AELE Monthly Law Journal

ISSN 1935-0007
Cite as: 2016 (7) AELE Mo. L. J. 301
Jail & Prisoner Law Section – July 2016

The "Three Strikes" Rule In Prisoner Civil Rights Litigation

Part 1 (last month)

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

Part 2 (this month)

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

This is part two of a two-part article. To read part one, click here.

❖ What is Not a "Strike?"

Prisoners may have many dismissed lawsuits without suffering three strikes, or even one. The mere fact that twenty-two prior actions filed by prisoner had been dismissed did not suffice to show that he had suffered "three strikes" under the Prison Litigation Reform Act. The burden was on the defendants to show that at least three of these cases had been dismissed as frivolous, malicious, or for failure to state an assertable claim. Dismissed habeas petitions and actions filed while the plaintiff was in the custody of immigration authorities without facing criminal charges did not count as "strikes" under the rule. *Andrews v. King*, #02-17440, 398 F.3d 1113 (9th Cir. 2005).

In *Richey v. Dahne*, #12-36045, 807 F.3d 1202 (9th Cir. 2015), a prisoner was entitled to proceed as a pauper in an appeal from the dismissal of a complaint that arguably constituted his third "strike" under the "three strikes rule" of the Prison Litigation Reform Act, since it was not a strike upon a "prior" occasion. A fourth case that the prisoner lost did not constitute a "strike" as it was not dismissed as frivolous or for failure to state a claim. Because the trial judge in that prior case considered evidence submitted by the

defendant, the decision should be considered a grant of summary judgment, rather than a "strike."

Cases dismissed on the basis of absolute or qualified immunity do not constitute strikes. An inmate sought to proceed as a pauper in a federal civil rights lawsuit, but the trial court denied them permission to do so and dismissed the complaint because the plaintiff had "three strikes" within the meaning of the Prison Litigation Reform Act, 28 U.S.C. Sec. 1915(g). The third of those cases had been dismissed after the trial court found that the sole named defendant was entitled to prosecutorial immunity. A federal appeals court ruled that cases dismissed on the basis of immunity are not among the types of dismissals listed as "strikes" in the statute, so that a third dismissal was not a strike. The dismissal of the immediate case, therefore, was vacated. *Castillo-Alvarez v. Krukow*, #14-2263, 768 F.3d 1219 (8th Cir. 2014).

In *Feathers v. McFaul*, # 07-3930, 2008 U.S. App. Lexis 8909 (Unpub. 6th Cir.), while four prior lawsuits filed by the plaintiff prisoner had been dismissed, two of them were dismissed on the basis that he had failed to adequately affirmatively state exhaustion of remedies in his complaints, a requirement that the court later eliminated. Those two dismissals, therefore, were not for frivolous or malicious litigation or failure to state a claim, and did not count as "strikes" for purposes of the rule. A dismissal of the prisoner's lawsuit for failure to protect him from assault by another inmate while in protective custody was therefore overturned.

Dismissal of a case for a procedural defect will not ordinarily constitute a strike. Mere dismissal of an appeal on the basis of the filing of a premature notice of appeal did not constitute a "strike" for purposes of the "three strikes" rule of the Prison Litigation Reform Act, 28 U.S.C. Sec. 1915(g), since such a dismissal was based on a curable procedural flaw, unlike a dismissal for making a frivolous claim or for failure to state a claim on which relief can be granted. *Tafari v. Hues*, #05-0958, 472 F.3d 440 (2nd Cir. 2007).

Similarly, the "routine" dismissal of a lawsuit over prison conditions because of the failure to exhaust available administrative remedies is not a "strike" for purposes of the Prison Litigation Reform Act's "three strikes" rule. *Green v. Young*, #04-7252, 454 F.3d 405 2006 U.S. App. Lexis 18685 (4th Cir. 2006).

❖ Imminent Danger Exception to the Rule

The sole stated statutory exception to the three strikes rule is when the prisoner alleges that they are faced with an "imminent danger" of death or serious bodily harm. In one case, however, a federal appeals court stated that it could not presume that a prisoner faced a

threat of imminent death or serious physical injury merely because he claimed that he had been denied his heart medication, when he failed to describe either the medical condition resulting in the prescription or that he suffered a physical injury after he did not receive the medication. As a result, the court upheld the trial judge's decision denying the prisoner, who had previously had "three strikes," permission to proceed as a pauper in his federal civil rights lawsuit. *Skillern v. Deputy Warden Paul*, #06-11440, 2006 U.S. App. Lexis 24841 (Unpub. 11th Cir.).

On the other hand, a female prisoner who claimed that prison officials put her in danger and caused gang members to threaten her by starting rumors that she was a convicted sex offender and changing her prison records could proceed with her appeal as a pauper despite having previously suffered "three strikes" by having lawsuits dismissed as frivolous. She specifically alleged that she faced an imminent danger at the time she filed the notice of appeal. *Williams v. Paramo*, #13-56004, 775 F.3d 1182 (9th Cir. 2015).

The imminent danger can arise from general prison conditions according to some courts. In one such case, a plaintiff's claim that he was being subjected to the danger of exposure to communicable diseases because of a facility's housing practices and failure to screen prisoners for such diseases was found to fall within this exception to the "three strikes rule." *Andrews v. Cervantes*, #04-17459, 493 F.3d 1047 (9th Cir. 2007).

The danger must be a present imminent one—not incidents in the past. A prisoner claimed that the defendant prison officials were responsible for using excessive force against him on several occasions. After the lawsuit was dismissed, he appealed, and sought an order giving him the trial transcript for free on the basis of poverty. Denying this request, the appeals court noted that he was not--and could not--proceed as a pauper because he had "three strikes" (meritless lawsuits), and the exception for prisoners in imminent danger of serious physical injury did not apply. *Maus v. Baker*, #13-2420, 747 F.3d 926 (7th Cir. 2013).

Also see *Judd v. Furgeson*, #01-4217, 239 F. Supp. 2d 442 (D.N.J. 2002), in which a prisoner who had filed over 200 prior civil actions in federal courts, many of which were dismissed as frivolous, was barred by the "three strikes" rule of the Prison Litigation Reform Act, 28 U.S.C. Sec. 1915(g), from proceeding as a pauper in his most recent filing when he could not show that he was in "imminent danger of physical injury" at the time the complaint was filed, which is the sole exception to the "three strikes" rule. The court noted that allegations of past physical danger are insufficient to invoke the exception.

Similarly, a released plaintiff prisoner, who claimed he was assaulted while incarcerated and denied medical care for his injuries, was not entitled to an exception to the rule, as he was not in imminent danger of serious harm when he filed his lawsuit. *Harris v. City of New York*, #09-0081, 607 F.3d 18 (2nd Cir.).

A prisoner's claim that he was sprayed with a chemical agent that damaged his lungs was insufficient to show an imminent danger of serious physical injury required to allow him to proceed as a pauper with his federal civil rights lawsuit despite his prior failure, as a frequent filer of civil rights lawsuit, to make progress towards the repayment of unpaid filing fees from previously filed lawsuits. The complaint was dismissed on the basis of the three strikes rule, as required by 28 U.S.C. Sec. 1915(g), barring a prisoner from proceeding as a pauper after having three lawsuits dismissed as frivolous, except in cases of a risk of imminent physical harm. Because four months had elapsed between the alleged injury and the filing of the lawsuit, the prisoner could not show a risk of imminent danger. *Cosby v. Gray*, #04-1286, 124 Fed. Appx. 595 (Unpub. 10th Cir. 2005).

Ongoing alleged inadequate medical care can constitute an imminent danger. In one case, a prisoner filed a lawsuit against a health care service and five medical professionals claiming that they were deliberately indifferent to his chronic serious medical conditions of diabetes and Hepatitis C, and that this had caused the need for partial amputation of his feet and visual impairment. He argued that this deliberate indifference was ongoing, subjecting him to a risk of coma, death, or further amputations. While he had filed three previous lawsuits dismissed as frivolous, he was not precluded from proceeding as a pauper on the current lawsuit under the "three strikes" rule of the Prison Litigation Reform Act because his claims of an ongoing risk of additional harm fell within the "imminent danger" exception to that rule. *Vandiver v. Prison Health Servs., Inc*. #11-1959, 727 F.3d 580 (6th Cir. 2013).

Also see *Bond v. Aguinaldo*, #02-C-5357, 228 F. Supp. 2d 918 (N.D. Ill. 2002), in which a prisoner's claim that he is currently being denied medical care for acid reflux and painful cysts on his vocal cords could pursue his lawsuit without prepaying a filing fee, despite having three previous lawsuits which were dismissed for failure to state a claim, under an "imminent danger" exception.

Despite the fact that he had many more than three prior "strikes" against him, i.e., lawsuits dismissed as frivolous or for failure to state a claim, a prisoner was entitled to pursue as a pauper his lawsuit claiming that he had been denied proper treatment for both Hepatitis C and prostate cancer, since these claims constituted an allegation of imminent danger

constituting an exception to the "three strikes" rule of 28 U.S.C. Sec. 1915(g). *Ibrahim v. District of Columbia*, #05-5370, 463 F.3d 3 (D.C. Cir. 2006).

The exception won't apply if the imminent danger is the prisoner's own fault. A prisoner's lawsuit was properly dismissed under the "three strikes" rule provision of the Prison Litigation Reform Act (PLRA), 28 U.S.C. Sec. 1915(g), as he had three-strikes from previous litigation and failed to show that he was in "imminent danger" simply because he was on a "food strike." Any threat of "imminent danger" came from his own decision to cease eating and not from any outside source. The court also noted that the prisoner, in each of three prior lawsuits he filed since January of 2008, threatened in connection with each one to go on a food strike to object to his detention. His lawsuits claimed that he was illegally detained and had never been convicted or sentenced. *In Re: Whitfield*, Misc. #C-08-021, 2008 U.S. Dist. Lexis 25044 (S.D. Tex.).

A general complaint, even if about present and ongoing conditions will not suffice to invoke the exception when there is no specific allegation that the danger is both imminent and serious. A prisoner's complaint about being compelled to work in cold weather without warm clothing, or in hot, humid weather despite his high blood pressure, did not qualify as a claim of imminent danger of serious physical harm coming under an exception to the "three strikes" rule of the Prison Litigation Reform Act barring access to courts as a pauper following the filing of three or more frivolous lawsuits. *Martin v. Shelton*, #02-2770, 319 F.3d 1048 (8th Cir. 2003).

❖ Constitutional Challenges to the Rule

Federal courts have ultimately rejected all constitutional challenges to the "three strikes" rule. While there were some lower court decisions finding the rule unconstitutional on various grounds, those cases have all been overruled by federal appeals courts.

Cases upholding the constitutionality of the "three strikes" rule include:

- *Polanco v. Hopkins*, #07-11739, 510 F.3d 152 (2d Cir. 2007) and *Lewis v. Sullivan*, #01-2251, 279 F.3d 526 (7th Cir. 2002), rejecting constitutional access to courts claims.
- *Higgins v. Carpenter*, #00-3316, 258 F.3d 797 (8thCir. 2001) involving both equal protection and access to courts claims.
- *Medberry v. Butler*, #97-4516, 185 F.3d 1189 (11th Cir. 1999) turning down an Ex Post Facto Clause argument.

- *Rodriguez v. Cook*, #97-35095, 169 F.3d 1176 (9th Cir. 1999) finding no merit in due process, equal protection, access to courts, Ex Post Facto Clause, and separation of powers claims.
- *White v. Colorado*, #97-1011, 157 F.3d 1226 (10th Cir. 1998), turning down access to courts and equal protection challenges.
- *Wilson v. Yaklich*, #96-3023, 148 F.3d 596 (6th Cir. 1998) rejecting equal protection and due process challenges.
- *Rivera v. Allin*, #97-2868, 144 F.3d 719 (11th Cir. 1998), in which the court stated that proceeding as a pauper is "a privilege, not a right," and rejecting First Amendment, access to courts, separation of powers, due process, and equal protection claims.
- *Carson v. Johnson*, #96-41003, 112 F.3d 818 (5th Cir. 1997) noting that the plaintiff "still has the right to file suits if he pays the full filing fees in advance, just like everyone else."

❖ **Resources**

The following are some useful resources related to the subject of this article.

- Prison Litigation Reform Act: **"**Three Strikes" Rule, AELE Case Summaries.
- Prison Litigation Reform Act. Wikipedia article.

❖ **Prior Relevant Monthly Law Journal Articles**

- Prison Litigation Reform Act: Exhaustion of Remedies - Part One, 2011 (4) AELE Mo. L. J. 301.
- Prison Litigation Reform Act: Exhaustion of Remedies - Part Two, 2011 (5) AELE Mo. L. J. 301.
- Attorneys' Fees in Prisoners' Civil Rights Lawsuits, 2016 (1) AELE Mo. L. J. 301.
- The "Three Strikes" Rule In Prisoner Civil Rights Litigation, Part 1, 2016 (6) AELE Mo. L. J. 301.

❖ **References:** (*Chronological*)

1. Trends in Prisoner Litigation, as the PLRA Enters Adulthood, by Margo Schlanger, 5 UC Irvine Law Review 153 (2015).

AELE Monthly Law Journal

Bernard J. Farber
Jail & Prisoner Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: bernfarber@aele.org
Tel. 1-800-763-2802

- The purpose of this publication is to provide short articles to acquaint the reader with selected case law on a topic. Articles are typically six to ten pages long. Because of the brevity, the discussion cannot cover every aspect of a subject.
- The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as "legal advice." Lawyers often disagree as to the meaning of a case or its application to a set of facts.

AELE Home Page – Publications Menu – Seminar Information