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DISTRICT OF NEVADA	
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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

MICHAEL DAVITT,  
#91072

Plaintiff,

vs.

OFFICER HIBBS MONTOYA,

Defendant.

3:09-cv-0506-ECR-VPC

**ORDER**

Plaintiff is a prisoner proceeding *pro se* and has submitted a complaint(#1) attempting to initiate a civil rights action pursuant to 42 U.S.C. § 1983. He has not submitted an application to proceed *in forma pauperis* or paid the filing fee. On at least three (3) occasions, the Court has dismissed civil actions commenced by plaintiff for being frivolous.<sup>1</sup>

Under 28 U.S.C. § 1915(g), "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 is frivolous, malicious, or fails to state a claim upon which relief may be granted," he may not proceed *in forma pauperis* and instead must pay the full \$350.00 filing fee in advance, unless he is under imminent danger of serious physical injury. "Section 1915(g)'s cap on prior dismissed claims applies to claims dismissed both before and after the statute's effective date" of April 26, 1996. *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997).

Plaintiff cannot proceed *in forma pauperis* in this action or any other civil action filed in any

<sup>1</sup> See *Davitt v. Hellig*, 3:08-cv-0604-LRH-VPC; *Davitt v. McDaniel*, 3:09-cv-0028-ECR-RAM; *Davitt v. McDaniel*, 3:09-cv-0074-RCJ-RAM. The Court takes judicial notice of its prior records in the above matters.

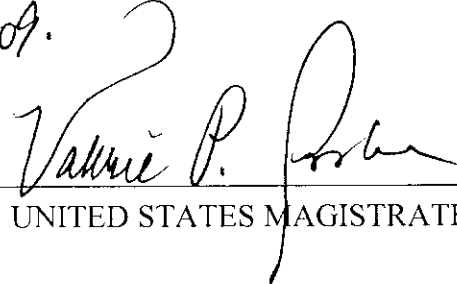
1 federal court because he has had three (3) or more prior actions dismissed for failure to state a claim  
2 upon which relief may be granted, or as frivolous or malicious. Plaintiff has not alleged, and the  
3 subject matter of this action does not indicate, that he is in imminent danger of serious physical  
4 injury. He must pre-pay the filing fee in full.

5 **IT IS THEREFORE ORDERED** that this action will be dismissed without prejudice unless  
6 plaintiff pays the \$350.00 filing fee in full within **thirty (30) days** of entry of this order.

7 **IT IS FURTHER ORDERED** that the Clerk of Court shall send plaintiff two copies of this  
8 order. Plaintiff shall make the necessary arrangements to have one copy of this order attached to the  
9 check paying the filing fee.

10 **IT IS FURTHER ORDERED** that the Clerk of the Court shall retain the complaint.

11 DATED: *September 28, 2009.*

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14 UNITED STATES MAGISTRATE JUDGE  
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