

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 19-7649

KENNETH H. NEWKIRK,

Plaintiff - Appellant,

v.

WARDEN KISER,

Defendant - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at
Roanoke. Glen E. Conrad, Senior District Judge. (7:19-cv-00648-GEC-PMS)

Submitted: June 17, 2020

Decided: July 16, 2020

Before WYNN, DIAZ, and FLOYD, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

Kenneth H. Newkirk, Appellant Pro Se. Margaret Hoehl O'Shea, OFFICE OF THE
ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kenneth H. Newkirk appeals the district court's order denying his application for leave to proceed in forma pauperis (IFP) and dismissing his 42 U.S.C. § 1983 (2018) complaint and motion for a preliminary injunction without prejudice. On appeal, Newkirk challenges the court's conclusion that he failed to adequately allege that he is in imminent danger of serious physical injury. We vacate the district court's order and remand for further proceedings.

Under the Prison Litigation Reform Act, a prisoner like Newkirk, who has had three or more actions or appeals dismissed as frivolous, malicious, or for failure to state a claim, may not proceed without prepayment of fees unless he is in "imminent danger of serious physical injury." 28 U.S.C. § 1915(g) (2018). We review de novo a district court's conclusion that a three-strikes litigant has not adequately alleged that he is in imminent danger of serious physical injury. *See Richey v. Dahne*, 807 F.3d 1202, 1206 (9th Cir. 2015).

To satisfy the imminent danger criterion, a prisoner must show that the danger "exist[ed] at the time the complaint or the appeal [wa]s filed, not when the alleged wrongdoing occurred." *Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003). "[T]he exception focuses on the risk that the conduct complained of threatens continuing or future injury, not on whether the inmate deserves a remedy for past misconduct." *Id.*; *see Pettus v. Morgenthau*, 554 F.3d 293, 296 (2d Cir. 2009) (reiterating that "a three-strikes litigant is not excepted from the filing fee if he alleges a danger that has dissipated by the time a complaint is filed"; collecting cases).

“[T]he imminent danger exception is essentially a pleading requirement subject to the ordinary principles of notice pleading.” *Vandiver v. Prison Health Servs., Inc.*, 727 F.3d 580, 585 (6th Cir. 2013) (internal quotation marks omitted). “[A] prisoner who alleges that prison officials continue with a practice that has injured him or others similarly situated in the past will satisfy the ‘ongoing danger’ standard and meet the imminence prong of the three-strikes exception.” *Andrews v. Cervantes*, 493 F.3d 1047, 1056-57 (9th Cir. 2007). And, “once a prisoner satisfies the exception to the three-strikes rule and otherwise qualifies for IFP status, the district court must docket the entire complaint and resolve all of its claims, without requiring the upfront payment of the filing fee.” *Id.* at 1053-54; *see Chavis v. Chappius*, 618 F.3d 162, 171-72 & n.7 (2d Cir. 2010) (collecting cases).

In his complaint, Newkirk described one incident in which he was allegedly subjected to excessive force and asserted that this was not an isolated occurrence. To the contrary, he claimed that prison staff members regularly assault inmates without cause and threaten inmates who complain. *See Andrews*, 618 F.3d at 1056 (“The common definition of imminent . . . does not refer only to events that are already taking place, but to those events ready to take place or hanging threateningly over one’s head.” (internal quotation marks omitted)). Accordingly, we conclude that Newkirk articulated “a pattern of misconduct evidencing the likelihood of imminent serious physical injury.” *Martin*, 319 F.3d at 1050; *see Bazemore v. Best Buy*, 957 F.3d 195, 200 (4th Cir. 2020) (reiterating that pro se pleadings must be liberally construed).

We vacate the district court's order and remand with instructions that the court grant Newkirk's IFP application so that he may proceed with his complaint. We express no opinion on the merits of Newkirk's allegations, and we deny as moot his motions for bail or release pending appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the material before this court and argument would not aid the decisional process.

VACATED AND REMANDED

Appendix @ A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

KENNETH NEWKIRK,)	CASE NO. 7:19CV00648
)	
Plaintiff,)	
v.)	MEMORANDUM OPINION
)	
WARDEN KISER,)	By: Glen E. Conrad
)	Senior United States District Judge
Defendant.)	

Kenneth Newkirk, a Virginia inmate proceeding pro se, filed this action under 42 U.S.C. § 1983, alleging that prison officials have wrongfully transferred him to a prison facility where he feels unsafe. Newkirk has not prepaid the requisite filing fee and applies to proceed in forma pauperis. Upon review of the record, the court finds that the action must be summarily dismissed without prejudice based on Newkirk's prior civil actions that have been dismissed as frivolous or for failure to state claim.

Under 28 U.S.C. § 1915(b), all prisoner litigants suing government entities or officials are required to pay court filing fees in full, either through prepayment or through installments withheld from the litigant's inmate trust account. Section 1915(g) denies the installment payment method to prisoners who have "three strikes" — those prisoners who have had three previous cases or appeals dismissed as frivolous, malicious, or for failure to state a claim, unless the three-striker inmate shows "imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

Newkirk has at least three prior actions or appeals that have been dismissed as frivolous or malicious, or for failure to state a claim. See, e.g., Newkirk v. Shaw, No. 3:14CV426-HEH, 2014 WL 4161991, at *3 (E.D. Va. Aug. 19, 2014); Newkirk v. Circuit Court, No. 3:14CV372-HEH, 2014 WL 4072212, at *3 (E.D. Va. Aug. 14, 2014); Newkirk v. Lerner, No. 3:13CV364-

APPENDIX B

HEH, 2014 WL 587174, at *2-5 (E.D. Va. Feb. 14, 2014); Newkirk v. Chappell, No. 3:13CV73-HEH, 2013 WL 5467232, at *3 (E.D. Va. Sept. 30, 2013). See also Newkirk v. Clarke, 3:18CV205-HEH (E.D. Va. Apr. 13, 2018) (dismissing under § 1915(g)). Accordingly, Newkirk may proceed in forma pauperis (without prepayment of the filing fee) only if he can show that he faces imminent danger of serious physical injury. 28 U.S.C. § 1915(g).

Newkirk states that he is confined at the "SAM's mental health program" at Wallens Ridge State Prison. He alleges that Wallens Ridge officers are cruel to inmates and do not wear body cameras; visitors are told not to drink the water; the religious diets are cold and unsanitary in unspecified ways; and he cannot get adequate mental health treatment. Newkirk describes one occasion when a correctional officer allegedly bent his left hand upward while escorting him to the shower and caused him pain for which he took Motrin. This isolated event and Newkirk's unsupported generalizations about Wallens Ridge do not support a finding that he was in continuing, imminent danger of serious physical harm when he filed this action.

Because the records reflect that Newkirk has at least three "strikes" under § 1915(g) and he has not demonstrated that he is in imminent danger of physical harm, the court denies him the opportunity to proceed in forma pauperis and dismisses the complaint without prejudice. An appropriate order will issue this day.

The Clerk is directed to send copies of this memorandum opinion and accompanying order to plaintiff.

ENTER: This 3rd day of October, 2019.



Senior United States District Judge

FILED: August 24, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7649
(7:19-cv-00648-GEC-PMS)

KENNETH H. NEWKIRK

Plaintiff - Appellant

v.

WARDEN KISER

Defendant - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Wynn, Judge Diaz, and Judge
Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix C