

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES DEAN TAYLOR, No. C 09-05999 CW (PR)
 Plaintiff,
v. ORDER TO SHOW CAUSE; REVOKING IFP STATUS
U.S. COURT OF APPEALS,
 Defendant.

Plaintiff, a state prisoner and frequent litigant in this Court, has filed a pro se civil rights complaint pursuant to 42 U.S.C. § 1983. His motion for leave to proceed in forma pauperis (IFP) has been granted.

The Prison Litigation Reform Act of 1995 (PLRA) was enacted, and became effective, on April 26, 1996. It provides that a prisoner may not bring a civil action IFP under 28 U.S.C. § 1915 "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).

For purposes of a dismissal that may be counted under § 1915(g), the phrase "fails to state a claim on which relief may be granted" parallels the language of Federal Rule of Civil Procedure 12(b)(6) and carries the same interpretation, the word "frivolous" refers to a case that is "of little weight or importance: having no basis in law or fact," and the word "malicious" refers to a case "filed with the 'intention or desire

1 to harm another.'" Andrews v. King, 398 F.3d 1113, 1121 (9th Cir.
2 2005) (citation omitted). Only cases within one of these three
3 categories can be counted as strikes for § 1915(g) purposes. See
4 id. Dismissal of an action under § 1915(g) should only occur when,
5 "after careful evaluation of the order dismissing an [earlier]
6 action, and other relevant information, the district court
7 determines that the action was dismissed because it was frivolous,
8 malicious or failed to state a claim." Id.

9 Andrews requires that the prisoner be given notice of the
10 potential applicability of § 1915(g), by either the district court
11 or the defendants, but also requires the prisoner to bear the
12 ultimate burden of persuasion that § 1915(g) does not bar pauper
13 status for him. Id. Andrews implicitly allows the Court to raise
14 the § 1915(g) problem sua sponte, but requires the Court to notify
15 the prisoner of the earlier dismissals it considers to support a §
16 1915(g) dismissal and allow the prisoner an opportunity to be heard
17 on the matter before dismissing the action. See id. at 1120. A
18 dismissal under § 1915(g) means that a prisoner cannot proceed with
19 his action as a pauper under § 1915(g), but he still may pursue his
20 claims if he pays the full filing fee at the outset of the action.

21 A review of the dismissal orders in Plaintiff's prior prisoner
22 actions in this Court reveals that Plaintiff has had at least three
23 such cases dismissed on the ground that they were frivolous,
24 malicious, or failed to state a claim upon which relief may be
25 granted. Plaintiff is now given notice that the Court believes the
26 following dismissals may be counted as dismissals for purposes of
27 § 1915(g): (1) Taylor v. California, No. C 05-2924 CW (PR) (N.D.
28 Cal. Jan. 17, 2006) (dismissed for failure to state a claim);

1 Taylor v. Bailey, No. C 05-4953 CW (PR) (N.D. Cal. June 13, 2006)
2 (dismissed under Heck v. Humphrey, 512 U.S. 477 (1994)); and
3 (3) Taylor v. Kennedy, No. C 06-0749 CW (PR) (N.D. Cal. Oct. 26,
4 2006) (dismissed for failure to state a claim). Plaintiff
5 therefore may proceed in forma pauperis only if he is seeking
6 relief from a danger of serious physical injury which is "imminent"
7 at the time of filing. See Abdul-Akbar v. McKelvie, 239 F.3d 307,
8 312 (3d Cir. 2001) (en banc); Medberry v. Butler, 185 F.3d 1189,
9 1192-93 (11th Cir. 1999); Ashley v. Dilworth, 147 F.3d 715, 717
10 (8th Cir. 1998); Banos v. O'Guin, 144 F.3d 883, 885 (5th Cir.
11 1998). He is not.

12 In light of the dismissals listed above, and because Plaintiff
13 does not appear to be under imminent danger of serious physical
14 injury, it is clear that leave to proceed IFP was granted
15 erroneously. It will be revoked, and Plaintiff will be afforded an
16 opportunity to pay the filing fee. See Banos v. O'Guin, 144 F.3d
17 883, 885 (5th Cir. 1998) (revoking IFP status on appeal on
18 three-strikes grounds); Patton v. Jefferson Corr. Center, 136 F.3d
19 458, 461, 465 (5th Cir. 1998) (district court correctly revoked IFP
20 upon discovering on remand that plaintiff had five prior strikes
21 and, when plaintiff failed to pay fee, properly dismissed case with
22 prejudice). Accordingly, leave to proceed IFP is REVOKED.

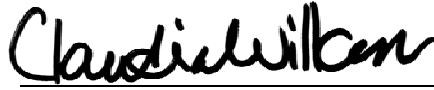
23 Plaintiff is ORDERED TO SHOW CAUSE in writing no later than
24 thirty (30) days from the date of this Order why his motion for
25 leave to proceed IFP should not be denied and this action should
26 not be dismissed pursuant to 28 U.S.C. § 1915(g). If Plaintiff is
27 so inclined, he may avoid dismissal by paying the \$350.00 filing
28 fee. In any event, the Court will continue to review under

1 § 1915(g) all future actions filed by Plaintiff while he is
2 incarcerated in which he seeks IFP status.

3 Failure to file a timely response or failure to pay the full
4 filing fee in will result in the dismissal of this action without
5 further notice to Plaintiff.

6 IT IS SO ORDERED.

7 DATED: 7/23/2010



8 CLAUDIA WILKEN
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 JAMES DEAN TAYLOR et al,

5 Plaintiff,

6 v.

7 US COURT OF APPEALS et al,

8 Defendant.

Case Number: CV09-05999 CW

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
10 Court, Northern District of California.

11 That on July 23, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

15 James Dean Taylor K05216
16 California State Prison - Soledad
17 P.O. Box 689, C-106
18 Soledad, CA 93960

19 Dated: July 23, 2010

20 Richard W. Wieking, Clerk
21 By: Nikki Riley, Deputy Clerk