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2-23-2015

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Recommended Citation

Betsy Ginsberg, *Under the Prison Litigation Reform Act's So-Called Three Strikes Provision, When Does a Dismissal Count as a Strike: Coleman v. Tollefson (13-1333)*, 42 Preview of United States Supreme Court Cases 187 (2015).
https://larc.cardozo.yu.edu/faculty-articles/569

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Under the Prison Litigation Reform Act's So-Called "Three Strikes" Provision, When Does a Dismissal Count as a "Strike?"

CASE AT A GLANCE

The Prison Litigation Reform Act of 1996 amended the federal in forma pauperis statute to include, among other provisions, what has become known as the "three strikes provision." Under this provision, prisoners who have accumulated three strikes—three dismissals of cases that were frivolous, malicious, or failed to state a claim—are no longer permitted to proceed in forma pauperis unless they can show immediate danger of serious physical injury. This case asks the Court to determine whether a dismissal by the district court immediately counts as a strike or whether it does not count until any appeal of the dismissal has been decided or the time to appeal has expired.

Coleman v. Tollefson
Docket No. 13-1333

Argument Date: February 23, 2015
From: The Sixth Circuit

by Betsy Ginsberg
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INTRODUCTION

Andre Lee Coleman filed a civil rights lawsuit alleging that prison officials denied his constitutional right of access to the courts. Because he was indigent and unable to pay the court filing fee, he sought to proceed in forma pauperis (IFP). His motion to proceed IFP was denied under the Prison Litigation Reform Act's three strikes provision, which prohibits prisoners from proceeding IFP if they have brought three previous actions or appeals that were dismissed because they were frivolous, malicious, or failed to state a claim. He challenged that denial on the basis that his third "strike" was a dismissed case pending on appeal and thus subject to reversal.

ISSUE

Under the "three strikes" provision of the Prison Litigation Reform Act, 28 U.S.C. § 1915(G), does a district court's dismissal of a lawsuit count as a strike while it is still pending on appeal?

FACTS

Andre Lee Coleman is a prisoner in the custody of the Michigan Department of Corrections. In 2010, he filed a civil rights lawsuit in federal court against state prison official Todd Tollefson and several other prison employees, alleging that they had violated his constitutional rights by interfering with his access to the courts. Because he did not have the resources to pay the filing and other court fees, Coleman also moved for leave to proceed IFP. The United States District Court for the Western District of Michigan denied his application to proceed IFP on the grounds that he had previously brought three cases, each of which was dismissed, thereby constituting three "strikes" under the Prison Litigation Reform Act. The three strikes provision prevents courts from granting IFP status to prisoners who have had three or more prior actions dismissed as "frivolous," "malicious," or as failing to state a claim unless the prisoner can show that he or she is in immediate danger of "serious physical injury."

Coleman sought and was denied reconsideration of the denial of IFP status on the grounds that one of his strikes was a district court dismissal of a case still pending on appeal. Because of the denial of IFP status, Coleman was unable to pursue his claims and the district court dismissed his case for failure to prosecute his case. A divided Sixth Circuit Court of Appeals affirmed the district court's decision, noting its departure on this issue from the majority of other circuits.

Some background here on the Prison Litigation Reform Act (PLRA) and IFP statute bear mentioning. The federal IFP statute was originally enacted in 1892; its purpose was to provide indigent litigants with meaningful access to the federal courts. Litigants who can show the court that they are sufficiently without means to proceed can ask the court to grant them this status. If granted, the statute excuses payment of the $400 filing fee to get into federal court as well as some other costs, such as the cost of an appeal and some court transcripts. Other litigation costs, such as the costs of discovery or access to electronic court records via PACER may be excused upon application of litigant but are not automatically covered by the statute. Over the years since the statute's enactment, Congress has amended the statute to expand its coverage. However, Congress most recently amended the IFP statute in 1996 as a part

of the PLRA in such a way as to dramatically contract application to prisoners.

The PLRA amended the IFP statute in two primary ways. First, prisoners who qualify for IFP status are nonetheless required to pay the court filing fee in small monthly installment payments until the entire fee is paid. Under the statute, the prisoner must pay an initial installment and then, each month, 20 percent of his or her monthly income from the prior month is deducted from his or her prisoner account. Given that prisoners earn on average between $0.93 and $4.73 per *day* while working in prison, it can take a significant amount of time for a prisoner *with* IFP status to pay the $400 federal court filing fee. The other notable way that the PLRA amended the IFP statute is, as mentioned previously, with the three strikes provision. As noted, this provision, prevents a prisoner from proceeding IFP in federal court if "the Prisoner has on 3 or more prior occasions, while incarcerated … 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."

CASE ANALYSIS

In approaching this issue of statutory interpretation, the parties, unsurprisingly, have differing views on whether the language of the statute clearly addresses the question before the Court. Coleman, the petitioner here, takes the view that the language of § 1915(g) is ambiguous and looks to logic, the purpose of the PLRA, lower court interpretations of the language of the statute, and issues of fairness and efficiency to support his interpretation that a dismissal should only count as a strike once it is no longer pending on appeal. Tollefson and the other prison officials, as respondents, take a contrary view of the statutory language, arguing the text of the statute itself is clear and that the plain language itself answers the question. Under canons of statutory construction, where there is an unambiguous statute, we do not look to other considerations such as purpose or efficiency. Nonetheless, they argue, these considerations weigh in favor of considering a dismissal to be a strike immediately.

Coleman's primary argument is that the text of § 1915(g), particularly when understood in light of the purpose of the PLRA, supports a reading of the statute that would count a dismissal as a strike only once it has become final on appeal. Coleman admits that the text of the statute is ambiguous as to the ultimate question of whether a dismissal counts as a strike immediately or only once it has become final on appeal. He argues, however, that the most logical reading of the language and the one adopted by the majority of the courts of appeals to have addressed the issue supports his argument.

The statute denies IFP status where a prisoner "on 3 or more prior occasions … brought an action or appeal … that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." Coleman points out that the terms "prior occasions" and "dismissed" are the relevant terms that speak to the question of when a dismissal is deemed to be a strike and that nowhere in the statute are these terms defined. He argues that the term "prior occasion" is itself ambiguous and could be interpreted to mean a single event, such as the appeal or the action or the entire continuing claim, from filing through the conclusion of the appeal. He then argues that the term "dismiss" is similarly ambiguous, noting that where a district court dismisses a case which is later reinstated on appeal, that action can no longer be properly described as "dismissed."

These ambiguities, Coleman argues, should be resolved in his favor both because such a reading would be consistent with the text of the statute and because it would further the PLRA's purpose. Coleman points out that under a plain language reading of the statute, the lower courts, including the Sixth Circuit, have consistently held that a court of appeals's affirmance of a district court dismissal does not count as a distinct strike. Thus, he argues, the logical conclusion to draw from this is that the district court dismissal and any appeal taken from that dismissal should count as one "occasion." Given this logic, he continues, the strike resulting from that occasion cannot occur until the appeal has been completed. Coleman argues that both logic and the text of the statute support his argument that the strike cannot occur until the appeal from a dismissal has run its course.

Petitioner Coleman also contends that his is the reading most consistent with the purpose of the PLRA. According to the statute's stated purpose and its legislative history, the PLRA is meant to filter out meritless claims by prisoners in the federal courts, while allowing their legitimate cases to go forward. Coleman argues that counting a dismissal as a strike while it is still pending on appeal runs the risk of penalizing the prisoner for bringing a suit that may ultimately be found to be meritorious, and that this is contrary to what Congress intended.

Coleman also argues that his interpretation of the statute is more workable as it provides the federal courts with a rule that is far easier to administer than the rule adopted by the Sixth Circuit. Here Coleman focuses on what he terms the Sixth Circuit's "dynamic approach" to counting strikes. By this he means that under the Sixth Circuit's current rule, the number of strikes a prisoner has can actually decrease because a dismissal at the district court counts as a strike, but it is erased if that dismissal is reversed on appeal. Coleman notes three problems that this approach creates. The first is that it can unfairly bar a fourth meritorious lawsuit while the appeal on the third case is pending. If the statute of limitations on the fourth case were to run before the dismissal on the third case were overturned, the prisoner would be barred from bringing that meritorious suit altogether. Second, the approach brings unnecessary complexity and uncertainty into this area despite the fact that the PLRA meant to decrease the courts' work in processing these cases. Under Coleman's approach, a prisoner would be assessed as having three strikes only once, whereas under the Sixth Circuit approach, courts could be required to undertake that assessment on multiple occasions. Third, Coleman argues that the Sixth Circuit approach of immediately counting district court dismissals as strikes would bar a prisoner from appealing a dismissal that counted as a third strike. This would deprive prisoners of the right to appeal and to some degree eliminate the appellate function in a large swath of a category of cases.

Coleman also attempts to explain why the Sixth and Seventh Circuits, the only two to adopt the rule of immediately counting district court dismissals as strikes, were incorrect in their reasoning on this issue.

While Coleman argues that § 1915(g) is ambiguous as to the question presented by this case, Tollefson and the other prison officials argue that the text of the statute is in fact not ambiguous at all and that the plain text reading of the statute supports the Sixth Circuit's decision. The pertinent language from the statute is an "action" that was "dismissed." The prison officials argue that the statutory text does in fact address the question of when a strike counts because the common usage of the word "dismissed" is clear. When a district court is said to have dismissed a case, they argue, it is commonly understood that the dismissal is an event that occurred in the district court at a particular time irrespective of any subsequent appeal. The prison officials rely on the use of the term "dismiss" by the Supreme Court in its reported decisions as well as on the use of the terms "dismiss" and "action" in the Federal Rules of Civil Procedure in support of their argument concerning the ordinary meaning of these terms.

That the statute distinguishes between dismissals of appeals and dismissals of actions, according to respondents supports their argument that the dismissal of "an action" under § 1915(g) is the act of a district court. Reference in the statute to both "an action" and to "an appeal," argues respondents, confirms that an action refers solely to the district court's dismissal of the case and not to the entire life of the lawsuit. The prison officials argue that this interpretation makes sense in the context of the IFP statute, which is focused on allowing indigent plaintiffs to avoid filing fees, because there are separate fees involved in filing actions at the district court level and appeals of judgments in those cases. In support of this argument, respondents again look to the use of the terms "action" and "appeal" in the federal rules.

Respondents also argue that had Congress meant to make an exception for dismissals that were pending on appeal, it would have done so for two reasons. First, they note that Congress made an exception here for where the prisoner is in "imminent danger of serious physical injury," but made no exception for where the dismissal is pending on appeal. Second, they argue Congress's inclusion of a finality requirement, similar to the one Coleman argues exists in § 1915(g), in other federal statutes, including two that were passed just days before the PLRA, is evidence that it expressly chose not to impose such a requirement in § 1915(g).

Similarly, the prison officials argue that the term "prior occasions" is not, as Coleman argues, an ambiguous term, but rather refers to the two occasions identified by the statute that can give rise to a strike—an action and an appeal. They note that their argument is supported by the decisions of all the other courts of appeals which have affirmatively answered the question of whether a prisoner can be awarded two strikes in one case—one for the dismissal of the action and one for the dismissal of the appeal.

Just as Coleman argues that his reading of the statute furthers the purpose of the PLRA and provides the courts with a more easily administrable rule, the prison officials counter that their construction better furthers the PLRA's purpose and is easier to apply. The prison officials argue that immediately counting a dismissal as a strike is consistent with the PLRA's purpose of limiting frivolous lawsuits by prisoners. They argue that requiring prisoners to give greater thought to whether to spend resources on filing a lawsuit will result in more meritorious lawsuits going forward. This argument assumes, of course, that the prisoner actually has the funds to pay a filing fee and can even make such a decision. To support the claim that their rule is the more administrable, one, the prison officials note that a court can simply look to the docket to see when judgment has been entered rather than doing the math to determine whether the time to file an appeal has expired. Moreover, they argue that the Court need not be too concerned that their rule will require courts to reassess a prisoner's strikes after dismissals that once counted as strikes are reversed on appeal. First, the prison officials conjecture that there are a small number of such cases. Second, they argue that the notion that district court judgments have legal effect unless and until they are reversed on appeal is an ordinary principle that courts encounter with regularity across a number of contexts, most notably preclusion.

SIGNIFICANCE

While the dispute as to when in the life of a lawsuit a dismissal should count as a strike may seem rather technical, the decision could have a pronounced impact on at least some prisoner litigants. If the Court were to adopt the Sixth Circuit's rule—that a dismissal prior to appeal counts as a strike—the result could be severe for prisoners whose appeals are pending. Though it may be tempting to assume that the prisoner who has already been assessed three strikes is unlikely to have a fourth meritorious case, it is useful to remember that much of the IFP litigation conducted by prisoners is conducted pro se and that the vast majority—perhaps 70 percent—of the adult prison population in the United States does not read above a fourth-grade level. The suggestion here is that prisoners with low literacy proceeding without lawyers are not likely to be able to understand how to plead the elements of complex federal constitutional causes of action or to determine which harms are of a constitutional dimension. Therefore, they may be more likely to file claims that are ultimately dismissed as lacking merit, not because they are abusive litigants (though some may be) but because they do not know which of the harms they suffer are litigable or how to follow pleading rules, even where they are liberally applied to pro se litigants.

While the number of those whose claims are barred by adopting the Sixth Circuit rule may in fact be rather low, the cost of imposing this rule can be high: it shuts the courthouse door on meritorious claims. On the other hand, the cost of imposing the majority rule seems comparatively low. Assessing a strike only after a dismissal is final on appeal is just not likely to have a significant impact. The PLRA has already cut prisoner litigation in half since its passage. Moreover, the circuits that have adopted the majority rule have not seen higher rates of prisoner litigation since adopting the rule, nor did the Seventh Circuit see a decrease when it adopted a contrary rule.

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PREVIEW of United States Supreme Court Cases, pages 187–190.
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