

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA**

Weston v. Deputy Sheriff #2549, et al.

Weston · No. 24-cv-04213-PCP · Decided July 23, 2025

OPINION

Weston v. Deputy Sheriff 2549

PER CURIAM.

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4 UNITED STATES DISTRICT COURT

5 NORTHERN DISTRICT OF CALIFORNIA

6 7 ANDRE D. WESTON, Case No. 24-cv-04213-PCP 8 Plaintiff, ORDER TO SHOW CAUSE
WHY

PAUPER STATUS SHOULD NOT BE

9 v. REVOKED

10 DEPUTY SHERIFF #2549, et al., Re: Dkt. Nos. 6, 9 Defendants. 11 12 13 Andre D. Weston,
an inmate at Santa Rita Jail in Dublin, California, filed this pro se civil 14 rights action under 42
U.S.C. § 1983. Dkt. Nos. 1, 4, 5. United States Magistrate Judge Virginia 15 DeMarchi reviewed
the Complaint pursuant to 28 U.S.C. § 1915A and dismissed it with leave to 16 amend. Dkt No.
13. In a separate order, Judge DeMarchi granted Mr. Weston’s motion to proceed 17 in forma
pauperis. Dkt. No. 12. Mr. Weston subsequently filed an amended complaint. Dkt. No. 18 14
 (“Amended Complaint”). 19 It now has come to the Court’s attention that Mr. Weston may have
had more than three 20 prior cases dismissed as “strikes” under 28 U.S.C § 1915(g). The Court
therefore orders Mr. 21 Weston to show cause why his in forma pauperis status should not be
revoked. 22 A. Legal Standard

23 In 1996, Congress decided that a prisoner may not bring a civil action in forma pauperis
24 under 28 U.S.C. § 1915, 25 if the prisoner has, on 3 or more prior occasions, while incarcerated
26 or detained in any facility, brought an action or appeal in a court of the United States that was
dismissed on the grounds that it is 27 frivolous, malicious, or fails to state a claim upon which
relief may be granted, unless the prisoner is under imminent danger of serious 1 28 U.S.C. §
1915(g). Section 1915(g) requires that the court consider prisoner actions dismissed 2 before, as
well as after, the statute’s 1996 enactment. *Tierney v. Kupers*, 128 F.3d 1310, 1311–12 3 (9th Cir.
1997). Relying on the statute’s command that such a prisoner may proceed “in no event,” 4 the
Ninth Circuit has held that this bar is triggered by a prisoner’s history of filing frivolous 5
litigation without consideration of the merits of the current action. See *El-Shaddai v. Zamora*, 833
6 F.3d 1036, 1042 (9th Cir. 2016) (emphasis in original). 7 For purposes of a dismissal that may

be counted under § 1915(g), the phrase “fails to state a claim on which relief may be granted” parallels the language of Federal Rule of Civil Procedure 12(b)(6) and carries the same interpretation, the word “frivolous” refers to a case that is “of little weight or importance: having no basis in law or fact,” and the word “malicious” refers to a case “filed with the ‘intention or desire to harm another.’” *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) (citation omitted). Only cases within one of these three categories can be counted as strikes for § 1915(g) purposes, so the mere fact that the prisoner has filed many cases does not alone warrant dismissal under § 1915(g). See *Andrews*, 398 F.3d at 1121. Rather, dismissal of an action under § 1915(g) should only occur when, “after careful evaluation of the order dismissing an [earlier] action, and other relevant information, the district court determines that the action was dismissed because it was frivolous, malicious or failed to state a claim.” *Andrews*, 398 F.3d at 1121. B. Strikes *Andrews* requires that a prisoner be given notice of the potential applicability of § 1915(g), by either the district court or the defendants, but also requires the prisoner to bear the ultimate burden of persuasion that § 1915(g) does not bar pauper status for him. *Andrews*, 398 F.3d at 1121. *Andrews* implicitly allows the court to sua sponte raise the § 1915(g) problem but requires the court to notify the prisoner of the earlier dismissals that might support a § 1915(g) dismissal and allow the prisoner an opportunity to be heard on the matter before dismissing the action. *Andrews*, 398 F.3d at 1120. A dismissal under § 1915(g) means that a prisoner cannot proceed with his action as a pauper under § 1915, but he still may pursue his claims if he pays the full fee. Mr. Weston is now given notice that the Court believes the following dismissals may be counted as strikes for purposes of § 1915(g):

1. *Weston v. Winfield*, Case No. 2:93-cv-02016-WBS-JFM (E.D. Cal. March 8, 1994) (order dismissing complaint as frivolous upon a magistrate’s recommendation);
2. *Weston v. Montaubaum*, Case No. 2:94-cv-1722-DFL-JFM (E.D. Cal. March 14, 1995) (order dismissing complaint as frivolous);
3. *Weston v. Department of Corrections*, Case No. 2:94-cv-1739-LKK-GGH (E.D. Cal. Oct. 19, 1995) (order dismissing complaint, after a chance to amend, as frivolous); and
4. *Weston v. Alameda Sheriff Dept.*, Case No. 3:96-cv-0449-FMS (E.D. Cal. March 11, 20, 1996) (order dismissing complaint after a chance to amend).

The Court evaluated these cases based on the dismissal orders and docket sheets in them. See *Andrews*, 398 F.3d at 1120 (noting that the docket records may sometimes be sufficient but that the actual court files may sometimes need to be consulted). Having evaluated these cases, the Court concludes that each of these dismissals likely counts as a strike. As to the *Weston v. Winfield* and *Weston v. Montaubaum* actions, it is well-established that a dismissal for frivolity constitutes a strike. See 28 U.S.C. § 1915(g) (an action “dismissed on the grounds that it is frivolous” is a strike) As to the *Weston v. Department of Corrections* and *Weston v. Alameda Sheriff Department* actions, the Ninth Circuit has concluded that a dismissal counts as a strike where qualifying defects are identified, the plaintiff is given leave to amend to remedy those defects, and the plaintiff fails to file an amended complaint. See *Harris v. Mangum*, 863 F.3d 1133, 1141–43 (9th Cir. 2017)

(holding that the order dismissing with leave to amend “rang the 23 PLRA bells,” and that the plaintiff’s decision not to amend merely delayed the acquisition of the 24 strike). 25 C. Imminent Danger Exception 26 Despite having accrued three strikes pursuant to section 1915(g), a plaintiff may still be 27 able to proceed in forma pauperis if he can show that he is in imminent danger of serious physical 1 that he is in imminent danger of serious physical injury. The plain language of the imminent 2 danger clause indicates that “imminent danger” is to be assessed at the time of the filing of the 3 complaint. See *Andrews v. Cervantes*, 493 F.3d 1047, 1053 (9th Cir. 2007) (“*Andrews II*”). It is 4 sufficient if the complaint “makes a plausible allegation that the prisoner faced ‘imminent danger 5 of serious physical injury’ at the time of filing.” *Id.*; see, e.g., *id.* at 1055 (allegation that plaintiff 6 was at risk of contracting HIV or hepatitis C was sufficient to bring his complaint within the 7 imminent danger exception); cf. *Medberry v. Butler*, 185 F.3d 1189, 1193 (11th Cir. 1999) (no 8 ongoing danger where plaintiff had been placed in administrative segregation following physical 9 assaults and before he filed his complaint). In this circuit, “requiring a prisoner to allege[] an 10 ongoing danger ... is the most sensible way to interpret the imminency requirement.” *Andrews II*, 11 493 F.3d at 1056 (internal quotation marks omitted). 12 In addition, “the imminent danger exception to § 1915(g) requires a nexus between the 13 alleged imminent danger and a prisoner’s complaint.” *Ray v. Lara*, 31 F.4th 692, 695 (9th Cir. 14 2022). To qualify under the imminent danger exception, “a three-strikes prisoner must allege 15 imminent danger of serious physical injury that is both fairly traceable to unlawful conduct alleged 16 in his complaint and redressable by the court.” *Id.* (emphases added). 17 Here, Mr. Weston does not allege that he was in “imminent danger” at the time of filing. 18 See generally *Am. Compl.* Rather, Mr. Weston claims that he was subjected to an act of excessive 19 force on September 7, 2023. See *Am. Compl.* at 2, 5 (specifying the event occurred on that single 20 date). Mr. Weston does not claim that he was subjected to excessive force on more than one 21 occasion, much less that the excessive force was still being applied to his person when he opened 22 this action on July 3, 2024. See *Dkt. Nos.* 1 (letter seeking assistance from the court), 4 (clerk’s 23 notice stating that an action had been opened in an abundance of caution and advising Mr. Weston 24 to file a complaint); see also *Houston v. Lack*, 487 U.S. 266 (1988) (announcing the mailbox rule 25 for prisoners). Because the allegedly unconstitutional actions had occurred and concluded well 26 before the time of filing, it appears that any danger Mr. Weston faced was not “imminent” when 27 this action was filed. Mr. Weston therefore likely does not qualify for the imminent danger D. Conclusion In light of these dismissals, and because Mr. Weston does not appear to be under imminent 2 danger of serious physical injury, he is ORDERED TO SHOW CAUSE in writing filed no later 3 than August 22, 2025, why in forma pauperis status should not be revoked and this action should 4 not be dismissed pursuant to 28 U.S.C. § 1915(g). 5 In the alternative to showing cause why the action should not be dismissed, Mr. Weston 6 may avoid dismissal by paying the filing fee by the deadline.! 7 8 IT ISSO ORDERED. 9 Dated: July 23, 2025 10 il May 12 P. Casey Pitts United States District Judge 13 «14 16 17 Oo Z 18 19 20 21 22 23 24 25 %6 '

For Mr. Weston's benefit, the Court notes that this order does not reach the merits of his action. Even if Mr. Weston pays the filing fee, his allegations still must survive the Court's screening 97 || before they may be served. See 28 U.S.C. § 1915A(a)-(b) (requiring district courts to conduct a pre-service review of any complaint filed by a prisoner, and to dismiss any complaint which is 28 frivolous, malicious, fails to state a claim upon which relief may be granted, or which seeks monetary relief from an immune defendant).