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The "Three Strikes" Rule In Prisoner Civil Rights Litigation

Part 1 (this month)

- **Introduction**
- **Prison Litigation Reform Act Provisions**
- **U.S. Supreme Court Decision**
- **What is a "Strike?"**

Part 2 (next month)

- **What is Not a "Strike?"**
- **Imminent Danger Exception to the Rule**
- **Constitutional Challenges to the Rule**
- **Resources and References**

"For it's one, two, three strikes, you're out,
At the old ball game."
--Take Me Out to the Ball Game (1908)
song by Jack Norworth and Albert Von Tilzer

❖ Introduction

The Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e, was first enacted in 1996 in response to an increase in prisoner litigation in the federal courts. It was intended, among other things, to reduce the burden of meritless and frivolous litigation. Prisoners typically lack substantial funds to pursue litigation, but have a constitutional right of access to the courts, including for the purpose of seeking remedies for violations of their constitutional or statutory rights by prison officials and employees. Accordingly, they are allowed to file lawsuits *in forma pauperis* (as paupers) without having the funds to pay the entirety of court filing fees upfront. (Under 28 U.S.C. Sec. 1915(b) of the PLRA, however, they still must ultimately pay the entire filing fees in full, but are allowed to do so under a complex formula involving an initial fee of 20% of the greater of their average balance in their inmate account or the average deposits to the account for the preceding six months, followed by monthly installment payments).

Of special concern was the fact that some prisoners engaged in a practice of filing multiple lawsuits over time that were frivolous, malicious, or simply failed to state a proper legal claim on which relief could be granted. A specific provision of the Prison Litigation Reform Act popularly known as the "three strikes" rule is designed to lessen this problem, barring prisoners who repeatedly do so from filing further lawsuits as paupers after "three strikes."

This two-part article will look at this provision in some detail. In this first part, we look at the provision itself, a U.S. Supreme Court decision interpreting it, and how the courts have defined a "strike" for purposes of the rule. Next month's article examines how courts have defined dismissals of lawsuits which do not constitute "strikes" for purposes of the rule, the imminent danger of serious physical harm exception to the rule, and constitutional challenges to the rule, concluding with a list of useful and relevant resources and references.

❖ Prison Litigation Reform Act Provisions

The Prison Litigation Reform Act, in pertinent part provides in 28 U.S.C. § 1915(g):

> "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [*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."

The rule applies to "prisoners," in other words, to persons who are incarcerated when they file their lawsuit. The PLRA defines a prisoner as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 28 U.S.C. § 1915(h).

In *Jackson v. Johnson*, #04-10419, 475 F.3d 261 (5th Cir. 2007), the court stated that persons released on parole into the general public are not prisoners for purposes of the PLRA, even if their lawsuit involves incidents that occurred while they were incarcerated, but a person who was confined in a halfway house was still a prisoner subject to the three strikes rule.

Those incarcerated as a result of civil proceedings, such as sex offenders, are not prisoners according to *Michau v. Charleston County S.C.*, #04-7726, 434 F.3d 725 (4th Cir. 2006), except that if their civil commitment was in connection with still pending criminal charges,

such as an offender held civilly while incompetent to stand trial, they are also pretrial detainees, so that the rule still applies. *Gibson v. Commissioner of Mental Health*, #04-Civ-4350, 2006 U.S. Dist. Lexis 27428 (Unpub. S.D.N.Y.), But see *Ring v. Knecht*, #04-1487, 130 Fed. Appx. 51 (Unpub. 7th Cir. 2005), holding that a civilly committed Illinois sex offender under the Illinois Sexually Dangerous Persons Act is subject to the three strikes rule, barring him from filing further civil rights lawsuits as a pauper after three such lawsuits have been found to be frivolous. His criminal charges were held in abeyance, and hence he was still a pretrial detainee.

A person committed after a finding of not guilty by reason of insanity is not a prisoner for purposes of the PLRA. *Kolocotronis v. Morgan*, #01-1308, 247 F.3d 726 (8th Cir. 2001).

The three strikes rule applies to civil lawsuits or appeals, which generally does not include habeas corpus or other similar challenges to a criminal conviction or a sentence. *Jennings v. Natrona County Det. Ctr. Med. Facility*, # 98-8032, 175 F.3d 775 (10th Cir. 1999).

The PLRA and its three strikes rule applies to prisoner litigation filed in federal court, and does not apply to state court lawsuits, although some states may have their own equivalent rules. In *Lakes v. State*, #2917, 333 S.C. 332, 510 S.E.2d 223 (S.C. App. 1998), the court ruled that the prisoner could proceed as a pauper in state court, since state law had no provision similar to the PLRA's three strikes rule.

The "three strikes" provision applies to lawsuits filed by prisoners while incarcerated, even if they are later released. Additionally, a court can rely on the docket sheet entries of prior dismissals to determine whether the prisoner has "strikes," and the court had no obligation to examine the actual orders of dismissal. The three strikes rule is not an affirmative defense that has to be raised in the defendant's pleadings, and the court can therefore apply the requirement itself. *Harris v. City of New York*, #09-0081, 607 F.3d 18 (2nd Cir. 2010).

A federal trial court rejected prisoner's argument that he did not have three strikes against him under the "three strikes" rule, based on the claim that at the time he filed one of his prior civil lawsuits against a county jail, he was released overnight and then rearrested the following day. Even if he was briefly released, this did not change the fact that he was in custody at the time the lawsuit in question was filed, so that it could properly be counted as one of his three strikes. *Buford v. Mounts*, #02-6187, 2007 U.S. Dist. Lexis 41648, 2007 WL 1574577 (E.D. Cal.).

❖ U.S. Supreme Court Decision

The U.S. Supreme Court has ruled that a prisoner who had accumulated three previously qualifying lawsuit dismissals ("strikes") under the "three strikes rule" of the Prison

Litigation Reform Act, 28 U.S.C. Sec. 1915(a) could not file an additional lawsuit as a pauper while his appeal of one of those dismissals was still pending.

Under the "three strikes" provision of the law the inmate litigant had, on three or more prior occasions, brought an action or appeal that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief could be granted.

While the third dismissal was pending on appeal, he filed four additional federal lawsuits, moving to proceed in forma pauperis in each. The trial court refused to permit him to proceed in forma pauperis in any of those lawsuits, holding that a prior dismissal is a strike even if it is pending on appeal. The U.S. Supreme Court agreed with that interpretation, rejecting the prisoner's argument that a dismissal should only be counted as a "strike" after review on appeal of it was completed.

A literal reading of the statute's phrases "prior occasion" and "was dismissed," the Court stated, was consistent with the statute's discussion of actions and appeals, it was supported by the way in which the law ordinarily treated trial court judgments, and it was supported by the statute's purpose to filter out bad claims and facilitate consideration of good claims. A dismissal is an action taken by a single court, not a series of events.

To refuse to count a prior dismissal because of a pending appeal, the Court stated, would produce a "leaky filter," since a prisoner would be able to file "many new lawsuits" before finally reaching the end of a frequently lengthy appellate process. *Coleman v. Tollefson*, #13-1333, 135 S. Ct. 1759, 191 L. Ed. 2d 803, 2015 U.S. Lexis 3201.

The prisoner also argued that if the dismissal of a third complaint counts as a third strike, a litigating inmate would lose the ability to appeal as a pauper from that strike itself. He argued that this was a result that Congress "could not possibly" have intended. Because the prisoner in this case was not appealing from a third strike trial court dismissal in this case, the Court declined to address that issue. The prisoner's position on this, however, was supported by the U.S. Solicitor General, contending that a trial court dismissal qualified as a strike only if it occurred in a "prior, *different*, lawsuit."

On this issue, see *Henslee v. Keller*, #11-6707, 681 F.3d 538 (4th Cir. 2012), in which a prisoner claimed that a correctional facility failed to enforce a grooming policy requiring that each inmate barber have three interchangeable razor heads, with one being disinfected while another was in use. He argued that this exposed him to a risk of infection.

He sought to proceed on the lawsuit as a pauper and the trial court dismissed the claim, which was the plaintiff's third dismissal; for failure to state a claim. A federal appeals court interpreting the "three strikes rule" of the Prison Litigation Reform Act ruled that the dismissal of the immediate claim could not count as the third strike for purposes of the rule,

as it was not a third "prior" dismissal. Counting it as the third strike would effectively insulate the dismissal itself from appellate review.

In accord is *Lopez v. U.S. Dept. of Justice*, #06-2409, 2007 U.S. App. Lexis 9403 (Unpub. 3rd Cir.), ruling that a prisoner was improperly denied permission to proceed as a pauper under the "three strikes" rule when one of the "strikes" relied on by the trial court was the dismissal of a lawsuit which was still then on appeal. Such a dismissal does not count as a "strike" under the statute until the prisoner either waives or exhausts his appeals rights. Further, the fact that an appeals court subsequently did uphold the dismissal of the prior lawsuit did not alter the result, since the statute only conditions the right to bring the lawsuit as a pauper on the number of "strikes" existing at the time the lawsuit is initially filed, and does not authorize a court to revoke status as a pauper if a plaintiff prisoner subsequently receives an additional "strike."

❖ What is a "Strike?"

What then constitutes a "strike?" It is, first of all, a dismissal of the lawsuit or appeal, rather than a ruling on the merits against the prisoner. The statute (which admittedly does not actually use the term "strike"), refers to instances in which the pending civil action or appeal is dismissed as: 1). frivolous, 2). malicious, 3). failing to state a claim upon which relief can be granted.

A legally frivolous lawsuit fails to raise even an arguable question of law, or in which it is apparent from the complaint itself that the claim is barred by a defense (such as the statute of limitations or immunity), or which is based on an "indisputably meritless legal theory." *Neitzke v. Williams*, #87-1882, 490 U.S. 319 (1989). Lawsuits can also, of course, be factually frivolous, putting forth a fantastic or delusional scenario, such as "the warden magically turned me into a toad."

Lawsuits dismissed as malicious are those filed for an improper purpose, such as harassment or otherwise boiling down to an abuse of the legal process. Examples are repetitive litigation, *Pittman v. Moore*, #92-2688, 980 F.2d 994 (5th Cir, 1993), or lawsuits clearly filed for the purpose of seeking vengeance on someone rather than to seek a remedy for an asserted legal right, *Spencer v. Rhodes*, #86-1258, 656 F. Supp. 458 (E.D.N.C. 1987), aff'd, *Spencer v. Rhodes*, #87-7556, 826 F.2d 1061 (Unpub. 4th Cir. 1987).

Dismissal for failure to state a claim on which relief may be granted means that, even assuming every allegation in the complaint is true, they do not add up to a legal violation that a court can remedy. See *Jones v. Bock*, #05-7058, 549 U.S. 199 (2007).

Lawsuits need not be in forma pauperis cases in order to be a strike for purposes of the PLRA three strikes rule. They merely need to be cases filed in federal court previously by the prisoner that were dismissed for one or more of the enumerated reasons. *Duvall v. Miller*, #96-4014, 122 F.3d 489 (7th Cir. 1997). Also of interest is that the three strikes rule has been used to count as strikes federal lawsuits filed by prisoners before the PLRA was enacted, so long as they were dismissed for one of the three enumerated reasons. *Welch v. Galie*, #99-0229, 207 F.3d 130 (2d Cir. 2000).

An appeal of a lawsuit dismissed as frivolous, abusive, or for failure to state a claim can itself count as a separate strike, but only if the appeals themselves were also dismissed as frivolous, abusive, or failing to state a claim. *Robbins v. Switzer*, #96-1053, 104 F.3d 895 (7th Cir. 1997). An appeals court decision that affirms the trial court's ruling, rather than specifying one of the enumerated reasons for dismissing the appeal, is not a strike. *Jennings v. National County Det. Ctr. Med. Facility*, #98-8035, 175 F.3d 775 (10th Cir. 1999).

Some decisions indicate that the entire lawsuit must be dismissed to constitute a strike, and that the mere dismissal of one or several claims for the enumerated reasons, while other claims survive is not sufficient. In *Tolbert v. Stevenson*, #09-8051, 635 F.3d 646 (4th Cir. 2011), the court held that the three strikes provision applies only when three of the prisoner's prior lawsuits have been entirely dismissed as frivolous, malicious, or failing to state a claim. The trial court therefore acted erroneously in regarding a plaintiff prisoner as having "three strikes" when only some claims in each of three prior lawsuits had been dismissed on such grounds.

Similarly, in *Tafari v. Hues*, #04-Civ-5564, 539 F. Supp. 2d 694 (S.D.N.Y. 2008), when a prisoner's lawsuit includes a number of claims, and one or some claims are dismissed for failure to state a claim, but other claims are allowed to proceed, the court ruled that the partial dismissal of the complaint does not constitute a "strike" for purposes of the "three strikes" provision of 28 U.S.C. Sec. 1915(g). Imposing such a "strike" while allowing the prisoner to proceed with other claims in the complaint would not further the purpose of the statute to deter frivolous lawsuits.

On the other hand, in *Pointer v. Wilkinson*, #06-3393, 502 F.3d 369 (6th Cir. 2007), a federal appeals court ruled that the dismissal of a lawsuit in which some claims were dismissed for failure to state a claim and other claims were dismissed for failure to exhaust available administrative remedies, the dismissal counts as a strike for purposes of the three strikes rule. The appeals court found that the whole purpose of the "three strikes" rule would be undermined if prisoners could avoid getting a "strike" simply by adding

"unexhausted" claims to a lawsuit containing claims that would otherwise be summarily dismissed on the merits.

In *Larson v. Gonzales*, #08-0740, 2008 U.S. Dist. Lexis 81555, 2008 WL 4601569 (E.D. Calif.), a prisoner was barred from proceeding as a pauper in his lawsuit claiming that he was illegally housed in administrative segregation, when he had previously had three lawsuits dismissed as frivolous or for failure to state a claim. A prior lawsuit challenging the banning of tobacco as a civil rights violation counted as a "strike," since a later lawsuit found to have possible merit was not identical, instead revolving around the ban of snuff and similar tobacco substitutes.

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