

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

Driver v. Jacinto

No. 2:24-cv-3800-DAD-JDP (P), Findings and Recommendations (E.D. Cal. May 22, 2025) · No. 2:24-cv-3800-DAD-JDP (P) · Decided May 22, 2025

OPINION

(PC) Driver v. Jacinto

PER CURIAM.

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8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 11 BILLY DRIVER, JR., Case No. 2:24-cv-3800-DAD-JDP (P) 12 Plaintiff,

13 v. FINDINGS AND RECOMMENDATIONS

14 JACINTO, et al., 15 Defendants. 16 17 Plaintiff has filed an amended complaint, ECF No. 11, and a request to proceed in forma 18 pauperis, ECF No. 4. As I found in my previous order, plaintiff is a “three-striker” within the 19 meaning of Title 28 U.S.C. § 1915(g). He has filed at least three cases that were dismissed for 20 failure to state a claim upon which relief can be granted: (1) Driver v. Martel, No. 08-cv-1910- 21 GEB-EFB (E.D. Cal. Sept. 15, 2009) at ECF Nos. 28 & 32; (2) Driver v. Kelso, No. 2:11-cv- 22 2397-EFB-P (E.D. Cal. Aug. 9, 2012) at ECF Nos. 17 & 20; (3) Driver v. Epp, No. 2:12-cv-0589- 23 EFB (E.D. Cal. Sept. 5, 2012) at ECF Nos. 7 & 8. 24 When a prisoner-plaintiff is a three-striker and files an application to proceed in forma 25 pauperis, a court will generally only grant such an application if the complaint demonstrates that 26 the plaintiff was in imminent physical danger at the time of filing. In plaintiff’s case, the 27 allegations in the initial complaint did not seem to demonstrate that he was in imminent physical 28 harm, but the allegations were difficult to understand. Plaintiff alleged that he had safety 1 concerns with some number of unidentified officers in December 2024. ECF No. 1 at 1. 2 Defendant Jacinto allegedly told him that a certain prison yard at was safe. Id. He disagreed 3 based on events that occurred more than two years prior but did not allege that any harm befell 4 him or was realistically imminent. Id. at 1-2. Plaintiff did allege that another inmate in his cell 5 was stabbed to death at some unspecified earlier time, but he did not connect this vague claim to 6 his fears about yard safety. Id. 7 Absent additional context and more detailed allegations, I determined that it was unclear 8 whether plaintiff could realistically claim that he was in imminent danger on or around December 9 30, 2024, when he filed his complaint. See *Andrews v. Cervantes*, 493 F.3d 1047, 1053 (9th Cir. 10 2007) (“We are in agreement with all of these cases in holding that it is the circumstances at the 11 time of the filing of the complaint that matters for purposes of the ‘imminent danger’ exception to 12 §1915(g).”). I dismissed the complaint with

leave to amend and informed plaintiff that should 13 his amended complaint fail to show that he was in imminent danger at the time of filing, I would 14 recommend that plaintiff's application to proceed in forma pauperis be denied. 15 Plaintiff has filed an amended complaint, but it does not demonstrate that plaintiff was in 16 imminent physical danger at the time of filing—in December 2024. ECF No. 11. In his amended 17 complaint, plaintiff alleges that he informed defendant Jacinto of his safety concern with Captain 18 Konrad and that Jacinto told him that he should not have been transferred back to California State 19 Prison, Sacramento. Id. at 3. Jacinto also said in a loud voice that plaintiff should have been 20 killed a long time ago because of his criminal conviction. Id. Plaintiff alleges that he informed 21 defendant Dr. Wallace and defendant officer Alvarado that he had a safety concern with Captain 22 Konrad. Id. 23 Plaintiff's allegations are insufficient to demonstrate that he faced imminent danger of 24 physical injury at the time he filed the initial complaint. Plaintiff has not alleged any facts 25 demonstrating he was subjected to any physical harm, either at the time of filing or now, much 26 less a "serious physical injury." See Cervantes, 493 F.3d at 1055-56. Additionally, his alleged 27 harm—defendants' failure to protect him from an unidentified harm—is a generalized fear of 28 potential harm, which is insufficient. Id. at 1053. 1 Plaintiff's application for leave to proceed in forma pauperis should therefore be denied 2 | pursuant to § 1915(g). Plaintiff should be required to submit the appropriate filing fee in order to 3 | proceed with this action. 4 Accordingly, it is RECOMMENDED that plaintiff's application to proceed in forma 5 || pauperis, ECF No. 4, be DENIED and plaintiff be directed to tender the filing fee within twenty- 6 | one days of any order adopting these recommendations. 7 These findings and recommendations are submitted to the United States District Judge 8 | assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(). Within fourteen days of 9 | service of these findings and recommendations, any party may file written objections with the 10 | court and serve a copy on all parties. Any such document should be captioned "Objections to 11 | Magistrate Judge's Findings and Recommendations," and any response shall be served and filed 12 | within fourteen days of service of the objections. The parties are advised that failure to file 13 | objections within the specified time may waive the right to appeal the District Court's order. See 14 | Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Yist, 951 F.2d 1153 (9th Cir. 15 1991). 16 7 IT IS SO ORDERED. 18 (1 Oy — Dated: _ May 22, 2025 q———

19 JEREMY D. PETERSON

UNITED STATES MAGISTRATE JUDGE

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