, three of plaintiff's cases filed in this court so
2 identified plaintiff, each based on the same three prior dismissals. See Moten v. Allison, Case
3 No. 1:12-cv-00034 AWI GSA (PC) (E.D. Cal. Feb. 16, 2012) (ECF No. 7 at 2 n.1); Moten v.
4 Adams, Case No. 1:07-cv-00924 AWI MJS (PC) (E.D. Cal. Aug. 13, 2012) (ECF Nos. 86, 84),
5 and Moten v. Allison, Case No. AWI JLT (PC) (E.D. Cal. July 6, 2012) (ECF Nos. 22, 15). As
6 summarized in the latter case, ECF No. 15 at 3:

7 [T]he Court takes judicial notice that at least three previous actions
8 filed by Plaintiff have been dismissed as frivolous or for failure to
9 state a claim. . . . On June 12, 2001, in Moten v. Renwick, 2:98-cv-
10 00118-LKK-DAD-PC (E.D. Cal.), the District Court dismissed
11 Plaintiff's action for failure to state a claim, as none of the four
12 causes of action in his Fourth Amended Complaint stated facts
13 sufficient to constitute a constitutional claim. On November 23,
14 2004, in Moten v. Giurbino, 3:04-cv-01891-L-JMA (S.D. Cal.), the
15 District Court dismissed the action for failure to state a claim.
16 Additionally, on September 18, 2006, in Moten v. Gomez, 2:03-cv-
17 01729-GEB-DAD-PC, 2006 U.S. Dist. LEXIS 67081 (E.D. Cal.),
18 the District Court dismissed Plaintiff's action as frivolous and for
19 failure to state a claim because his claims merely duplicated claims
20 the court had previously rejected in previous cases filed by Plaintiff.

21 The undersigned has reviewed each of the cited cases and concurs that their dismissals come
22 within the scope of 28 U.S.C. § 1915(g). Accordingly, plaintiff is precluded from proceeding in
23 forma pauperis in the instant action unless the complaint demonstrates that plaintiff was under
24 imminent danger of serious physical injury when he filed the complaint. See 28 U.S.C. 1915(g).

25 C. Plaintiff's Allegations

26 The complaint, which identifies eleven named defendants (all correctional staff at
27 California State Prison Solano (CSP-SOL)) and twenty "Doe" defendants, initially and broadly
28 alleges, ECF No. 8 at 1-2 (sic):

[D]efendants' acts and omissions were [retaliatory] unnecessary
and unjustified that intentionally violated plaintiff's due process
procedural rights, redress, equal protection rights of being
safeguarded by classifications (reckless endangerment) abuse of
authority and adverse actions of punishment by (violation of
Informational Practice Act) deliberate and reckless indifference that
resulted in a adverse transfer (generalized risk/safety risk and
pervasive risk) which placed him in hardship (180 Prison Design)
re-endorsed at another prison (PBSP) that resulted in denial of any
property for 3-months, failed health care needs, and heightened
reasons for threats of violence, or murder without good cause.

1 These acts by defendants violated plaintiff's rights by the California
2 Departmental rules and regulations under the color of state law
 which will be at all times mentioned herein this civil action.

3 The complaint alleges that plaintiff was transferred from CSP-SOL to PBSP (from a
4 medium security to maximum security prison) in retaliation for exercising his First Amendment
5 rights, based on false rules violation reports (RVRs) and procedurally flawed disciplinary
6 hearings. Plaintiff alleges that his transfer to PBSP violated his rights to due process, equal
7 protection, and the exercise of his First Amendment rights; that his maximum security
8 incarceration at PBSP is cruel and unusual punishment in violation of the Eighth Amendment;
9 that the transfer resulted in the deprivation of plaintiff's property for a period of three months;
10 and the transfer has deprived plaintiff of contact with his family and the pursuit of his religious
11 studies.

12 The only allegations of the complaint potentially relevant to the "imminent danger"
13 exception under Section 1915(g) are that defendant CSP-SOL correctional officer Wymer, acting
14 in retaliation against plaintiff for the exercise of his First Amendment rights, "lab[eled] plaintiff
15 as a 'snitch-rat' in order to expose plaintiff to emotional, or physical harm from other prisoners,
16 thus, deliberate indifference to plaintiff's safety and health." ECF No. 8 at 17; see also id. at 18
17 (CSP-SOL Appeals Office "violated plaintiff's First Amendment right to pursue redress through
18 the prison appeal process without machinations, misrepresentation, or intimidation in that with
19 deliberate indifference to plaintiff's safety and health, [] they knowing[ly] exposed plaintiff to
20 physical harm, emotional trauma, or harm at the hands of others by ignoring plaintiff's claims that
21 defendant Wymer was labeling plaintiff as a snitch-rat"). Plaintiff alleges that defendant Wymer
22 told plaintiff after an April 2015 disciplinary hearing based on an RVR issued by Wymer that
23 "this is what you get for 'snitching.'" Id. at 15. Plaintiff also alleges, summarily, that he was
24 "sexually harassed by defendant" Wymer. Id. Plaintiff seeks, inter alia, \$750,000 compensatory
25 damages, \$1,200,000 punitive damages, and "injunctive relief from further actions by defendants
26 for taking civil action and that plaintiff[s] classification record be corrected and first action be
27 vacated, and reassign plaintiff for 2TOP Program (Cognitive Behavior) Mentor Training, at
28 Solano." Id. at 18-9 (sic).

1 D. Plaintiff Does Not Satisfy The Imminent Danger Exception

2 The undersigned finds that plaintiff has failed to plausibly allege he was under imminent
3 danger of serious physical injury when he filed the instant complaint. The allegation that
4 defendant Wymer's name-calling "*exposed* plaintiff to emotional, or physical harm from other
5 prisoners," ECF No. 8 at 17 (emphasis added), without facts establishing actual or impending
6 harm, is merely speculative; it conveys neither an imminent nor proximate danger. Cf.
7 Ciarpaglini, 352 F.3d at 330; Andrews, 493 F.3d at 1057 n.11. This assessment is underscored by
8 plaintiff's allegation that the name calling occurred or commenced in April 2015, more than a
9 year before plaintiff filed his complaint in November 2016. It is also underscored by the
10 prospective injunctive relief plaintiff seeks in this case, viz., his return to CSP-SOL (defendant
11 Wymer's place of employment). As for plaintiff's cursory allegations of "sexual harassment" by
12 Wymer, plaintiff is informed that "verbal harassment or abuse . . . [alone] is insufficient to state a
13 constitutional deprivation under 42 U.S.C. 1983." Oltarzewski v. Ruggiero, 830 F.2d 136, 139
14 (9th Cir. 1987) (citation and internal quotation omitted).

15 For these reasons, the undersigned finds that plaintiff has failed to demonstrate he was
16 under imminent danger of serious physical injury when he filed the complaint in this action.
17 Because this action does not come within the exception created by Section 1915(g), it is the
18 recommendation of this court that plaintiff be required to submit the full filing fee in order to
19 proceed.

20 III. Request for Appointment of Counsel

21 Plaintiff requests appointment of counsel due to the alleged complexities of this case,
22 including the necessity to identify the Doe defendants. See ECF No. 16.

23 District courts lack authority to require counsel to represent indigent prisoners in Section
24 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In certain
25 exceptional circumstances, the district court may request the voluntary assistance of counsel
26 pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991);
27 Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). The test for exceptional
28 circumstances requires the court to evaluate the plaintiff's likelihood of success on the merits and

1 the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal
2 issues involved. See Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986); Weygandt v.
3 Look, 718 F.2d 952, 954 (9th Cir. 1983).

4 Plaintiff's motion for appointment of counsel is premature. The court is unable to assess
5 the potential merits of plaintiff's claims or plaintiff's likelihood of success on those claims unless
6 he first pays the filing fee so that this action may be screened pursuant to 28 U.S.C. § 1915A.³
7 Accordingly, plaintiff's motion for appointment of counsel will be denied as premature.

8 IV. Conclusion

9 For the foregoing reasons, IT IS HEREBY ORDERED that plaintiff's request for
10 appointment of counsel, ECF No. 16, is denied without prejudice as premature.

11 Additionally, IT IS HEREBY RECOMMENDED that:

12 1. Plaintiff's motion to proceed in forma pauperis, ECF No. 15, be denied with prejudice
13 under 28 U.S.C. § 1915(g).

14 2. Plaintiff be directed to submit, within fourteen (14) days after the district judge adopts
15 these findings and recommendations, the full filing fee of \$400.00; failure to timely comply with
16 this directive should result in the dismissal of this action.

17 These findings and recommendations are submitted to the United States District Judge
18 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
19 after being served with these findings and recommendations, plaintiff may file written objections
20 with the court. Such document should be captioned "Objections to Magistrate Judge's Findings
21 and Recommendations." Plaintiff is advised that failure to file objections within the specified

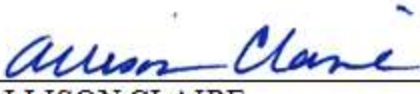
22 ///

23 ³ Plaintiff is informed, however, that his requests for injunctive relief – a change in his
24 classification status and transfer to another prison – are not cognizable under Section 1983. The
25 Constitution does not guarantee a prisoner placement in a particular prison or protection from
26 transfer to another institution. See Meachum v. Fano, 427 U.S. 215, 223-25 (1976); see also
27 Rizzo v. Dawson, 778 F.2d 527, 530 (9th Cir. 1985) (prison authorities may change a prisoner's
28 "place of confinement even though the degree of confinement may be different and prison life
may be more disagreeable in one institution than in another" without violating the prisoner's due
process rights). Similarly, prisoners have no constitutional right to a particular security
classification. See Meachum, 427 U.S. at 224-25; Moody v. Daggett, 429 U.S. 78, 88 n.9 (1976)
(applied to federal prisoners); see also Myron v. Terhune, 476 F.3d 716, 718 (9th Cir. 2007) (a
raised classification score does not implicate a state-created liberty interest).

1 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
2 (9th Cir. 1991).

3 SO ORDERED.

4 DATED: January 25, 2018

5 
6 ALLISON CLAIRE
7 UNITED STATES MAGISTRATE JUDGE
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28