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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARLON JESSE BLACHER,
Plaintiff,
v.
SCOTT KERNAN, et al.,
Defendants.

No. 2:18-cv-1620-MCE-EFB P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He seeks leave to proceed in forma pauperis. See 28 U.S.C. § 1915(a). For the reasons stated below, the court finds that plaintiff has not demonstrated he is eligible to proceed in forma pauperis.

A prisoner may not proceed in forma pauperis:

if the prisoner has, on 3 or more prior 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). Court records reflect that on at least three prior occasions, plaintiff has brought actions while incarcerated that were dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. See (1) *Blacher v. Diaz*, No. 1:11-cv-1993-SKO (E.D. Cal.), ECF No. 12 (Sept. 24, 2012 order dismissing action for failure to state a claim); (2)

1 *Blacher v. Dieball*, No. 2:14-cv-7985 (C.D. Cal.), ECF No. 7 (Dec. 2, 2014 order dismissing
2 action as frivolous, malicious, or failing to state a claim upon which relief could be granted); (3)
3 *Blacker v. Villamarin*, 2:15-cv-3061 (C.D. Cal.), ECF No. 68 (Aug. 11, 2017 order dismissing
4 action after plaintiff failed to amend pursuant to court’s June 23, 2017 order, which granted
5 defendants’ motion to dismiss for failure to state a claim upon which relief could be granted)¹;
6 and (4) *Blacher v. Talley*, No. 2:16-cv-3680 (C.D. Cal.), ECF No. 74 (July 26, 2017 order
7 dismissing action after plaintiff failed to amend pursuant to court’s June 6, 2017 order, which
8 granted defendants’ motion to dismiss for failure to state a claim upon which relief could be
9 granted).

10 The section 1915(g) exception applies if the complaint makes a plausible allegation that
11 the prisoner faced “imminent danger of serious physical injury” at the time of filing. 28 U.S.C.
12 § 1915(g); *Andrews v. Cervantes*, 493 F.3d 1047, 1055 (9th Cir. 2007). In this case, plaintiff’s
13 complaint includes numerous grievances. It complains of mail interference, dissatisfaction with
14 the pre-renal diet, moldy food or food prepared in unsanitary conditions, retaliatory and punitive
15 cell and bodily searches, and a discrete instance of inadequate shelter and hydration. See ECF
16 No. 1. The allegations do not demonstrate that plaintiff was under an imminent danger of serious
17 physical injury when he filed this action. Plaintiff’s application for leave to proceed in forma

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20 ¹ In a recent decision, the Ninth Circuit held that:

21 There is nothing in § 1915(g) that suggests a dismissal for failure to
22 state a claim only counts as a strike when the complaint is obviously
23 unsalvageable on its face. We have previously held that “[l]eave to
24 amend should be granted if it appears *at all possible* that the plaintiff
25 can correct the defect” and that opportunities to amend are
26 “particularly important for the pro se litigant.” *Crowley v. Bannister*,
27 734 F.3d 967, 977-78 (9th Cir. 2013) (emphasis added in *Crowley*)
(quoting *Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000)).
In light of this “longstanding rule,” *Lopez*, 203 F.3d at 1130, district
courts may routinely give pro se plaintiffs opportunities to amend
their complaints regardless of how meritless their claims may appear.
A prisoner may not avoid incurring strikes simply by declining to
take advantage of these opportunities to amend.

28 *Harris v. Mangum*, 863 F.3d 1133, 1142-1143 (9th Cir. 2017).

1 pauperis must therefore be denied pursuant to § 1915(g). Plaintiff must submit the appropriate
2 filing fee in order to proceed with this action.

3 Accordingly, because plaintiff has not paid the filing fee and is not eligible to proceed in
4 forma pauperis, IT IS HEREBY RECOMMENDED that:

- 5 1. Plaintiff's application to proceed in forma pauperis (ECF No. 5) be denied; and
- 6 2. Plaintiff be ordered to pay the \$400 filing fee within fourteen days from the date of any
7 order adopting these findings and recommendations and be warned that failure to do so will result
8 in the dismissal of this action.

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: August 14, 2018.

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18 EDMUND F. BRENNAN
19 UNITED STATES MAGISTRATE JUDGE
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