

1
2
3
4
5
6
7
8
9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 RUSSELL DWAYNE RODGERS,)
13 Plaintiff,)
14 v.)
15 GREG MUNKS, et al.,)
16 Defendants.)
17

No. C 15-4585 LHK (PR)

ORDER DENYING MOTION
FOR LEAVE TO PROCEED IN
FORMA PAUPERIS; ORDER
OF DISMISSAL

18 Plaintiff, a state prisoner proceeding *pro se*, filed a civil rights complaint pursuant to 42
19 U.S.C. § 1983 seeking damages for alleged civil rights violations. Plaintiff also filed a motion
20 for leave to proceed in forma pauperis (“IFP”). On January 7, 2016, the court issued an order to
21 plaintiff to show cause why plaintiff’s motion to proceed IFP should not be denied, and the case
22 dismissed, pursuant to 28 U.S.C. § 1915(g). The court also notified plaintiff that, alternatively,
23 he could pay the \$400.00 to avoid dismissal. Plaintiff has not filed a response. For the reasons
24 stated below, the court DENIES plaintiff’s motion for leave to proceed IFP, and DISMISSES
25 this case without prejudice.

26 **DISCUSSION**

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

1 the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility,
2 brought an action or appeal in a court of the United States that was dismissed on the grounds that
3 it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the
4 prisoner is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

5 For purposes of a dismissal that may be counted under section 1915(g), the phrase “fails
6 to state a claim on which relief may be granted” parallels the language of Federal Rule of Civil
7 Procedure 12(b)(6) and carries the same interpretation, the word “frivolous” refers to a case that
8 is “of little weight or importance: having no basis in law or fact,” and the word “malicious”
9 refers to a case “filed with the ‘intention or desire to harm another.’” *Andrews v. King*, 398 F.3d
10 1113, 1121 (9th Cir. 2005) (citation omitted). Only cases within one of these three categories
11 can be counted as strikes for section 1915(g) purposes. *See id.* Dismissal of an action under
12 section 1915(g) should only occur when, “after careful evaluation of the order dismissing an
13 [earlier] action, and other relevant information, the district court determines that the action was
14 dismissed because it was frivolous, malicious or failed to state a claim.” *Id.*

15 The court previously notified plaintiff that plaintiff has had at least three prior prisoner
16 actions that were dismissed on the ground that they were frivolous, malicious, or failed to state a
17 claim upon which relief may be granted. The following federal district court dismissals may be
18 counted as dismissals for purposes of section 1915(g): (1) *Rodgers v. Munk*, No. 12-5620 CRB
19 (pr) (N.D. Cal. dismissed April 25, 2013) (dismissed with leave to amend for failure to state a
20 claim, and ultimately dismissed without filing an amended complaint); (2) *Rodgers v. County of*
21 *San Mateo*, No. 10-1354 JW (pr) (N.D. Cal. dismissed July 22, 2010) (dismissed for failure to
22 state a claim); and (3) *Rodgers v. Griffith*, No. 07-5597 SBA (pr) (N.D. Cal. dismissed Dec. 10,
23 2009) (same). Plaintiff has not objected to, or otherwise refuted, that the above-referenced
24 dismissals are “strikes” for purposes of section 1915(g).

25 Despite having had three strikes pursuant to section 1915(g), plaintiff may still be able to
26 proceed IFP if he can show that he is in imminent danger of serious physical injury. Plaintiff has
27 the burden of proving that he satisfies this exception to section 1915(g) by demonstrating that he
28 is in imminent danger of serious physical injury. The plain language of the imminent danger

1 clause in section 1915(g) indicates that “imminent danger” is to be assessed at the time of the
2 filing of the complaint. *See Andrews v. Cervantes*, 493 F.3d 1047, 1053 (9th Cir. 2007)
3 (“*Andrews II*”). The conditions that existed at some earlier or later time are not relevant. *See id.*
4 and n.5. The court “should not make an overly detailed inquiry into whether the allegations
5 qualify for the exception.” *Id.* at 1055. It is sufficient if the complaint “makes a plausible
6 allegation that the prisoner faced ‘imminent danger of serious physical injury’ at the time of
7 filing.” *Id.*; *see, e.g., id.* at 1055 (allegation that plaintiff was at risk of contracting HIV or
8 hepatitis C was sufficient to bring his complaint within the imminent danger exception); *cf.*
9 *Medberry v. Butler*, 185 F.3d 1189, 1193 (11th Cir. 1999) (no ongoing danger where plaintiff
10 had been placed in administrative segregation following physical assaults by fellow inmates and
11 before he filed his complaint). In this circuit, “requiring a prisoner to allege[] an ongoing danger
12 – the standard adopted by the Eighth Circuit – is the most sensible way to interpret the
13 imminency requirement.” *Andrews II*, 493 F.3d at 1056 (internal quotation marks omitted).

14 Here, plaintiff has not suggested that he was under imminent danger of serious physical
15 injury. Thus, he has not satisfied his burden to show that he is entitled to the exception to
16 section 1915(g). In addition, the court has reviewed plaintiff’s complaint, and nothing in the
17 complaint suggests that plaintiff faced any “ongoing danger” of serious physical injury sufficient
18 to “meet the imminence prong of the three-strikes exception” at the time plaintiff filed his
19 complaint. *Id.* at 1057. Accordingly, plaintiff has not shown that he is entitled to the imminent
20 danger exception under section 1915(g) to avoid dismissal without prejudice.

21 CONCLUSION

22 Plaintiff’s motion to proceed IFP is DENIED. Because plaintiff has not paid the \$400.00
23 filing fee, this action is DISMISSED without prejudice.

24 The Clerk shall terminate all pending motions and close the file.

25 IT IS SO ORDERED.

26 DATED: 2/24/2016



LUCY H. KOH
United States District Judge