

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge Christine M. Arguello**

Civil Action No. 12-cv-01997-CMA-MJW

WALLACE GILBERT-MITCHELL, JR.,

Plaintiff,

v.

DAVID V. ALLRED, in his personal and professional capacities,  
H. NEWCOMB, in his personal and professional capacities,  
MS. INOUE, in her personal and professional capacities,  
CHARLIE A. DANIELS, in his personal and professional capacities,  
J. RODRIGUES, in his personal and professional capacities,  
ROBERT LEGGITT, in his personal and professional capacities,  
THERESA MONTOYA, in her personal and professional capacities,  
MS. McDERMOTT, in her personal and professional capacities,  
THE UNITED STATES OF AMERICA, in tort,

Defendants.

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**ORDER ADOPTING AND AFFIRMING FEBRUARY 28, 2013  
RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

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This matter is before the Court on the February 28, 2013 Recommendation of United States Magistrate Judge Michael J. Watanabe. (Doc. # 49.) In his Recommendation, the Magistrate Judge recommends that Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Doc. # 9) be denied without prejudice pending determination of whether Plaintiff may proceed *in forma pauperis*.

On February 26, 2013, the Federal Bureau of Prisons (“BOP”) filed a motion seeking reconsideration of an order (Doc. # 4) granting Plaintiff leave to proceed *in forma pauperis* under 28 U.S.C. § 1915. (Doc. # 46.) In the BOP’s motion, the BOP asserts that Plaintiff had failed to inform the Court of his three strikes status, which would preclude him from filing a lawsuit *in forma pauperis*. The BOP attached several court orders indicating that Plaintiff has three strikes against him. (Doc. ## 46-2; 46-4; 46-5; 46-6.) As the Magistrate Judge found, there is a genuine issue as to whether Plaintiff may proceed *in forma pauperis*. Thus, the Magistrate Judge recommended that Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction be denied without prejudice until such time as the Court makes a determination as to whether Plaintiff may proceed *in forma pauperis*.

On March 13, 2013, Plaintiff, proceeding *pro se*,<sup>1</sup> filed timely objections to the Recommendation. (Doc. # 50.) This Court has conducted a *de novo* review of this matter, including carefully reviewing all relevant pleadings, the Recommendation, and Plaintiff’s Objections to the Recommendation. In his Objections, Plaintiff correctly observes that a prisoner with three strikes may proceed *in forma pauperis* when “the prisoner is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g). Thus, despite his apparent three strikes status, Plaintiff may be permitted to proceed

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<sup>1</sup> Because Plaintiff is proceeding *pro se*, the Court “review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys.” *Trackwell v. U.S. Gov’t*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)).

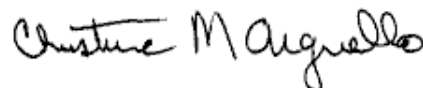
*in forma pauperis* if the Court deems that he is “under imminent danger of serious physical injury.” *Id.* However, this is a threshold matter that should be determined before deciding whether an injunction should issue. Thus, the Court agrees with the Magistrate Judge that Plaintiff’s Motion should be denied without prejudice until such time as the Court determines whether Plaintiff may proceed *in forma pauperis*.

Based on the Court’s *de novo* review, the Court concludes that Magistrate Judge Watanabe’s Recommendation is correct. Therefore, Plaintiff’s Objections are OVERRULED and the Court hereby ADOPTS the Recommendation of the United States Magistrate Judge as the findings and conclusions of this Court.

Accordingly, it is ORDERED THAT Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction (Doc. # 9) is DENIED.

DATED: March 22, 2013

BY THE COURT:



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CHRISTINE M. ARGUELLO  
United States District Judge