

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

Israel Maldonado-Ramirez v. Francisco et al.

No. 1:23-cv-00162-HBK (PC), United States District Court for the Eastern District of California (March 2,
2023)

OPINION

(PC)Ramirez v. Francisco

PER CURIAM.

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8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 11 ISRAEL MALDONADO-RAMIREZ, Case No. 1:23-cv-00162-HBK (PC) 12 Plaintiff,
ORDER TO ASSIGN DISTRICT JUDGE

13 v. FINDINGS AND RECOMMENDATIONS TO

DENY PLAINTIFF’S MOTION FOR LEAVE

14 FRANCISCO ET AL., TO PROCEED IN FORMA PAUPERIS

UNDER 28 U.S.C. § 1915 (g) 1

15 Defendants.

FOURTEEN-DAY OBJECTION PERIOD

16 (Doc. No. 2) 17 18 Plaintiff Israel Maldonado-Ramirez, a prisoner incarcerated at Madera
County Jail, 19 initiated this action by filing a pro se prisoner civil rights complaint under 42
U.S.C. § 1983 on

20 February 2, 2023. (Doc. No. 1, “Complaint”). Plaintiff seeks to proceed in this action in forma
21 pauperis. (Doc. No. 2). For the reasons discussed below, the undersigned recommends the 22
district court deny Plaintiff’s IFP motion under 28 U.S.C. § 1915(g) because Plaintiff has had at
23 least three actions or appeals that constitute strikes, and the Complaint does not establish that
24 Plaintiff meets the imminent danger exception. 25 /// 26 27 1 The undersigned submits these
factual findings and recommendations to the District Court pursuant to 28 U.S.C. § 636(b)(1)(B)
and Local Rule 302 (E.D. Cal. 2022). 28

1 BACKGROUND AND FACTS

2 The Complaint identifies the following as defendants: Bar Associate Francisco, Brah 3 Cona,
and the Madera County Police Department. (Doc. No. 1 at 1-2). The Complaint is difficult 4 to
decipher and is disjointed. To the extent discernable and liberally construed, Plaintiff’s 5
complaint alleges that unspecified personal property was wrongly taken (Claims 1, 3), he suffered
6 retaliation by unspecified individuals (Claim 2), he was denied Due Process in unspecified court
7 or grievance proceedings (Claims 4 and 5), his request for medical leave has not been granted 8

(Claims 6 and 7), and an outside legal organization declined to pursue a case on his behalf (Claim 9 8). (See generally *id.*)

10 APPLICABLE THREE STRIKE LAW

11 The “Three Strikes Rule” states: 12 In no event shall a prisoner bring a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while 13 incarcerated or detained in any facility, brought an action or appeal in the United States that was dismissed on grounds that it was 14 frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious 15 physical injury. 16 28 U.S.C. § 1915(g). As part of the Prison Litigation Reform Act, the Three Strikes Rule was 17 enacted to help curb non-meritorious prisoner litigation. See *Lomax v. Ortiz-Marquez*, 140 S. Ct. 18 1721, 1723 (2020) (citations omitted)). Under § 1915(g), prisoners who have repeatedly brought 19 unsuccessful suits may be barred from bringing a civil action and paying the fee on a payment 20 plan once they have had on prior occasions three or more cases dismissed as frivolous, malicious, 21 or for failure to state a claim. *Id.*; see also *Andrews v. Cervantes*, 493 F.2d 1047, 1052 (9th Cir. 22 2007). 23 For a dismissal to count as a strike, the dismissal had to be on a “prior occasion,” meaning 24 the order dismissing the case must have been docketed before plaintiff initiated the current case. 25 See § 1915(g). The reviewing court then looks to the basis of prior dismissals. *Knapp v. Hogan*, 26 738 F.3d 1106, 1109 (9th Cir. 2013). A dismissal counts as a strike when the dismissal of the 27 action was for frivolity, maliciousness, or for failure to state a claim, or an appeal was dismissed 28 for the same reasons. *Lomax*, 140 S. Ct. at 1723 (citing Section 1915(g)); see also *Washington v. 1 Los Angeles Cty. Sheriff’s Dep’t*, 833 F.3d 1048 (9th Cir. 2016) (reviewing dismissals that count 2 as strikes); *Coleman v. Tollefson*, 135 S. Ct. 1759, 1761 (2015) (dismissal that is on appeal counts 3 as a strike during the pendency of the appeal). It is immaterial whether the dismissal for failure to 4 state a claim to count was with or without prejudice, as both count as a strike under § 1915(g). 5 *Lomax*, 140 S. Ct. at 1727. When a district court disposes of an in forma pauperis complaint 6 requiring the full filing fee, then such a complaint is “dismissed” for purposes of §1915(g). *Louis 7 Butler O’Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008). 8 Once a prisoner-plaintiff has accumulated three strikes, he/she may not proceed without 9 paying the full filing fee, unless “the complaint makes a plausible allegation” that the prisoner 10 “faced ‘imminent danger of serious physical injury’ at the time of filing” of the complaint. 11 *Andrews v. Caervantes*, 493 F.3d 1047, 1051-52 (9th Cir. 2007) (addressing imminent danger 12 exception for the first time in the Ninth Circuit). The court must construe the prisoner’s “facial 13 allegations” liberally to determine whether the allegations of physical injury are plausible. 14 *Williams v. Paramo*, 775 F.3d 1182, 1190 (9th Cir. 2015). 15 In order to avail oneself of this narrow exception, “the PLRA requires a nexus between 16 the alleged imminent danger and the violations of law alleged in the prisoner’s complaint.” *Ray 17 v. Lara*, 31 F. 4th 692, 700-701 (9th Cir. Apr. 11, 2022) (adopting nexus test). “In deciding 18 whether such a nexus exists, we will consider (1) whether the imminent danger of serious 19 physical injury that a three-

strikes litigant alleges is fairly traceable to unlawful conduct asserted 20 in the complaint and (2) whether a favorable judicial outcome would redress that injury.” *Id.* at 21 700 (adopting test as articulated by Second Circuit, citation omitted). The three-strikes litigant 22 must meet both requirements of the nexus test to proceed. *Id.* 23 Assertions of imminent danger may be rejected as overly speculative, fanciful, or 24 “conclusory or ridiculous.” *Andrews*, 493 F.3d at 1057, fn. 11. Similarly, “vague and utterly 25 conclusory assertions” of imminent danger are insufficient. *White v. Colorado*, 157 F.3d 1226, 26 1231–32 (10th Cir. 1998). Instead, the “imminent danger” exception exists “for genuine 27 emergencies,” where “time is pressing” and “a threat . . . is real and proximate.” *Lewis v. 28 Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002). Thus, conditions that posed imminent danger to a 1 plaintiff at some earlier time are immaterial, as are any subsequent conditions. *Cervantes*, 493 2 F.3d at 1053; *Blackman v. Mjening*, 1:16-cv-01421-LJO-GSA-PC, 2016 WL 5815905, at *1 3 (E.D. Cal. Oct. 4, 2016). 4 Upon a finding that the plaintiff is barred by the three strikes provision of 28 U.S.C. § 5 1915(g), some courts have found that the proper procedure is to dismiss the case without 6 prejudice to re-filing the action upon pre-payment of fees at the time the action is refiled. 7 *Hardney v. Hampton*, No. 2:20-cv-01587-WBS-DMC-P, 2021 WL 4896034, at *4 (E.D. Cal.

8 Oct. 20, 2021), report and recommendation adopted, No. 2:20-cv-01587-WBS-DMC-P, 2021 9 WL 6051701 (E.D. Cal. Dec. 21, 2021) (citing *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 10 2002); *Campbell v. Vance*, No. CIV S-05-1163 RRB, 2005 WL 3288400, at *1 (E.D. Cal. Nov. 11 30, 2005). Other courts have first afforded the plaintiff an opportunity to pay the filing fee 12 before dismissing the case. See *Gorby v. Internal Revenue Service*, Fresno, Case No. 1:21-cv- 13 320-NONE-HBK, 2021 WL 1339146, report and recommendation adopted in part and rejected 14 in part, 2021 WL 2227810 (E.D. Cal. June 2, 2021)(rejected immediate dismissal, instead 15 permitting 30 days to pay filing fee, and if not, then requiring dismissal); *Trujillo Cruz v. White*, 16 No. 2:19-cv-1304-KJM-DMC, 2019 WL 4917192 (Oct. 4, 2019), report and recommendation 17 adopted in part and rejected in part, *Trujillo-Cruz v. White*, 2020 WL 1234201 (E.D. Cal. March 18 13, 2021)(rejected immediate dismissal, instead permitting 30 days to pay filing fee, and if not 19 then requiring dismissal). 20 The preceding law must be taken in the context of congressional intent when enacting the 21 Prison Litigation Reform Act. As the United States Supreme Court noted in *Lomax*, “[t]he point 22 of the PLRA . . . was to cabin not only abusive but also simply meritless prisoner suits.” *Lomax*, 23 140 S.Ct. at 1726. And the three strikes provision, in particular, was aimed “to disincentivize 24 frivolous prisoner litigation.” *Hoffman v. Pulido*, 928 F.3d 1147, 1148-49 (9th Cir. 2019).

25 ANALYSIS

26 A. Plaintiff has three or more qualifying strikes 27 A review of the Pacer Database reveals that Plaintiff has filed more than 20 civil actions 28 1 or appeals in a court of the United States.2 Although not exhaustive, for purposes of these 2 findings and recommendations, each of the following cases are properly deemed qualifying 3 § 1915(g) strikes and each was entered before

Plaintiff commenced the instant action: 4 5 Date of Order Case Style Disposition Ramirez v. Khale et al., No. Adopting Findings and

6 November 18, 2021

1:21-cv-1213-DAD-EPG Recommendations to dismiss 7 (E.D. Cal.) complaint as frivolous. Ramirez v. Khale, No. 1:21- Adopting Findings and October 27, 2021 8 cv-1237-NONE-GSA (E.D. Recommendations to dismiss Cal.) complaint as barred by Heck 9 v. Humphrey, 512 U.S. 477

(1994) from face of

10 complaint. 11 Ramirez v. Perez, No. 1:22- Adopting Findings and November 21, 2022 cv-564-JLT-SAB (E.D. Recommendation to dismiss 12 Cal.) complaint for failure to state a cognizable claim for relief, 13 failure to comply with a court 14 order, and failure to prosecute. See Harris v. 15 Mangum, 863 F.3d 1133, 1143 (9th Cir. 2017) (finding 16 dismissal counts as 1915(g) strike “when (1) a district 17 court dismisses a complaint 18 on the ground that it fails to state a claim, (2) the court 19 grants leave to amend, and

(3) the plaintiff then fails to

20 file an amended complaint.”). 21 As evidenced above, Plaintiff has had three or more qualifying strikes for purposes of § 22 1915(g). 23 B. The Imminent Danger Exception Does Not Apply 24 Because Plaintiff has three-qualifying strikes, he may not proceed IFP unless the 25 Complaint contains plausible allegations that Plaintiff is in imminent danger of serious physical 26 injury as of the date the complaint is filed. Andrews v. Cervantes, 493 F.3d 1047, 1052-53 (9th 27 28 2 <http://pacer.usci.uscourts.gov>

1 Cir. 2007). Liberally construing the Complaint, there are no facts that indicate Plaintiff was in 2 imminent danger of serious physical injury at the time he filed the action. Plaintiff’s Complaint, 3 to the extent discernible, centers on the wrongful taking of his property, an unspecified form of 4 retaliation, due process violations, denial of his request for medical leave, and the ACLU’s failure 5 to pursue his case. (See generally *id.*). The nature of Plaintiff’s claims do not lend themselves to 6 imminent danger of serious physical injury, nor does Plaintiff allege any facts that articulate a risk 7 of imminent physical danger. 8 While Plaintiff uses certain words that may give the perception of physical injury such as 9 “die” (e.g., “do it for me to die forever”) (*Id.* at 4) and “kill” (e.g., “if they keep on do it ima keep 10 on killing them”) (*Id.* at 10), such phrases are insufficient to qualify as imminent danger of 11 serious physical harm. The law requires that there be a nexus between the imminent danger that 12 Plaintiff alleges and the claims he asserts in the Complaint. Without providing more facts, simply 13 using words related to physical injury does not show imminent danger under § 1915(g). Cruz v. 14 Pfeiffer, No. 1:20-CV-01522-AWI-SAB-PC, 2021 WL 289408, at *2 (E.D. Cal. Jan. 28, 2021). 15 Accordingly, Plaintiff does not satisfy either prong of the nexus test set forth above. 16 Accordingly it is ORDERED: 17 The Clerk of the Court randomly assign this case to a District Judge. 18 It is further RECOMMENDED: 19 Plaintiff’s motion to proceed in forma pauperis (Doc. No. 2) be DENIED under § 1915(g) 20 due

to his three-strike status and his failure to meet the imminent danger exception. 21 //// 22 //// 23 ////

24 NOTICE TO PARTIES

25 These findings and recommendations will be submitted to the United States district judge 26
assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14) 27
days after being served with these findings and recommendations, a party may file written 28
objections with the Court. The document should be captioned “Objections to Magistrate Judge’s 1
| Findings and Recommendations.” Parties are advised that failure to file objections within the 2 |
specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 3
| 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)). 4 > |

Dated: _ March 2, 2023 Mile. ☐☐☐ foareA Zacks

6 HELENA M. BARCH-KUCHTA

4 UNITED STATES MAGISTRATE JUDGE

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