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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AARON LAMONT STRIBLING,
Plaintiff,
v.
LEWIS,
Defendant.

No. 2:17-cv-2009-KJM-EFB P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Defendant has filed a motion for an order revoking plaintiff’s in forma pauperis status. ECF No. 15. For the following reasons, the motion must be denied.

I. Background

This action proceeds on the complaint filed September 28, 2017. ECF No. 1. Plaintiff alleges that defendant Lewis, a correctional officer, used excessive force against him on October 5, 2015 by spraying him with pepper spray without cause and then unjustly charged him with committing battery on a peace officer. *Id.* at 4.

II. The Motion to Revoke *IFP* Status

28 U.S.C. § 1915 authorizes federal courts to allow certain litigants to sue without prepayment of the ordinary filing fee (commonly referred to as “proceeding in forma pauperis”).

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1 These litigants must show that they are unable to pay the fee. 28 U.S.C. § 1915(a)(1). Prisoners
2 face additional barriers to proceeding in forma pauperis. One such barrier, known as the “three
3 strikes” provision, provides: “In no event shall a prisoner bring a civil action under this section if
4 the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility,
5 brought an action or appeal in a court of the United States that was dismissed on the grounds that
6 it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the
7 prisoner is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g); *Andrews v.*
8 *King*, 398 F.3d 1113, 1116 n. 1 (9th Cir.2005). Prior cases that fall within the categories
9 described by § 1915(g) are known as “strikes.” Thus, under § 1915(g), a prisoner with three or
10 more strikes (and who was not under imminent danger at the time of filing the complaint) may
11 not proceed in forma pauperis and must instead pay the full filing fee up front. *Andrews v.*
12 *Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007).

13 A case is “frivolous” under § 1915(g) “if it is of little weight or importance: having no
14 basis in law or fact.” *King*, 398 F.3d at 1121 (internal quotation marks omitted). “A case is
15 malicious if it was filed with the intention or desire to harm another.” *Id.* And a case “fails to
16 state a claim upon which relief may be granted” if it fails to state a claim under Federal Rule of
17 Civil Procedure 12(b)(6). *Id.*

18 When a defendant challenges a prisoner’s right to proceed in forma pauperis, the
19 defendant bears the burden of producing sufficient evidence to establish that the plaintiff has
20 sustained three strikes. *King*, 398 F.3d at 1120. To discharge this burden, the defendant must
21 produce court records or other documentation that will allow the district court to determine that
22 three prior cases were dismissed for the reasons set forth in § 1915(g). Once the defendant has
23 done so, the burden shifts to the plaintiff to persuade the court that § 1915(g) should not apply.
24 *Id.*

25 The Ninth Circuit has cautioned district courts to look closely at dismissal orders and any
26 other relevant information in determining whether a case was dismissed for one of the reasons
27 listed in § 1915(g). *King*, 398 F.3d at 1121. The court may deny in forma pauperis status only

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1 when, after this careful evaluation, the court determines that the prior actions were dismissed
2 because they were frivolous, malicious or failed to state a claim. *Id.*

3 Defendant identifies three cases¹ as strikes within the meaning of § 1915(g). The court
4 need not examine all three cases, however, because the first – *Stribling v. Defazio*, E.D. Cal. Case
5 No. 2:12-cv-02729-JAM-EFB – does not constitute a strike. There, the court dismissed plaintiff’s
6 complaint with leave to amend in its screening order because (1) plaintiff had joined unrelated
7 claims; (2) plaintiff had included a claim that was the subject of another lawsuit; and (3) the
8 allegations of the complaint were “too vague and conclusory to state a cognizable claim for relief
9 and violate Rule 8.” ECF No. 16 at 11-12. When plaintiff failed to file an amended complaint,
10 the court dismissed the action “for failure to state a claim and failure to prosecute.” *Id.* at 18-21.

11 While the question presents a close call here, under applicable Ninth Circuit standards the
12 single failure to comply with Federal Rule of Civil Procedure 8(a) in *Stribling v. Defazio* cannot
13 support using that case as a strike.

14 In assessing whether *Stribling v. Defazio* may constitute a strike, the court must ask
15 whether the dismissing court passed on the merits of plaintiff’s claims (that is, determined that the
16 allegations failed to state a claim or were frivolous) or the plaintiff’s state of mind (that is,
17 whether the case was filed maliciously). *Knapp v. Hogan*, 738 F.3d 1106, 1109-10 (9th Cir.
18 2013). From review of the screening order, it is clear that the court did not pass on the merits of
19 plaintiff’s claims. There is no determination that the allegations failed to state essential elements
20 of a claim or were frivolous. Nor did the court find that plaintiff acted maliciously in filing the
21 complaint. Instead, the court determined that plaintiff’s allegations were “too vague and
22 conclusory” – a violation of Federal Rule of Civil Procedure 8(a) – and that plaintiff had
23 additionally improperly joined a duplicative claim and unrelated claims.

24 The Ninth Circuit has held that dismissals following *repeated* violations of Rule 8(a)
25 constitute dismissals for failure to state a claim under § 1915(g). *Knapp*, 738 F.3d at 1110
26 (emphasizing that the violation of Rule 8(a) must be repeated). Thus, a dismissal following a

27 ¹ The court grants defendant’s request for judicial notice of selected records from these
28 actions. ECF No. 16.

1 single violation of Rule 8(a) does not constitute a strike. *Hendrix v. Nevada*, 689 F. App'x 532,
2 533 (9th Cir. 2017) (“[A]n initial dismissal of a complaint for violation of Federal Rule of Civil
3 Procedure 8(a), with leave to amend, does not count as a strike.”). Because *Stribling v. Defazio*
4 was dismissed for a single, initial violation of Rule 8(a), it may not be considered a strike.

5 **III. Conclusion and Recommendation**

6 Defendant has not met his burden of demonstrating that plaintiff has accrued “three
7 strikes” under 28 U.S.C. § 1915(g), and it is therefore RECOMMENDED that his January 29,
8 2018 motion for the revocation of plaintiff’s in forma pauperis status be DENIED.

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

16 DATED: July 12, 2018.

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18 EDMUND F. BRENNAN
19 UNITED STATES MAGISTRATE JUDGE
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