

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Apr 06, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DAVID TROUPE,

Plaintiff,

v.

LISA MORROW, TORIN  
MITCHEL, C/O MRS. RUTLAGE,  
SGT MEUSS, SHARON DUKE,  
SCOTT R. BUTTICE, JAMIE L.  
DAVIS, LT CAPT LONG, LT  
MOORE, LISA ROBTOY,  
CRYSTAL CONTRERAS, RANDAL  
GOODENOUGH, SARAH KNAPP,  
DR. KARI RAINER, JONATHAN  
LOPEZ, and KATRINA SUCKOW,

Defendants.

NO: 4:18-CV-5041-RMP

ORDER DENYING LEAVE TO  
PROCEED *IN FORMA PAUPERIS*,  
DISMISSING ACTION AND  
DENYING PENDING MOTIONS AS  
MOOT

By Order filed March 16, 2018, the Court directed Plaintiff to show cause why he should be permitted to proceed *in forma pauperis* under 28 U.S.C. § 1915(g). On March 23, 2018, Plaintiff, a *pro se* prisoner at the Washington State Penitentiary, filed a Reply, ECF No. 10. At the same time, he also filed a Motion for Emergency Protective Order and Expedited Motion, ECF No. 11, which was

ORDER DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS*, DISMISSING ACTION AND DENYING PENDING MOTIONS AS MOOT -- 1

1 noted for hearing on March 30, 2018. The Motion for Emergency Protective Order  
2 and Expedited Motion were considered without oral argument on the date signed  
3 below.

#### 4 **REPLY**

5 Plaintiff David Troupe does not contest that he has qualifying “strikes”  
6 under 28 U.S.C. § 1915(g), but he asserts that “[t]he 3 strike law is ambiguous  
7 since it doesn’t clarify frivolous or malicious and leaves it open to Judges to make  
8 varying decisions on what’s a strike.” ECF No. 10 at 3. Section 1915(g) has been  
9 upheld against numerous constitutional challenges. *See Andrews v. King*, 398 F.3d  
10 1113, 1123 (9th Cir. 2005); *Rodriguez v. Cook*, 169 F.3d 1176, 1178-82 (9th Cir.  
11 1999); *Tierney v. Kupers*, 128 F.3d 1310, 1311-12 (9th Cir 1997). Plaintiff’s  
12 assertion is unavailing.

13 Plaintiff has not shown that he successfully appealed the dismissals of his  
14 actions or appeals as frivolous, malicious, or for failure to state a claim upon which  
15 relief may be granted.<sup>1</sup> He may not challenge those dismissals here. With more

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17 <sup>1</sup> *See Troupe v. Evensen, et al.*, No. 2:13-CV-05037-EFS (E.D. Wash. Aug. 5,  
18 2013) (dismissed for failure to state a claim after being provided an opportunity to  
19 amend the complaint, ECF No. 11, no appeal taken); *Troupe v. Swain et al.*, No.  
20 3:14-CV-05886-BHS (W.D. Feb. 9, 2015) (District Court adopted a Report and  
21 Recommendation to dismiss the action with prejudice for failure to state a claim

1 than three qualifying “strikes” under 28 U.S.C. § 1915(g), Plaintiff must  
2 demonstrate that he was under “imminent danger of serious physical injury” when  
3 he lodged his complaint on March 12, 2018. *Andrews v. Cervantes*, 493 F.3d  
4 1047, 1052-53 (9th Cir. 2007).

5 To support his contention that he is under “imminent danger of serious  
6 physical injury,” Plaintiff asserts that Defendant Correctional Officer Torin  
7 Mitchel has threatened to kill him twice. ECF No. 10 at 2. Plaintiff provides no  
8 information regarding when Defendant Mitchel issued these alleged threats or the  
9 circumstances that prompted them.

10 In the initial complaint, Plaintiff had asserted only one threat issued while  
11 Defendant Mitchel and another officer were apparently attempting to subdue  
12 \_\_\_\_\_  
13 and to count the action as a strike, ECF No. 16, appeal No. 15-35221, dismissed as  
14 untimely, mandate issued July 1, 2015); *Troupe v. Woods, et al.*, No. 3:16-CV-  
15 05077-RBL (W.D. Wash. Mar. 31, 2017) (District Court adopted a Report and  
16 Recommendation to dismiss the action with prejudice and to count the action as a  
17 strike for being frivolous and malicious, ECF No. 101, no appeal taken); *and*  
18 *Troupe v. Swain et al.*, No. 3:16-CV-05380-RJB (W.D. Wash. Jun. 5, 2017)  
19 (District Court dismissed the action with prejudice and counted the action as a  
20 strike for being frivolous and malicious, ECF No. 93, appeal No. 17-35516,  
21 pending).

1 Plaintiff on January 31, 2018. ECF No. 1 at 8. Plaintiff has alleged no facts  
2 indicating Defendant Mitchel is allowed unsupervised contact with Plaintiff.  
3 Indeed, Plaintiff indicated that at least one other person had been present when  
4 Defendant Mitchel had contact with Plaintiff. Plaintiff contends, “even if this  
5 Court doesn’t think a [corrections officer] will kill an inmate[, it] doesn’t diminish  
6 the threat that Troupe feels daily.” ECF No. 10 at 7. Plaintiff’s subjective  
7 feelings, without supporting factual allegations, are not sufficient to avoid  
8 application of 28 U.S.C. § 1915(g).

9 Plaintiff repeats the assertion from his complaint that, on January 31, 2018,  
10 his lower back was “slammed into the concrete floor,” and his wrists were twisted  
11 to the point of injury after which he was denied medical treatment. ECF No. 10 at  
12 4. Plaintiff complains that he experienced severe pain/harm for two weeks  
13 following that incident, which could have been alleviated by “proper treatment and  
14 anti-[inflammatory] meds.” *Id.* He also complains that dirty gauze was used on  
15 his leg on January 31, 2018, to “put his life and limb at risk.” *Id.*

16 The Court notes that Plaintiff admitted in his complaint to receiving medical  
17 treatment on February 1, 2018, when he was prescribed antibiotics. ECF No. 1 at  
18 9. The Court cannot infer from the facts presented that Plaintiff was in imminent  
19 danger of serious physical injury on March 12, 2018, based on incidents occurring  
20 in January.

1 Plaintiff contends that Defendant Jamie Davis told Plaintiff that “custody is  
2 not mental health and he needs to stop complaining.” ECF No. 10 at 5. To  
3 discourage Plaintiff’s complaints, Plaintiff claims Defendant Davis “tortured” him  
4 by telling him that she had tortured animals/rodents. *Id.* Plaintiff accuses  
5 Defendant Davis of taking no action regarding his suicide thoughts/depression, and  
6 allegedly allowing him to go without food and water for over three days. *Id.*  
7 Plaintiff contends that Defendant Davis “showed no concern” for his depression;  
8 that she failed to ask the medical staff to watch Plaintiff closely over the weekend;  
9 and that the lack of water for three days (apparently over that weekend) constituted  
10 “imminent danger of serious physical injury.” *Id.*

11 According to the complaint, this occurred several weeks before Plaintiff  
12 filed his initial complaint. ECF No. 1 at 11. He does not allege that he was  
13 permitted to continue a hunger/water strike beyond three days. The fact Plaintiff  
14 anticipates his release from incarceration in June 2019, and possible future  
15 misbehavior, ECF No. 10 at 11, would seem to obviate an actual suicidal ideation.  
16 Furthermore, Plaintiff has a known propensity to engage in self-harming behavior  
17 to manipulate prison staff, *see Troupe v. Pease, et al.*, No. 4:15-CV-05090-EFS  
18 (Aug. 14, 2017), ECF No. 159 at 2-3.

19 Plaintiff also contends that around February 28, 2018, he was choked  
20 unconscious and kicked while his hands were cuffed behind his back. ECF No. 10  
21 at 6. He does not state by whom, or any circumstances surrounding the incident.

1 An incident nearly two weeks prior to the submission of a complaint is insufficient  
2 to show “imminent danger of serious physical injury.” *See Cervantes*, 493 F.3d at  
3 1056-57 (“[A] prisoner who alleges that prison officials continue with a practice  
4 that has injured him or others similarly situated in the past will satisfy the ‘ongoing  
5 danger’ standard and meet the imminence prong of the three-strikes exception.”).

6 Plaintiff claims that after he submitted his complaint, he was punched in the  
7 stomach, while cuffed and kneeling in his cell on March 13, 2018. ECF No. 10 at  
8 6. He claims no infraction and no report were issued. *Id.* From this, it could be  
9 inferred that Plaintiff was engaging in behavior for which he could have been  
10 infraacted, and for which any contact with his stomach could plausibly have been  
11 either accidental or used to subdue him.

12 Plaintiff complains that he has a broken rib for which he is awaiting an x-  
13 ray. *Id.* He does not state when this occurred, or any circumstances surrounding  
14 the incident. Although Plaintiff contends that he was subjected to physical assaults  
15 between January 31, 2018, and March 17, 2018, he presents no facts from which  
16 the Court could infer that the contact with Plaintiff was excessive under the  
17 circumstances or subjected him to the imminent danger of serious physical injury.

18 Plaintiff concludes that “[e]very day Troupe is at the mercy of the  
19 Defendants and with the continued assaults, threats, spiting [sic] in food there’s  
20 always a danger of serious physical injury because so far no one at all has helped  
21 Troupe.” ECF No. 10 at 9-10. He contends that “every single day the Defendants

1 have the option to cuff him up, kneel him down, assault him and have done so  
2 repetedly [sic] for almost 2 months.” *Id.* at 10. He asserts that his “safety should  
3 in any Court of Law outweigh any 3 strike rule.” *Id.* Unfortunately, Plaintiff has  
4 failed to present facts which would satisfy the imminent danger exception of 28  
5 U.S.C. § 1915(g).

6 Based on the facts presented, Plaintiff has not made a sufficient showing of  
7 “imminent danger of serious physical injury” in the complaint he lodged on March  
8 12, 2018. *See* ECF No. 2. Liberally construing Plaintiff’s submissions in the light  
9 most favorable to him, the Court finds that his assertions of speculative future  
10 injury fail to overcome the preclusive effects of 28 U.S.C. § 1915(g). Therefore,  
11 **IT IS ORDERED** the application to proceed *in forma pauperis*, ECF No. 3, is  
12 **DENIED.**

13 Although granted the opportunity to do so, Plaintiff did not pay the \$400.00  
14 fee (\$350.00 filing fee, plus \$50.00 administrative fee) to commence this action.  
15 Therefore, **IT IS ORDERED** this action is **DISMISSED without prejudice** for  
16 failure to comply with 28 U.S.C. § 1914. **IT IS FURTHER ORDERED** that all  
17 pending motions are **DENIED as moot.**

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