

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

MICHAEL JOHN MODENA,

Plaintiff,

-against-

9:12-CV-0884 (LEK/CFH)

UNITED STATES BUREAU OF  
PRISONS; *et al.*,

Defendants.

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**DECISION and ORDER**

**I. INTRODUCTION**

Presently before the Court is a Complaint brought pursuant to Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narcotics, 403 U.S. 388 (1971), by *pro se* Plaintiff Michael John Modena (“Plaintiff”). Dkt. No. 1 (“Complaint”). This action, commenced by Plaintiff in the United States District Court for the Western District of New York, was transferred to this District by Order of the Honorable John T. Curtain, Chief United States District Judge for the Western District of New York. Dkt. No. 3. Plaintiff has not paid the filing fee and seeks leave to proceed with this action *in forma pauperis*. Dkt. No. 7 (“IFP Application”). For the reasons set forth below, Plaintiff’s IFP Application is denied, and this action is dismissed *sua sponte* pursuant to 28 U.S.C. § 1915 unless Plaintiff pays the Court’s filing fee of \$350.00 within thirty days of the filing date of this Decision and Order.

**II. DISCUSSION**

Where a plaintiff seeks leave to proceed *in forma pauperis*, a court must determine whether the plaintiff has demonstrated sufficient economic need to proceed without prepaying the \$350.00 filing

fee in full.<sup>1</sup> In this case, Plaintiff has demonstrated economic need and has filed the inmate authorization form required in the Northern District of New York. See IFP Appl. Before granting *in forma pauperis* status, the Court must also determine whether the “three strikes” provision of 28 U.S.C. § 1915(g) bars Plaintiff from proceeding *in forma pauperis* and without prepayment of the filing fee. Section 1915(g) provides:

[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding [*in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated 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 frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).<sup>2</sup> The manifest intent of Congress in enacting this “three strikes” provision was to curb prison inmate abuses and to deter the filing of multiple, frivolous civil rights suits by prison inmates. Tafari v. Hues, 473 F.3d 440, 443-44 (2d Cir. 2007). The question of whether the dismissal of a prior action qualifies as a strike for purposes of § 1915(g) is a matter of statutory interpretation and, as such, a question for the courts. Id. at 442-43.<sup>3</sup>

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<sup>1</sup> “28 U.S.C. § 1915 permits an indigent litigant to commence an action in a federal court without prepayment of the filing fee that would ordinarily be charged.” Cash v. Bernstein, No. 09-CV-1922, 2010 WL 5185047, at \*1 (S.D.N.Y. Oct. 26, 2010). “Although an indigent, incarcerated individual need not prepay the filing fee . . . at the time of filing, he must subsequently pay the fee, to the extent he is able to do so, through periodic withdrawals from his inmate accounts.” Id. (citing 28 U.S.C. § 1915(b); Harris v. City of New York, 607 F.3d 18, 21 (2d Cir. 2010)).

<sup>2</sup> If Plaintiff is not barred from proceeding *in forma pauperis*, the Court must consider whether the causes of action stated in the Complaint are, *inter alia*, frivolous or malicious, or if they fail to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2)(B); see also 28 U.S.C. § 1915A(b)(1). In this case, because Plaintiff’s IFP Application is denied, the Court does not address the potential merit of Plaintiff’s claims.

<sup>3</sup> The Second Circuit has expressed its view that the time for determination of “strikes” is only when the § 1915(g) issue is ripe for adjudication, and that because of the potentially significant

In determining whether a dismissal satisfies the “failure to state a claim” prong of the statute, courts have drawn upon the provisions of Rule 12(b)(6) of the Federal Rules of Civil Procedure for guidance, particularly in light of the similarity in phrasing utilized in the two provisions. *Id.* at 442 (citing Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005)). In determining whether a dismissal satisfies the “frivolous” prong of the statute, courts have been guided by the Supreme Court’s decision in Neitzke v. Williams, 490 U.S. 319 (1989). In Neitzke, the Supreme Court addressed the question “whether a complaint filed *in forma pauperis* which fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) is automatically frivolous within the meaning of 28 U.S.C. § 1915(d).” *Id.* at 320.<sup>4</sup> In noting that neither the statute nor the accompanying congressional reports defined the term “frivolous,” the Neitzke Court found that “close variants of the definition of legal frivolousness” articulated in the Sixth Amendment case of Anders v. California, 386 U.S. 738 (1967), had properly been adopted by the courts of appeals “as formulae for evaluating frivolousness under § 1915(d).” Neitzke, 490 U.S. at 325.<sup>5</sup> The Supreme Court further stated that, “[b]y logical extension, a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact.” *Id.* Thus, the Supreme Court held that the term “frivolous,”

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consequences flowing from such a finding, a court should not, when dismissing an inmate complaint, contemporaneously signal whether the dismissal should count as a “strike” for the purposes of that section. Deleon v. Doe, 361 F.3d 93, 95 (2d Cir. 2004); see also Snider v. Melindez, 199 F.3d 108, 115 (2d Cir. 1999) (“We . . . doubt whether the entry of a strike is properly considered at the time an action is dismissed”).

<sup>4</sup> At the time Neitzke was decided, 28 U.S.C. § 1915(d) authorized federal courts to dismiss a claim filed *in forma pauperis* “if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.” 490 U.S. at 324. The Prison Litigation Act of 1995, Pub. Law 104-134, 110 Stat. 1321, amended and recodified § 1915(d) as § 1915(e)(2).

<sup>5</sup> In Anders, the Supreme Court had stated that an appeal on a matter of law is frivolous where “[none] of the legal points [are] arguable on their merits.” 386 U.S. at 744.

when applied to a complaint being reviewed under § 1915, “embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.” Id.

The Court has reviewed Plaintiff’s extensive litigation history on the Federal Judiciary’s Public Access to Court Electronic Records (“PACER”) Service.<sup>6</sup> Upon review, the Court finds that since 1999, Plaintiff has commenced more than thirty-six actions in numerous district courts across the country. Indeed, the three strikes provision of 28 U.S.C. § 1915(g) was enforced against Plaintiff in the Northern District of Ohio as early as October 31, 2003. See Modena v. Bureau of Prisons, No. 4:03 CV 1938, Memorandum of Opinion and Order (N.D. Ohio filed Oct. 31, 2003) (“Modena v. BOP”).<sup>7</sup> The Court finds, moreover, that since 2003, Plaintiff has brought at least three more actions in the district courts that have been dismissed on grounds that qualify as “strikes” for purposes of 28 U.S.C. § 1915(g). Modena v. United States, No. 06-CV-2865, Order of Dismissal (D. Minn. filed Jan. 30, 2007) (dismissing *sua sponte* plaintiff’s *pro se* prisoner civil rights action pursuant to 28 U.S.C. § 1915A(b) on the ground that it is frivolous, malicious, or fails to state a claim on which relief can be granted); Modena v. United States, No. 10-CV-0911, 2011 WL 2670577, at \*8 (W.D. Mich. July 7, 2011) (dismissing *sua sponte* plaintiff’s *pro se* prisoner civil rights action pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b) because defendants are immune and plaintiff fails to state a claim);

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<sup>6</sup> See U.S. Party/Case Index, <http://pacer.uspci.uscourts.gov/cgi-bin/dquery.pl> (last visited Sept. 25, 2012).

<sup>7</sup> Citing the decision of the Sixth Circuit Court of Appeals in Baxter v. Rose, 305 F.3d 486, 489 (6th Cir. 2002), the court in Modena v. BOP noted that “[f]ailure to exhaust administrative remedies constitutes a failure to state a claim upon which relief can be granted.” Modena v. BOP, at 2 n.1. Unlike the Sixth Circuit, the Second Circuit has expressed doubt that a dismissal for failure to exhaust administrative remedies may be found to be a strike. See Snider, 199 F.3d at 112 (“[W]e believe that ‘fail[ure] to state a claim,’ as used in Sections 1997e(c) and 1915(g) of the PLRA, does not include failure to exhaust administrative remedies—at least absent a finding that the failure to exhaust permanently bars the suit. However, we need not decide this question.”).

Modena v. Neff, 91 Fed. Cl. 29 (Fed. Cl. 2010) (dismissing *sua sponte* plaintiff's complaint with prejudice for failing to allege one or more claims cognizable under the Tucker Act, 28 U.S.C. § 1491(a)(1));<sup>8</sup> see also Modena v. United States, No. 1:12-cv-208, 2012 WL 1150819, at \*\*3-4 (W.D. Mich. Apr. 5, 2012) (dismissing plaintiff's complaint alleging that he is falsely imprisoned because FCI Ray Brook "is outside the jurisdiction of the United States" with prejudice as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b)).<sup>9</sup>

In considering Plaintiff's *in forma pauperis* application, the Court is also mindful that the ability to litigate *in forma pauperis* is a privilege that can be denied, revoked, or limited based upon a showing of prior abuses. See In re Anderson, 511 U.S. 364, 365-66 (1994). The authority of a court to deny or limit the privilege is implicit in the permissive, rather than compulsory, language of the controlling *in forma pauperis* statute, which provides that "[a] court of the United States *may* authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore." 28 U.S.C. § 1915(a)(1) (emphasis added); see also In re McDonald, 489 U.S. 180, 184 (1989). For this reason, courts are regarded as

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<sup>8</sup> While some courts have concluded that dismissals for lack of subject matter jurisdiction do not qualify as strikes, see, e.g., Thompson v. DEA, 492 F.3d 428, 438 (D.C. Cir. 2007), the Court finds that the better reasoned approach is that set forth by the Second Circuit in Tafari, 473 F.3d at 442 (holding that dismissal of an appeal as premature does not qualify as a strike): "However, we believe that the label attached to the defect is of far less significance than whether the defect is remediable." Here, upon review of plaintiff's complaint and the order of dismissal, it is clear that plaintiff's filing in the Federal Court of Claims naming as defendants a federal district judge and assistant United States attorney, identifying himself as a "copyrighted and bonded man" and claiming false imprisonment, "human trafficking [sic]" and "peonage" lacked an arguable basis in law or fact and was patently frivolous and not "remediable."

<sup>9</sup> Plaintiff appealed the dismissal of his complaint to the United States Court of Appeals for the Sixth Circuit. Modena v. United States, No. 1:12-cv-208, Notice of Appeal (W.D. Mich. filed Apr. 23, 2012). That appeal is pending so may not properly be considered a strike as of the date this action was filed.

possessing discretionary authority to deny *in forma pauperis* status to prisoners who have abused the privilege even when the strict requirements of § 1915(g) have not been met. See Butler v. U.S. Dep't of Justice, 492 F.3d 440, 444-45 (D.C. Cir. 2007); Gasaway v. Bureau of Prisons, No. 9:11-CV-1223, Dkt. No. 22, Decision and Order (N.D.N.Y. filed May 30, 2012) (Kahn, J.) (revoking plaintiff's *in forma pauperis* status on discretionary grounds based upon his history as an abusive litigant); Gasaway v. Perdue, No. 9:11-CV-1272, Dkt. No. 24, Decision and Order (N.D.N.Y. filed May 30, 2012) (Kahn, J.) (same).

Here, Plaintiff's history of prior abuses is well chronicled and provides ample ground for the denial of his IFP Application. Not only has Plaintiff filed more than thirty-five actions in various federal courts, he has proven himself to be vexatious and indeed incorrigible when proceeding *pro se*, and he has placed an unnecessary burden on the federal courts and their personnel. In Modena v. Modena, No. 1:08-cv-0107 (W.D. Mich. filed Feb. 7, 2008), a purported declaratory judgment action by Plaintiff against his estranged wife to declare respective rights in a parcel of real estate, Plaintiff's post-conviction litigation history was recounted by the court in the following terms:

Thereafter, Mr. Modena deluged this court with frivolous challenges to his conviction, leading Chief Judge Bell to enter an order on May 6, 2003, requiring screening of all Mr. Modena's submissions to determine whether they have any facial merit. The Court of Appeals refused Mr. Modena's request for mandamus relief from Chief Judge Bell's order. Heedless of the court's order, Mr. Modena has continued to deluge the court with dozens of frivolous filings. Additionally, the records of the Sixth Circuit Court of Appeals indicate over twenty appellate proceedings involving Mr. Modena. This case is another example of plaintiff's relentlessly frivolous lawsuits.

Modena v. Modena, 1:08-cv-0107, Report-Recommendation (W.D. Mich. filed Feb. 7, 2008);

Judgment of Dismissal (filed Oct. 22, 2008).<sup>10</sup> Similarly, in Modena v. United States, No. 1:12-cv-208, 2012 WL 1150819, at \*3 n.1 (W.D. Mich. Apr. 5, 2012), the court noted that Plaintiff had filed more than two dozen cases, most of which challenged his transfers to various federal prisons.

Dismissing the complaint in that action as “wholly without merit” and “frivolous,” the court stated that “[t]he instant action appears to be another futile attempt by Plaintiff to be returned to FCI Milan.”

Based upon the foregoing, the Court exercises its inherent discretionary authority by denying Plaintiff’s request for *in forma pauperis* status and requiring him to prepay, in full, the requisite filing fee before proceeding in this action.

Because the Court has denied Plaintiff’s request for *in forma pauperis* status under its inherent discretionary authority rather than under the three strikes provision, the Court need not consider whether the “imminent danger” exception set forth in § 1915(g) applies. Even so, the Court has, for the sake of completeness, considered whether Plaintiff has demonstrated that he was in “imminent danger of serious physical harm” when he filed this action, and concludes that he has not. Congress enacted the “imminent danger” exception to create a safety valve to prevent impending harms to prisoners otherwise barred from proceeding *in forma pauperis*. See Malik v. McGinnis, 293 F.3d 559, 563 (2d Cir. 2002). “[F]or a prisoner to qualify for the imminent danger exception, the danger must be present when he files his complaint—in other words, 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.” Pettus v. Morgenthau, 554 F.3d 293, 296 (2d Cir. 2009) (citing Malik, 293 F.3d at 562-63) (other citations omitted); see also Polanco v. Hopkins, 510 F.3d 152 (2d Cir. 2007) (stating that imminent danger

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<sup>10</sup> The court described plaintiff’s pleading as “virtually incomprehensible, as it is written in the pseudo-legalese employed by the tax protester movement in this country.” Id.

claims must be evaluated at the time the complaint is filed, rather than at the time of the events alleged). In addition, “§ 1915(g) allows a three-strikes litigant to proceed [*in forma pauperis*] only when there exists an adequate nexus between the claims he seeks to pursue and the imminent danger he alleges.” Pettus, 554 F.3d at 296.

Here, the only claim relevant to the “imminent danger” exception is Plaintiff’s claim that Officer Laynee assaulted him in January 2012 in the special housing unit at FCI Ray Brook. See Compl. at 2.<sup>11</sup>

Plaintiff does not allege that prison staff used excessive force against him on other occasions either before or after the January 2012 incident, nor does he express fear or concern regarding the possibility of future assaults. Construing his Complaint with the leniency that the Court must afford a *pro se* litigant, Lucas v. Miles, 84 F.3d 532, 535 (2d Cir. 1996), and even assuming that these allegations suffice to state an Eighth Amendment excessive force claim, these allegations do not plausibly suggest that Plaintiff faced an imminent danger of serious physical injury when he brought this action on May 17, 2012.

As a result, Plaintiff’s IFP Application is denied pursuant to 28 U.S.C. § 1915. If Plaintiff wishes to proceed with this action, he must pay the full filing fee of \$350.00. If Plaintiff fails to pay the filing fee in full within thirty days of the filing date of this Decision and Order, the Clerk will enter

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<sup>11</sup> Although not named in the caption of the Complaint, Officer Laynee, Unit Manager Snyder, Case Manager LaVigne, and Officer Shipman are identified as Defendants in the body of the Complaint. Compl. at 2-3. The Clerk is directed to revise the docket to add these individuals as Defendants. In addition to the alleged assault, Plaintiff alleges that he was improperly disciplined for possession of “contraband ‘UCC’ documents” and tax documents, and complains generally that his efforts to “clear his ‘prisoner bond’” relating to his 2009 criminal conviction in United States District Court for the Western District of Michigan have been improperly interfered with by prison staff. Id. at 3-7.

judgment dismissing this action without prejudice without further order of the Court.

### III. CONCLUSION

Accordingly, it is hereby:

**ORDERED**, that the Clerk revise the docket to reflect that Officer Laynee, Unit Manager Snyder, Case Manager LaVigne, and Officer Shipman are Defendants in this action; and it is further

**ORDERED**, that Plaintiff's IFP Application (Dkt. No. 7) is **DENIED** pursuant to 28 U.S.C. § 1915; and it is further

**ORDERED**, that Plaintiff's earlier filed IFP Application (Dkt. No. 2) is **DENIED as moot**; and it is further

**ORDERED**, that this action shall be **DISMISSED without prejudice**, without further order of this Court, unless **within thirty (30) days** of the filing date of this Decision and Order, Plaintiff pays the full filing fee of **three hundred and fifty dollars (\$350.00)**; and it is further

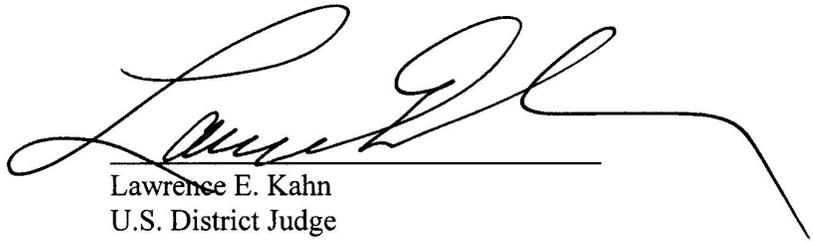
**ORDERED**, that, upon Plaintiff's compliance with this Decision and Order, the Clerk of the Court shall return the file to the Court for review of the Complaint in accordance with 28 U.S.C. § 1915A and consideration of the pending motions; and it is further

**ORDERED**, that the Clerk of the Court shall serve a copy of this Decision and Order on Plaintiff.

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Decision and Order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

**IT IS SO ORDERED.**

DATED:       October 11, 2012  
              Albany, New York



Lawrence E. Kahn  
U.S. District Judge