Recent Developments

The Application of the Three-Strikes Rule to the Prison Litigation Reform Act

By Alex M. Beeman

The Prison Litigation Reform Act of 1995 (PLRA) was passed to help "staunch a flood" of non-meritorious cases being brought by prisoners. *See Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020). The PLRA placed several restrictions on a prisoner's ability to file a lawsuit, including what has become known as the "three-strikes rule." The rule generally prevents a prisoner from bringing a suit *in forma pauperis* if, "on 3 or more prior occasions," he or she had a suit "dismissed on the grounds that it [was] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." 28 U. S. C. §1915(g) (note, however, that an exception exists if "the prisoner is under imminent danger of serious physical injury.").

Recent interpretations of the three-strikes rule may offer the attorney who researches its applicability a strong defense to prisoner suits.

The three-strikes rule is a powerful mechanism in deterring prisoner litigation because being permitted to proceed *in forma pauperis*—which allows a suit to be initiated without the prepayment of the filing fee—is often determinative as to whether the prisoner will be able to continue with the litigation. Most prisoners cannot afford to advance the entire filing fee at the initiation of a lawsuit. Even if a prisoner is working, the average prison job pays less than $1 per hour and, in some states, regular prison jobs are actually unpaid. *See State and Federal Prison Wage Policies and Sourcing Information*, Prison Policy Initiative, available at https://www.prisonpolicy.org (last updated April 10, 2017). Without help from family or friends, it proves difficult for most prisoners to pay a federal district court filing fee of at least $350, thus subjecting the suit to summary dismissal. *See* 28 U.S.C. §1914.

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Recently, there has been notable litigation regarding the scope of the three-strikes rule. In *Lomax v. Ortiz-Marquez*, the Supreme Court unanimously clarified that a suit dismissed for failure to state a claim *even without prejudice* counts as a strike. 140 S. Ct. 1721 (2020) (Justice Clarence Thomas joined in the opinion except with respect to one footnote). Prior to *Lomax*, there was a divide between districts as to whether a dismissal *without* prejudice for failure to state a claim qualifies as a strike. A dismissal without prejudice, as opposed to a dismissal with prejudice, would still allow a later to suit to be brought regarding the same, dismissed claim. This distinction, however, was found by the *Lomax* Court to be wholly immaterial as the broad language of 28 U. S. C. §1915(g) covers *all* dismissals for failure to state a claim.

In *Coleman v. Tollefson*, 575 U.S. 532, 135 S. Ct. 1759 (2015), the Supreme Court unanimously held that a prisoner's suit that was dismissed *but was still pending on appeal* counts as a strike. In *Coleman*, the third strike stemmed from unrelated litigation (i.e., an entirely separate suit). The next big three-strikes rule case (which the *Coleman* Court acknowledged) is going to be whether a prisoner would be barred from obtaining *in forma pauperis* status to appeal a third-strike dismissal (i.e., an appeal in the same suit). Significantly, most district and circuit courts have so far determined that "sequential dismissals" count as two strikes. *See Chavis v. Chappius*, 618 F.3d 162, 167 (2d Cir. 2010); *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996); *Hains v. Washington*, 131 F.3d 1248, 1250 (7th Cir. 1997) (per curiam); *Henderson v. Norris*, 129 F.3d 481, 485 (8th Cir. 1997) (per curiam); *Jennings v. Natrona County Det. Ctr. Med. Facility*, 175 F.3d 775, 780 (10th Cir. 1999).

For counsel defending this type of litigation, it is imperative to do an initial review as to whether the three-strikes rule applies and make the court aware if it does. Do not rely on the courts to undertake this effort. While it may take some time to dig through the court dockets, it will pay dividends in providing a possible strong defense to these actions. FD