

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

Cruz :  
 :  
v. : No. 3:01cv406 (JBA)  
 : PRISONER  
Marcial, et al., :

Ruling on Motion to Dismiss [Doc. #16]

Erick Cruz filed this action against the warden and several corrections officers at the correctional facility in which he was formerly incarcerated, alleging that he had (unspecified) information about an officer at the facility, and to prevent Cruz from divulging this information, the defendants placed Cruz in administrative detention and later transferred him to a different facility. The defendants have moved to dismiss the case in its entirety under the so-called "three strikes" provision of the Prison Litigation Reform Act, codified at 28 U.S.C. § 1915(g). For the reasons set out below, the motion is denied.

I. Procedural Background

Erick Cruz is a plaintiff in twenty-five cases in the District of Connecticut. Because each of Cruz's cases are prosecuted pro se and in forma pauperis ("IFP") under 28 U.S.C. § 1915, they are subject to sua sponte dismissal if "the court determines that . . . the action . . . is frivolous or malicious [or] fails to state a claim on which relief may be granted." 28

U.S.C. § 1915(e)(2). Six of Cruz's cases have been dismissed as frivolous under this section. See Cruz v. Waterbury Police, 3:01cv665; Cruz v. Parole, 3:01cv891; Cruz v. UCONN Correctional Managed Health Care, 3:01cv1039; Cruz v. Egan, 3:01cv1041; Cruz v. Rowland, 3:01cv1223; and Cruz v. Zailckas, 3:01cv1283.

The instant complaint was filed on March 12, 2001, and Cruz's motion to proceed IFP was granted on April 18, 2001. On May 25, 2001, one of Cruz's other cases was dismissed as frivolous; five other dismissals for frivolity followed in the next several months. On September 21, 2001, after Cruz had accrued five dismissals, the defendants moved to dismiss Cruz's complaint under the "three strikes" provision of 28 U.S.C § 1915(g).

## II. Analysis

The three strikes provision provides as follows:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [28 U.S.C. § 1915] 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.

28 U.S.C. § 1915(g). This section of the IFP statute was added by § 804(d) the Prison Litigation Reform Act ("PLRA") passed by

Congress in 1996.<sup>1</sup>

By its terms, the three strikes provision prevents prisoners from commencing new suits IFP after they have had three dismissals for frivolity: "In no event shall a prisoner bring a civil action . . . ." Webster's defines "bring" in this context as "to cause to exist or occur," and notes specifically that it can refer to instituting litigation. This action had already been commenced and was underway when Cruz accrued his third dismissal for frivolity, because IFP status had been granted and the complaint was docketed.<sup>2</sup> Additionally, it is undisputed that IFP status was, at the time granted, properly allowed, and that the complaint was properly accepted by the Clerk's office for filing. Thus, there is no argument to be made that Cruz was improvidently allowed to "bring" this suit.

Defendants attempt to use a retroactivity analysis such as that applied by the Supreme Court in Landgraf v. USI Film Prods., 511 U.S. 244 (1994), and cite to cases applying § 1915(g) to litigants whose prior dismissals occurred before the effective date of the three strikes provision. See, e.g., Green v.

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<sup>1</sup>The PLRA is Title VII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

<sup>2</sup>"A civil action is commenced by filing a complaint with the court," Fed. R. Civ. P. 3, and a party "instituting any civil action, suit or proceeding [shall] pay a filing fee of \$ 150," 28 U.S.C. § 1914, unless granted leave to proceed IFP under 28 U.S.C. § 1915.

Nottingham, 90 F.3d 415 (10th Cir. 1996) (applying three strikes provision to litigant who had filed hundreds of frivolous complaints before the effective date of the PLRA, but who had not had three dismissals for frivolity after the effective date of the PLRA). The cases and the retroactivity arguments advanced by the defendants are not applicable to the facts of this case, however, because the question here is not whether pre-PLRA dismissals count as part of the required three.

The question is whether § 1915(g) applies prevents litigants from proceeding with suits that have already been lawfully commenced once three dismissals for frivolity are subsequently accrued. The cases and arguments relied upon by defendants have no bearing on that question, and inasmuch as the plain language of § 1915(g) limits its applicability to the commencement of suits, defendants' arguments are unavailing. As this suit was properly commenced IFP prior to Cruz's third dismissal, § 1915(g) has no applicability here.<sup>3</sup>

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<sup>3</sup>Cases filed subsequent to Cruz's third dismissal are subject to § 1915(g)'s bar, and several such cases have been dismissed. See, e.g., Cruz v. Rodriguez, 3:01cv1598 (motion to proceed IFP filed August 21, 2001; motion denied and case dismissed February 15, 2002 under three strikes provision).

III. Conclusion

For the reasons set out above, defendants' motion to dismiss [Doc. #16] is DENIED.

IT IS SO ORDERED.

/s/

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Janet Bond Arterton  
United States District Judge

Dated at New Haven, Connecticut, this \_\_\_\_ day of April, 2002.