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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TRAVON LEON FREEMAN,
Plaintiff,
v.
SCOTT KERNAN, et al.,
Defendant.

No. 2:17-cv-2233 AC P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983.

I. Three Strikes Analysis

Plaintiff seeks leave to proceed in forma pauperis under 28 U.S.C. § 1915(a). ECF No. 2. The Prison Litigation Reform Act of 1995 (PLRA) permits any court of the United States to authorize the commencement and prosecution of any suit without prepayment of fees by a person who submits an affidavit indicating that the person is unable to pay such fees. However,

[i]n no event shall a prisoner bring a civil action or appeal a judgement in a civil action or proceeding under this section if the prisoner has, on 3 or more 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).

1 The plain language of the statute makes clear that a prisoner is precluded from bringing a
2 civil action or an appeal in forma pauperis if the prisoner has brought three frivolous actions
3 and/or appeals (or any combination thereof totaling three). Rodriguez v. Cook, 169 F.3d 1176,
4 1178 (9th Cir. 1999). “[Section] 1915(g) should be used to deny a prisoner’s [in forma pauperis]
5 status only when, after careful evaluation of the order dismissing an action, and other relevant
6 information, the district court determines that the action was dismissed because it was frivolous,
7 malicious or failed to state a claim.” Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005).
8 “[W]hen a district court disposes of an in forma pauperis complaint ‘on the grounds that [the
9 claim] is frivolous, malicious, or fails to state a claim upon which relief may be granted,’ such a
10 complaint is ‘dismissed’ for purposes of § 1915(g) even if the district court styles such dismissal
11 as denial of the prisoner’s application to file the action without prepayment of the full filing fee.”
12 O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008) (second alteration in original). Dismissal
13 also counts as a strike under § 1915(g) “when (1) a district court dismisses a complaint on the
14 ground that it fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff then
15 fails to file an amended complaint” regardless of whether the case was dismissed with or without
16 prejudice. Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017).

17 Inspection of other cases filed by plaintiff in this court has led to the identification of at
18 least three cases brought by plaintiff that qualify as strikes. The court takes judicial notice of the
19 following lawsuits filed by plaintiff:¹

- 20 1. Freeman v. Adams, E.D. Cal. No. 1:09-cv-2129 SKO (complaint dismissed with leave to
21 amend for failure to state a claim, case dismissed on April 18, 2011, for failure state a
22 claim after plaintiff failed to file an amended complaint);
- 23 2. Freeman v. Hynse, E.D. Cal. No. 1:09-cv-2146 GBC (complaint dismissed with leave to
24 amend for failure to state a claim, case dismissed on January 13, 2012, for failure state a

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26 ¹ “[A] court may take judicial notice of its own records in other cases.” United States v. Wilson,
27 631 F.2d 118, 119 (9th Cir. 1980) (citations omitted); Fed. R. Evid. 201(b)(2) (court may take
28 judicial notice of facts that are capable of accurate determination by sources whose accuracy
cannot reasonably be questioned).

1 claim after plaintiff failed to file an amended complaint);

- 2 3. Freeman v. Julious, E.D. Cal. No. 1:09-cv-2245 DLB (case dismissed for failure to state a
3 claim on May 6, 2011).

4 All of the preceding cases were dismissed well in advance of the October 22, 2017 filing
5 of the instant action,² and none of the strikes have been overturned. Therefore, this court finds
6 that plaintiff is precluded from proceeding in forma pauperis unless he is “under imminent danger
7 of serious physical injury.” 28 U.S.C. § 1915(g). To satisfy the exception, plaintiff must have
8 alleged facts that demonstrate that he was “under imminent danger of serious physical injury” at
9 the time of filing the complaint. Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007)
10 (“[I]t is the circumstances at the time of the filing of the complaint that matters for purposes of
11 the ‘imminent danger’ exception to § 1915(g).”); see also, Abdul-Akbar v. McKelvie, 239 F.3d
12 307, 312-14 (3rd Cir. 2001); Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir. 1999);
13 Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998); Banos v. O’Guin, 144 F.3d 883, 885 (5th
14 Cir. 1998).

15 The complaint alleges that from May 26 through June 25, 2017, during the month of
16 Ramadan, plaintiff’s meals were regularly incomplete, raw, and uncooked, leading plaintiff to go
17 on a hunger strike from July 8 to 31, 2017. ECF No. 1 at 5, 7. As a result, plaintiff went 37 days
18 without receiving a 2,500-calorie diet, causing him to become lightheaded and weak and
19 drastically lose weight. Id. at 5. When he tried to file an administrative appeal at the end of his
20 hunger strike, it was rejected because of the hunger strike. Id. at 8. The complaint was not filed
21 until October 22, 2017. Accordingly, these allegations do not demonstrate an imminent risk of
22 serious physical injury at the time of filing, and the undersigned will therefore recommend that
23 plaintiff be required to pay the filing fee in full or have the complaint dismissed.

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26 ² Since plaintiff is a prisoner proceeding pro se, he is afforded the benefit of the prison mailbox
27 rule. Houston v. Lack, 487 U.S. 266, 276 (1988) (establishing rule that a prisoner’s court
28 document is deemed filed on the date the prisoner delivered the document to prison officials for
mailing).

1 II. Plain Language Summary of this Order for a Pro Se Litigant

2 You have at least three strikes under § 1915(g) and cannot be granted in forma pauperis
3 status unless you show the court that you were in imminent danger of serious physical injury at
4 the time you filed the complaint. Because your claims are based on things that happened
5 approximately four months before you filed your complaint, you cannot show that you were in
6 imminent danger of serious physical injury at the time you filed the complaint. This means that
7 you are not eligible for IFP status. You may only pursue this lawsuit if you pay the filing fee in
8 full.

9 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court shall randomly
10 assign a United States District Judge to this action.

11 IT IS FURTHER RECOMMENDED that plaintiff be ordered to pay the entire \$400.00 in
12 required fees within thirty days or face dismissal of the case.

13 These findings and recommendations are submitted to the United States District Judge
14 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
15 after being served with these findings and recommendations, plaintiff may file written objections
16 with the court. Such a document should be captioned “Objections to Magistrate Judge’s Findings
17 and Recommendations.” Plaintiff is advised that failure to file objections within the specified
18 time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153
19 (9th Cir. 1991).

20 DATED: July 15, 2019

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22 ALLISON CLAIRE
23 UNITED STATES MAGISTRATE JUDGE
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