LGIT'S COMMANDER'S LOG
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The "Three Strikes' Provision of the Prison Litigation Reform Act

QUESTION: **Does every dismissal of a prisoner suit qualify as a "strike" under the Prison Litigation Reform Act?**

ANSWER: **No. Only if the dismissal was on grounds that the suit was frivolous, malicious, or "with prejudice" because it failed to state a claim of any merit will it qualify as a "strike" under the Act.**

CASE: ***McLean v. United States*, United States Court of Appeals for the Fourth Circuit Decided May 21, 2009**

In a recent opinion, the United States Court of Appeals for the Fourth Circuit revisited the "three strikes" provision of the Prison Litigation Reform Act of 1996 (PLRA or Act). The PLRA limits the ability of prisoners to file civil actions without prepayment of filing fees. When a prisoner has previously filed at least three actions or appeals that were dismissed on the grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted, the Act's "three strikes" provision requires that the prisoner demonstrate imminent danger of serious physical injury in order to proceed without prepayment of fees.

What does the PLRA require federal courts to do? The PLRA requires federal courts to engage in a preliminary screening of any complaint in which a prisoner seeks redress from a governmental entity or an officer or employee of a governmental entity. The court must identify cognizable claims or dismiss the complaint or any part of it that is "frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A(b)(1). This obligation arises from the PLRA's goal of reducing substantively meritless prisoner lawsuits.

How does this initial screening affect prisoners and their lawsuits? If the federal court finds that a prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in federal court that was dismissed on the grounds that it was frivolous, malicious, or fails to state a claim upon which relief can be granted, the prisoner will be required to prepay all necessary fees as is required of other litigants.

What will federal courts deem to be a frivolous claim? A lawsuit whose factual allegations are "so nutty," "delusional," or "wholly fanciful" as to be simply "unbelievable" will not pass muster.

What if the federal judge concludes upon review of the lawsuit that the prisoner is unlikely to prevail? Even if the federal judge disbelieves the lawsuit's factual allegations or concludes that recovery is unlikely, that is not the test for "frivolousness." If the complaint is well-pled it must be allowed to proceed even if recovery is unlikely.

In the *McLean* case, the prisoner had filed six lawsuits while incarcerated in Virginia. Only two, however, were dismissed on grounds that qualified them as "strikes" under the PLRA. As a

result, since the prisoner only had two strikes, he was not required to prepay fees in connection with his seventh filing. What the *McLean* case makes clear is that, when it comes to determining "strikes" under the PLRA, there is a huge difference between a potentially meritorious prisoner suit that is dismissed because it is inartfully pled and one that is dismissed as frivolous, malicious, or with prejudice because it is substantively meritless. Only the latter count as "strikes" under the Act.

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