UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KEVIN FERNANDEZ,

Plaintiff,

vs.

ISIDRO BACA et al.,

Defendants.

3:16-cv-00350-RCJ-WGC

ORDER

This is a prisoner civil rights complaint under 42 U.S.C. § 1983. Plaintiff Kevin Fernandez has sued multiple Defendants based on alleged surreptitious poisoning of his food at Northern Nevada Correctional Center. The Court previously denied Plaintiff's application to proceed *in forma pauperis* ("IFP") because he had at least three "strikes" under the Prison Litigation Reform Act and did not allege that he was "under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). Although Plaintiff alleged surreptitious poisoning of his food, he had been transferred to New Hampshire, far from the defendants, so there was no threat of immediate harm. The strikes the Court found were: (1) Case No. 3:13-cv-412, in which Judge Du dismissed for failure to state a claim; (2) Case No. 3:06-cv-511, in which Judge Sandoval dismissed the federal causes of action for failure to state a claim and declined jurisdiction over the state law claims; and (3)–(4) Case No. 1:13-cv-94 in the District of North Dakota, in which the district court dismissed for failure to state a claim, and the Eighth Circuit summarily affirmed

under Eighth Circuit Rule 47A(a), indicating that the Court of Appeals found the appeal to be "frivolous and entirely without merit." The Court of Appeals reversed, ruling: (1) the Eighth Circuit's affirmance in the North Dakota case did not count as a strike, because although the panel cited a circuit rule expressly applicable to appeals that are "frivolous and entirely without merit," the panel did not separately recite those words in its order; and (2) the dismissal of the '511 Case did not count as a strike under the intervening precedent of *Harris v. Mangum*, 863 F.3d 1133 (9th Cir. 2017) because the case had been removed from state court.

In the interim, however, Plaintiff has incurred another strike, bringing the total to at least three, even discounting the two strikes previously discounted by the Court of Appeals. In Case No. 1:17-cv-226 in the District of New Hampshire, the district court dismissed the federal causes of action for failure to state a claim and declined jurisdiction over the state law claims. (*See* R&R, ECF No. 16 in No. 1:17-cv-226 (D.N.H.); Order Adopting R&R, ECF No. 20 in No. 1:17-cv-226 (D.N.H.)). The Court therefore again denies IFP status and defers screening.

CONCLUSION

IT IS HEREBY ORDERED that the Application for Leave to Proceed in Forma Pauperis (ECF No. 1) is DENIED.

IT IS FURTHER ORDERED that Plaintiff shall have thirty (30) days to pay the filing fees. Failure to comply may result in dismissal without prejudice without further notice.

IT IS SO ORDERED.

Dated this May 22, 2018.

ROBERT C. JONES
United States District Judge