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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEVIN DUNIGAN,  
  
  Plaintiff,  
  
  v.  
  
CDCR, et al.,  
  
  Defendant.

No. 2:19-cv-2501 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. 3. 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.

1 28 U.S.C. § 1915(g). The plain language of the statute makes clear that a prisoner is precluded  
2 from bringing a civil action or an appeal in forma pauperis if the prisoner has brought three  
3 frivolous actions and/or appeals (or any combination thereof totaling three). Rodriguez v. Cook,  
4 169 F.3d 1176, 1178 (9th Cir. 1999). “[Section] 1915(g) should be used to deny a prisoner’s [in  
5 forma pauperis] status only when, after careful evaluation of the order dismissing an action, and  
6 other relevant information, the district court determines that the action was dismissed because it  
7 was frivolous, malicious or failed to state a claim.” Andrews v. King, 398 F.3d 1113, 1121 (9th  
8 Cir. 2005). “[W]hen a district court disposes of an in forma pauperis complaint ‘on the grounds  
9 that [the claim] is frivolous, malicious, or fails to state a claim upon which relief may be granted,’  
10 such a complaint is ‘dismissed’ for purposes of § 1915(g) even if the district court styles such  
11 dismissal as denial of the prisoner’s application to file the action without prepayment of the full  
12 filing fee.” O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008) (second alteration in original).  
13 Dismissal also counts as a strike under § 1915(g) “when (1) a district court dismisses a complaint  
14 on the ground that it fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff  
15 then fails to file an amended complaint” regardless of whether the case was dismissed with or  
16 without 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:<sup>1</sup>

- 20 1. Dunigan v. California Department of Corrections, E.D. Cal. No. 2:01-cv-1591 WBS JFM  
21 (complaint dismissed with leave to amend for failure to state a claim, case dismissed on  
22 March 29, 2002, for failure to file an amended complaint);

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25 <sup>1</sup> The court “may take notice of proceedings in other courts, both within and without the federal  
26 judicial system, if those proceedings have a direct relation to matters at issue.” United States ex  
27 rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)  
(citation and internal quotation marks omitted) (collecting cases); Fed. R. Evid. 201(b)(2) (court  
28 may take judicial notice of facts that are capable of accurate determination by sources whose  
accuracy cannot reasonably be questioned).

- 1       2. Dunigan v. United States, E.D. Cal. No. 2:10-cv-2992 JAM KJN (case dismissed as  
2       frivolous on May 2, 2011);
- 3       3. Dunigan v. United States, E.D. Cal. No. 2:12-cv-3048 TLN CKD (complaint dismissed  
4       with leave to amend for failure to state a claim; case dismissed on September 16, 2013, for  
5       failure to file an amended complaint).

6       All of the preceding cases were dismissed well in advance of the December 8, 2019 filing<sup>2</sup>  
7       of the instant action and none of the strikes have been overturned. Therefore, this court finds that  
8       plaintiff is precluded from proceeding in forma pauperis unless she is “under imminent danger of  
9       serious physical injury.” 28 U.S.C. § 1915(g). To satisfy the exception, plaintiff must have  
10      alleged facts that demonstrate that she was “under imminent danger of serious physical injury” at  
11      the time of filing the complaint. Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007)  
12      (“[I]t is the circumstances at the time of the filing of the complaint that matters for purposes of  
13      the ‘imminent danger’ exception to § 1915(g).”); see also, Abdul-Akbar v. McKelvie, 239 F.3d  
14      307, 312-14 (3rd Cir. 2001); Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir. 1999);  
15      Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998); Banos v. O’Guin, 144 F.3d 883, 885 (5th  
16      Cir. 1998).

17      The complaint names ninety-six defendants, including individuals and both private and  
18      government entities, and makes allegations regarding plaintiff’s conviction, his ability to use the  
19      administrative appeals process, interference with previous lawsuits, unspecified retaliation, and  
20      various conspiracies. However, none of the allegations demonstrate an imminent risk of serious  
21      physical injury at the time of filing, and the undersigned will therefore recommend that plaintiff  
22      be required to pay the filing fee in full or have the complaint dismissed.

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

24      You have at least three strikes under § 1915(g) and cannot be granted in forma pauperis  
25      status unless you show the court that you were in imminent danger of serious physical injury at  
26      the time you filed the complaint. You have not shown that you were in imminent danger of

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27      <sup>2</sup> Since plaintiff is a prisoner proceeding pro se, she is afforded the benefit of the prison mailbox  
28      rule. Houston v. Lack, 487 U.S. 266, 276 (1988).

1 serious physical injury and so it is being recommended that your motion to proceed in forma  
2 pauperis be denied.

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

5 IT IS FURTHER RECOMMENDED that plaintiff's motion to proceed in forma pauperis  
6 (ECF No. 3) be denied and plaintiff be ordered to pay the entire \$400.00 in required fees within  
7 thirty days or face dismissal of the case.

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

15 DATED: December 19, 2019

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17 ALLISON CLAIRE  
18 UNITED STATES MAGISTRATE JUDGE  
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