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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL LENIOR SMITH,
CDCR #P-64019,

Plaintiff,

vs.

SERGEANT HAMPTON;
C/O FLORES; C/O COLON,

Defendants.

Case No. 3:23-cv-01978-BAS-JLB

ORDER: (1) DENYING MOTION TO PROCEED IN FORMA PAUPERIS AS BARRED BY 28 U.S.C. § 1915(g); (2) DISMISSING CIVIL ACTION WITHOUT PREJUDICE FOR FAILURE TO PAY FILING FEE REQUIRED BY 28 U.S.C. § 1914(a)

[ECF No. 5]

Michael Lenior Smith (“Plaintiff” or “Smith”), a state prisoner currently incarcerated at the Richard J. Donovan Correctional Facility (“RJD”), is proceeding pro se and has filed a civil rights Complaint (“Compl.”) pursuant to 42 U.S.C. § 1983. *See* Compl., ECF No. 1. Smith did not prepay the civil filing fee required to commence a civil action at the time he filed his Complaint; instead, he later filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). *See* ECF No. 5.

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1 **I. Discussion**

2 “All persons, not just prisoners, may seek IFP status.” *Moore v. Maricopa County*
3 *Sheriff’s Office*, 657 F.3d 890, 892 (9th Cir. 2011). Prisoners like Smith, however, “face
4 an additional hurdle.” *Id.*

5 In order to further “the congressional goal of reducing frivolous prisoner litigation
6 in federal court,” the Prison Litigation Reform Act (“PLRA”) § 804(g), 28 U.S.C.
7 § 1915(g) (1996) provides that prisoners with “three strikes” or more cannot proceed IFP.
8 *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997). A prisoner has three strikes if

9 on 3 or more prior occasions, while incarcerated or detained in
10 any facility, [the prisoner] brought an action or appeal in a court
11 of the United States that was dismissed on the grounds that it is
12 frivolous, malicious, or fails to state a claim upon which relief
can be granted

13 28 U.S.C. § 1915(g).

14 When courts “review a dismissal to determine whether it counts as a strike, the style
15 of the dismissal or the procedural posture is immaterial. Instead, the central question is
16 whether the dismissal ‘rang the PLRA bells of frivolous, malicious, or failure to state a
17 claim.’” *El-Shaddai v. Zamora*, 833 F.3d 1036, 1042 (9th Cir. 2016) (quoting *Blakely v.*
18 *Wards*, 738 F.3d 607, 615 (4th Cir. 2013)). Thus, prior cases or appeals are considered
19 strikes “even if the district court styles such dismissal as a denial of the prisoner’s
20 application to file the action without prepayment of the full filing fee.” *O’Neal v. Price*,
21 531 F.3d 1146, 1153 (9th Cir. 2008). Once a prisoner has accumulated three strikes, he is
22 prohibited by Section 1915(g) from proceeding IFP in federal court unless he can show he
23 is facing “imminent danger of serious physical injury.” *See* 28 U.S.C. § 1915(g); *Andrews*
24 *v. Cervantes*, 493 F.3d at 1051–52 (9th Cir. 2007) (“*Cervantes*”).

25 Defendants typically carry the initial burden to produce evidence demonstrating a
26 prisoner is not entitled to proceed IFP, *Andrews*, 398 F.3d at 1119, but “in some instances,
27 the district court docket may be sufficient to show that a prior dismissal satisfies at least
28 one on the criteria under § 1915(g) and therefore counts as a strike.” *Id.* at 1120. Upon

1 reviewing its docket, and the docket of the Eastern District of California, the Court finds
2 that Smith, while incarcerated, has had three prior prisoner civil actions or appeals
3 dismissed on the grounds that they were frivolous, malicious, or failed to state a claim upon
4 which relief may be granted which renders him ineligible to proceed IFP. Fed. R. Evid.
5 201(b)(2); *United States v. Smith*, 631 F.2d 118, 119 (9th Cir. 1980) (stating that a court
6 may take judicial notice of its own records in other cases, as well as other courts' records).

7 They are:

- 8 (1) *Smith v. Blanas, et al.*, Civil Case No. 2:01-cv-01645-FCD-JFM (E.D.
9 Cal. Aug. 27, 2001) (Order Adopting Findings and Recommendation
10 Dismissing Action for Failing to State a Claim) (ECF No. 16) (strike
11 one);
- 12 (2) *Smith v. Yates, et al.*, Civil Case No. 1:09-00808-OWW-SMS (E.D.
13 Cal. Mar. 8, 2010) (Order Adopting Findings and Recommendation
14 Dismissing Complaint For Failing to State a Claim) (ECF No. 17)
15 (strike two)¹;
- 16 (3) *Smith v. Munoz, et al.*, Civil Case No. 1:13-cv-00387-BAM (E.D. Cal.
17 Mar. 18, 2013) (Order Dismissing First Amended Complaint For
18 Failing to State a Claim) (ECF No. 12) (strike three).

19 Accordingly, because Smith has, while incarcerated, accumulated more than three
20 “strikes” pursuant to § 1915(g), he cannot proceed IFP unless he meets the “imminent
21 danger” exception to the three strikes provision of the PLRA. In order to do so, his
22 pleadings must contain a “plausible allegation that the prisoner faced ‘imminent danger of
23 serious physical injury’ at the time of filing.” *Cervantes*, 493 F.3d at 1055; *see also* 28
24 U.S.C. § 1915(g). “Imminent danger” requires an allegation that a harm is “ready to take
25 place,” or “hanging threateningly over one’s head,” *Cervantes*, 493 F.3d at 1056, and
26 “cannot be triggered solely by complaints of past injury or generalized fears of possible
27 future harm.” *Hernandez v. Williams*, No. 21cv347-MMA-KSC, 2021 WL 1317376, at *2

28 ¹ *See Harris v. Mangum*, 863 F.3d 1133, 1143 (9th Cir. 2017) (“A prisoner may not avoid incurring strikes simply by declining to take advantage of [an] opportunity to amend.”).

1 (S.D. Cal. Apr. 8, 2021) (citing *Cervantes*, 493 F.3d at 1053).

2 In his Complaint, Smith alleges Defendants, all RJD correctional officers, violated
3 his constitutional rights by failing to protect him from an attack by another inmate on
4 August 2, 2021. *See generally* Compl. However, this attack is alleged to have occurred
5 over two years ago and he does not sufficiently allege that he is in imminent threat of harm
6 at the time he filed this action on October 19, 2023. Because Plaintiff is not facing a harm
7 that is “ready to take place,” or “hanging threateningly over [his] head,” Smith does not
8 meet the “imminent danger” exception to the three strikes rule. *Cervantes*, 493 F.3d at 1055
9 (quoting 28 U.S.C. § 1915(g)).

10 **II. Conclusion and Order**

11 For the reasons set forth above, the Court:

12 (1) **DENIES** Smith’s Motion to Proceed IFP (ECF No. 5) as barred by 28 U.S.C.
13 § 1915(g);

14 (2) **DISMISSES** this civil action without prejudice based on Smith’s failure to
15 pay the full statutory and administrative \$402 civil filing fee required by 28 U.S.C.
16 § 1914(a); and

17 (3) **DIRECTS** the Clerk of Court to close the case.

18 **IT IS SO ORDERED.**

19 Dated:



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21 Hon. Cynthia Bashant
22 United States District Judge
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