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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LANCE WILLIAMS,
Plaintiff,
v.
P. STEWART, et al.,
Defendants.

No. 2:18-cv-0631 DB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se and currently housed at R.J. Donovan Correctional Facility in San Diego (“R.J.D.”), seeks relief pursuant to 42 U.S.C. § 1983. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

The instant complaint was filed on March 23, 2018. (ECF No. 1). Thereafter, plaintiff was directed to file a completed affidavit to proceed in forma pauperis, and on July 5, 2018, plaintiff filed a motion for a fifteen-day extension of time to do so. (See ECF Nos. 8, 9). On July 9, 2018, plaintiff filed his motion to proceed in forma pauperis. (ECF No. 10).

The court will grant, nunc pro tunc, plaintiff’s motion for a fifteen-day extension of time to file an in forma pauperis application. In addition, for the reasons stated below, the court will recommend that: (1) plaintiff’s motion to proceed in forma pauperis be denied pursuant to 28 U.S.C. § 1915(g), and (2) plaintiff be ordered to pay the appropriate filing fee prior to proceeding any further with this action.

1 **I. APPLICABLE LAW: 28 U.S.C. § 1915(g)**

2 Section 1915(g) states:

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

9 28 U.S.C. § 1915(g).

10 “It is well-settled that, in determining a [Section] 1915(g) ‘strike,’ the reviewing court
11 looks to the dismissing court’s action and the reasons underlying it.” Knapp v. Hogan, 738 F.3d
12 1106, 1109 (9th Cir. 2013) (brackets added) (citation omitted). “[Section] 1915(g) should be used
13 to deny a prisoner’s in forma pauperis status only when, after careful evaluation of the order
14 dismissing an action, and other relevant information, the district court determines that the action
15 was dismissed because it was frivolous, malicious or failed to state a claim.” Andrews v. King,
16 398 F.3d 1113, 1121 (9th Cir. 2006) (brackets added).

17 **II. ANALYSIS**

18 **A. Cases Identified as Strikes**

19 On June 15, 2016, in Williams v. Just, No. 2:15-cv-2143 WBS CKD (E.D. Cal. June 15,
20 2016) (“Just”), the District Court judge adopted the assigned magistrate’s findings and
21 recommendations which had determined that plaintiff was a three-strikes litigant within the
22 meaning of 28 U.S.C. § 1915(g). (See Just, ECF Nos. 23, 24, 31, 32). Specifically, the Just
23 Court found that prior to filing the Just action, plaintiff had brought at least three actions that had
24 been dismissed on the grounds that they were frivolous, or malicious, or failed to state a claim
25 upon which relief may be granted. The cases identified as strikes in Just were the following:

- 26 • Williams v. Aparicio, No. 2:14-cv-8640 PA KK (C.D. Cal. Feb. 5, 2015);
- 27 • Williams v. Young, No. 2:14-cv-8037 PA KK (C.D. Cal. May 19, 2015);
- 28 • Williams v. Kerkfoot, No. 2:14-cv-7583 GW KK (C.D. Cal. May 15, 2015), and
- Williams v. Young, No. 15-55967 (9th Cir. Sept. 18, 2015).

(See Just, ECF No. 23 at 2-4).

1 This court takes judicial notice of Just and of the cases identified as strikes therein. See
2 United States v. Author Servs., Inc., 804 F.2d 1520, 1523 (9th Cir. 1986) (stating court may take
3 judicial notice of its own records) overruled on other grounds, United States v. Jose, 131 F.3d
4 1325, 1328-29 (9th Cir. 1997). Therefore, the first requirement under Section 1915(g) which
5 permits this court to deny plaintiff in forma pauperis status has been met. The court now
6 considers Section 1915(g)'s imminent danger of serious physical injury requirement.

7 **B. Absence of Imminent Danger of Serious Physical Injury**

8 In the instant complaint, plaintiff states that he is under imminent threat of serious
9 physical injury in light of the following: (1) the failure to receive timely "proper medical care"¹
10 from defendants Stewart and Sanders² for his injured back, torso and head when he fell off his
11 bunk at California Medical Facility – Vacaville ("CMF-Vacaville") in October 2015; (2)
12 defendant Stewart's failure to permit plaintiff to turn on a fan in his cellblock hallway despite
13 plaintiff's high body temperature and other heat-related medical ailments; (3) the various threats
14 of physical harm³ plaintiff received from defendant Stewart in April 2017 for pursuing
15 administrative grievances, and (4) the facilitation of plaintiff's transfer to R.J.D. in May 2017 by
16 defendants Taylor and Muhammad,⁴ despite the fact that they knew plaintiff had enemy concerns
17 there. (See ECF No. 1 at 5-13).

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20 ¹ Plaintiff describes "proper medical care" as "being given an M.R.I., CT scan for [his] back and
21 head." (See ECF No. 1 at 5-6) (brackets added). He states that he is "still suffering headaches,
22 severe back pain in a multitude of areas, dizziness and lightheadedness causing fainting all still
[sic] not being treated at time of filing this complaint causing my injuries and ailment to be of an
on-going [sic] nature." (See id. at 6) (brackets added).

23 ² Defendant Stewart is a correctional officer at California Medical Facility – Vacaville ("CMF-
24 Vacaville"). Defendant Sanders is a physician at CMF-Vacaville. (See ECF No. 1 at 3).

25 ³ Plaintiff states the threats included being attacked with a lock placed in a sock, having his cell
26 fire-bombed, being framed for a criminal charge and being placed in the hole. (See ECF No. 1 at
10).

27 ⁴ Defendants Taylor and Muhammad are correctional counselors at CMF-Vacaville. (See ECF
28 No. 1 at 3).

1 These facts as well as the timing of plaintiff’s filed pleadings do not support plaintiff’s
2 claim that he was under imminent danger of serious physical injury at the time this action was
3 brought. First, the imminent danger plaintiff states he was in at the time this action was filed on
4 March 23, 2018, was purportedly at the hands of the five named defendants, all of whom are
5 employees at CMF-Vacaville. (See ECF No. 1 at 1-4). Plaintiff’s complaint makes this
6 “imminent danger at CMF-Vacaville” claim despite the fact that it also states that plaintiff had
7 been transferred to R.J.D. in May 2017, almost a full year prior to the filing of the instant action.
8 (See ECF No. 1 at 12). In addition, a change of address notice plaintiff filed on the same day –
9 March 23, 2018 – verifies that plaintiff was no longer housed at CMF-Vacaville when he filed the
10 instant action. He was housed at R.J.D.⁵ (See ECF No. 3).

11 The imminent danger exception applies only where a plaintiff has alleged facts that
12 demonstrate he was “under imminent danger” at the time the complaint was filed. Andrews v.
13 Cervantes, 493 F.3d 1047, 1052-53 (9th Cir. 2007). Given that: (1) CMF-Vacaville is where all
14 the named defendants are located; (2) CMF-Vacaville is where plaintiff’s alleged imminent
15 danger of serious physical harm was alleged to be occurring via the hands of the defendants (see
16 generally ECF No. 1), and (3) by plaintiff’s own admissions both in his complaint and in his
17 simultaneously filed change of address notice, plaintiff was not housed at CMF-Vacaville when
18 he filed the instant complaint, the undersigned finds that plaintiff has not adequately established
19 the existence of imminent danger of serious physical injury at the time the action was brought that
20 Section 1915(g) requires. Consequently, plaintiff must be denied in forma pauperis status.

21 **III. CONCLUSION**

22 The undersigned shall recommend that plaintiff’s motion to proceed in forma pauperis be
23 denied pursuant to 28 U.S.C. § 1915(g). On June 15, 2016, the Just Court adopted the findings
24 that plaintiff was a three-strikes litigant within the meaning of the statute. (See Just, ECF Nos.

25 ⁵ As an aside, in April 2018, plaintiff filed two additional notices of address change with the
26 court, neither of which indicated that plaintiff was still housed at CMF-Vacaville, where
27 plaintiff’s complaint states his imminent danger threat existed. (See ECF Nos. 5, 7). The last
28 notice, filed April 30, 2018, confirms that plaintiff is currently still housed at R.J.D. (See ECF
No. 7).

1 23, 24, 31, 32). In addition, the instant complaint fails to establish that plaintiff was under
2 imminent danger of serious physical injury on March 23, 2018, the date plaintiff filed the instant
3 complaint.

4 Accordingly, IT IS HEREBY ORDERED that:

5 1. Plaintiff's motion for a fifteen-day extension of time to file a motion to proceed in
6 forma pauperis filed July 5, 2018 (ECF No. 9), is GRANTED nunc pro tunc, and

7 2. The Clerk of Court shall randomly appoint a District Court judge to this action.


8 IT IS FURTHER RECOMMENDED that:

9 1. Plaintiff's motion to proceed in forma pauperis filed July 9, 2018 (ECF No. 10), be
10 DENIED, and

11 2. Plaintiff be ordered to pay the appropriate filing fee.

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

19 Dated: February 25, 2019

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22 DEBORAH BARNES
23 UNITED STATES MAGISTRATE JUDGE

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26 DB/ORDERS/ORDERS/PRISONER.CIVIL RIGHTS/will0631.1915g.noifp
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