PRISONER INMATES FEES – DOES A DISMISSAL FOR WANT OF PROSECUTION PREVENT AN INDIGENT PRISONER FROM A WAIVER OF FEES PROVIDED BY THE PRISONER LITIGATION REFORM ACT?

Senator Dole once commented about an issue many people are unaware of: prisoners filing excessive frivolous lawsuits that waste the country’s legal resources.[[1]](#footnote-1) Senator Dole noted that prisoners often filed lawsuits over extremely insufficient grievances, including storage locker space, inabilities to attend wedding parties, and wrongfully receiving creamy peanut butter instead of chunky peanut butter.[[2]](#footnote-2)

It all starts with the question of what happens when a prisoner wants to file a lawsuit and is unable to pay the filing fee? The Prisoner Litigation Reform Act (PLRA) allows an indigent prisoner’s filing fees to be waived so they can proceed *in* *forma pauperis* (IFP) if an affidavit is filed that includes a statement of their assets, or lack thereof, evidencing the person’s inability to pay court costs and litigation fees.[[3]](#footnote-3) Usually if a prisoner files an action without funds for the court costs, the prisoner is still required to pay the filing fees but the court later collects payment either when funds become available or through a prison commissary account.[[4]](#footnote-4) Furthermore, the court may allocate attorneys for prisoners who lack funds to afford one.[[5]](#footnote-5)

However, the PLRA allocates a “strike” for each lawsuit that is filed and dismissed due to the judge’s finding of a frivolous, malicious, or improper claim, to reduce frivolous litigation by prisoners.[[6]](#footnote-6) Once a prisoner reaches three strikes, they are denied *in forma pauperis* status and are required to pay the full amount of court filing fees before they are permitted to file another lawsuit.[[7]](#footnote-7) Under the PLRA, an indigent “frequent filer” prisoner is required to prepay all filing fees before a federal court may consider their actions or appeals.[[8]](#footnote-8) There is one exception to this rule being if the prisoner has exhausted all remedies available and is subject to “imminent danger of serious physical injury.”[[9]](#footnote-9)

The term “want of prosecution” means the plaintiff did not fulfill their duties in a proceeding, such as filing a document in a timely manner or failing to be present for a hearing.[[10]](#footnote-10) What happens when the failure to pay a court fee results in the case being dismissed for want or prosecution? The circuits recently split their opinions on this issue.[[11]](#footnote-11) The Eleventh and Ninth Circuits recently held that dismissal for want of prosecution does not constitute a “strike” and still allows the indigent prisoner to litigate fee-free while the D.C. and Tenth Circuits have held the opposite.[[12]](#footnote-12)

This topic recently appeared as a case of first impression in the Court of Appeals for the Eleventh Circuit.[[13]](#footnote-13) Daker was a state prisoner who filed over a thousand filings in over a hundred actions in more than nine different federal courts.[[14]](#footnote-14) The court dismissed four of his filings for want of prosecution because he failed to pay a docket fee and further held only three of the four dismissals for frivolity.[[15]](#footnote-15) However, the Eleventh Circuit held his previous six dismissals for lack of jurisdiction or want of prosecution did not constitute strikes.[[16]](#footnote-16) The court noted, under the PLRA, the *only* way a dismissal would equate a strike would be through one of three grounds: frivolous, malicious, or failure to state a claim upon which relief may be granted.[[17]](#footnote-17) Daker’s filings were dismissed for lack of jurisdiction and want of prosecution, and not for a frivolous, malicious, or improper claim, thus, Daker’s dismissals did not constitute strikes and he is still permitted to litigate as an indigent prisoner under the PLRA.[[18]](#footnote-18) The Eleventh Circuit further held “a dismissal for want of prosecution, even after the denial of a petition to proceed *in forma pauperis* on the grounds of frivolousness, *cannot* be a strike under the Act.”[[19]](#footnote-19) The court further considered the judge’s ability to only deny, not dismiss, a prisoner’s petition by claiming that a single judge not can not dismiss or determine an appeal because only a panel of judges can dismiss a petition or appeal.[[20]](#footnote-20) In *Daker*, the prisoner was dismissed by a panel of judges for want of prosecution because did not pay filing fees, not because he was found to have frivolous arguments.[[21]](#footnote-21) The frivolous activity was considered irrelevant in the case and thus, the dismissal can not constitute a strike.[[22]](#footnote-22)

On the other hand, the D.C. and Tenth Circuits have held the contrary.[[23]](#footnote-23) In *Hafed*, the Tenth Circuit held that a dismissal under the PLRA counts as a strike if the grounds for dismissal included frivolous, malicious, or failure to state a claim, and a dismissal due to nonpayment would constitute a strike.[[24]](#footnote-24) They further held that the single judge’s denial of a petition on the grounds of frivolousness was the “but for” cause of the panel’s dismissal for want of prosecution, therefore the dismissal for want of prosecution was a strike for purposes of the PLRA.[[25]](#footnote-25)

The “but for” test was established in *Thompson v. DEA* when the court imposed a condition that if the prisoner’s case was dismissed through want of prosecution but would have continued previously but for frivolous nature in the past, the dismissal counts as a strike.[[26]](#footnote-26) In *Thompson*, the prisoner brought an appeal in the Eleventh Circuit and was assigned a single judge who denied his appeal after declaring it frivolous.[[27]](#footnote-27) The judge later dismissed his appeal for want of prosecution after the prisoner failed to file a motion for reconsideration during the allotted time.[[28]](#footnote-28) The court noted that the prisoner’s prosecution would have continued “[b]ut for” the frivolousness, and thus, the dismissed case was regarded as a strike for PLRA purposes.[[29]](#footnote-29) Ultimately, the Tenth and D.C. Circuits have held that a dismissal for want of prosecution results in a strike if there was any previous frivolous nature in the case because the frivolous nature was the “but for” cause of the dismissal.[[30]](#footnote-30)

The burden of proof for the prisoner’s three strikes is not yet decided in some courts, and on the defendant in other courts.[[31]](#footnote-31) The D.C. and Ninth Circuits recently held the defendant holds the burden of establishing the existence of three strikes.[[32]](#footnote-32) The defendant has the burden of proof because they are the party challenging the prisoner’s rights to *in forma pauperis* status.[[33]](#footnote-33) The D.C. Circuit notes a deviation in the default rule; the default rule being the plaintiff bears the risk of proving or not proving their claim.[[34]](#footnote-34) The court is permitted to depart from the default rule when “considerations of fairness, convenience, or probability so require.”[[35]](#footnote-35) Prisoners already have numerous pleading requirements set forth by the PLRA to obtain their *in forma pauperis* status, but the D.C. circuit agrees with the Ninth Circuit that the language of the PLRA does not require prisoners to show their obtainment of three strikes.[[36]](#footnote-36) However, the court withholds their discretion to deny *in forma pauperis* status to prisoners who become abusive filers, even the burden of proof that the prisoners have met three strikes has not been provided.[[37]](#footnote-37)

Though the majority of courts have held a dismissal does not qualify as a strike until the prisoner has met all PLRA requirements, other courts hold the contrary. This topic will continue to evolve in more circuits in the future with further litigation, but hopefully not regarding peanut butter or locker spaces.

For circuits that have held a dismissal does not constitute a strike in the context of the Prison Litigation Reform Act:

*See* Henslee v. Keller, 681 F.3d 538, 543-44 (4th Cir. 2012) (holding a district court’s dismissal is not a strike and thus does not preclude a prisoner from their *in forma pauperis* status on the dismissal’s appeal); Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 2002) (holding only a dismissal for frivolous, malicious, or improper claim would qualify a strike, as indicated by the PLRA, and a dismissal can not be a strike until the prisoner has exhausted or waived his appeals. Furthermore, Fifth Circuit states that a reversed dismissal due to frivolity would invalidate the strike); Coleman v. Tollefson, 733 F.3d 175, 178 (6th Cir. 2014) (quoting 28 U.S.C. § 1915(g) (1996) (holding a prisoner obtains a strike if the action was dismissed on a *prior* *occasion* for failure to state a claim because a prisoner can not hold *in forma pauperis* status “when ‘the prisoner has, on 3 or more *prior* *occasions* . . . brought an action or appeal . . . that was dismissed . . .’ if it was frivolous, malicious, or failed to state a claim”); Campbell v. Davenport Police Dep’t, 471 F.3d 952, 952-53 (8th Cir. 2013) (holding three dismissals for frivolous, malicious, or failure to state a claim upon which relief may be granted, only applies if the prisoner has three dismissals at the time he files his lawsuit or appeal. Furthermore, the prisoner must also exhaust or waive appeals in those cases before the dismissal can be counted as a strike); Silva v. Di Vittorio, 658 F.3d 1090, 1098-1110 (9th Cir. 2006) (holding a dismissal for failure to state a claim must be final before it can be considered a strike for PLRA purposes. Furthermore, a prisoner may still proceed on an appeal without prepaying court filing fees if the prisoner did not have three strikes at the time they filed the appeal, even if a separate case is still pending a decision); Graham v. Taylor, 640 Fed. Appx. 766, (10th Cir. 2016) (holding a prisoner’s failure to state a claim for relief imposes a first strike and frivolity in an appeal imposes a second strike under the PLRA. If the prisoner accrues a third strike, he will be barred from proceeding *in forma pauperis* in civil actions in federal courts unless the PLRA exception of imminent danger exists); Thompson v. Drug Enf’t Admin., 492 F.3d 428, 432-33 (D.C. Cir. 2007) (holding dismissal for want of prosecution does count as a strike under the PLRA if it was based on finding of frivolous, malicious, or improper nature before the appeal. A strike can only result from a dismissal based on frivolous, malicious, or improper claims); Daker v. Comm’r. Ga. Dep’t of Corr., 820 F.3d 1278, 1285 (11th Cir. 2016) (holding dismissal for want of prosecution does not constitute a strike and allows indigent prisoner to withhold payments of litigation fees).

The D.C. and Tenth Circuits have deemed a dismissal for want of prosecution as a strike while the Second, Fifth, Sixth, Seventh, and Eleventh Circuits have held the contrary:

*Compare* Daker v. Comm’r. Ga. Dep’t of Corr., 820 F.3d 1278, 1285 (11th Cir. 2016) (holding dismissal for want of prosecution does not constitute a strike and allows indigent prisoner to withhold payments of litigation fees), Haury v. Lemmon, 656 F.3d 521, 523 (7th Cir. 2011) (holding want of prosecution alone can not constitute a strike. The dismissal must have one of the three enumerated bases, such as frivolity, to be deemed a strike), Tafari v. Hues, 473 F.3d 440, 442 (2d Cir. 2007) (holding a dismissal for want of prosecution, without a frivolous foundation, does not constitute a strike), Butler v. Dep’t of Justice, 492 F.3d 440, 443-44 (D.C. Cir. 2007) (stating if Congress wanted a dismissal to constitute a strike then they would have made it clear in the statute and, since they did not, a dismissal can not be a strike; dismissals for failure to prosecute are *not* strikes under the PLRA but the judge still holds discretion to deny a claim by a prisoner who clearly abuses their IFP status. However, if there is frivolous activity founded within the dismissal, then the dismissal would be deemed a strike), El-Shaddai v. Zamora, No. 13-56104, 2016 WL 4254980, at \*4 (9th Cir. August 12, 2016) (holding a prisoner’s case requesting *in forma pauperis* status was dismissed because he failed to pay a filing fee and thus the dismissal did not constitute a strike because it was solely due to the plaintiff’s three strikes and lack of payment and *not* on finding of frivolous, malicious, or failure to state a claim. Furthermore, the incurrence of three strikes alone does not create an additional strike) (emphasis added), Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 2002) (holding only a dismissal for frivolous, malicious, or improper claim would qualify a strike, as indicated by the PLRA, and a dismissal can not be a strike until the prisoner has exhausted or waived his appeals), Coleman v. Tollefson, 733 F.3d 175, 178 (6th Cir. 2014) (quoting 28 U.S.C. § 1915(g) (1996) (holding a prisoner obtains a strike if the action was dismissed on a *prior* *occasion* for failure to state a claim because a prisoner can not hold *in forma pauperis* status “when ‘the prisoner has, on 3 or more *prior* *occasions* . . . brought an action or appeal . . . that was dismissed . . .’ if it was frivolous, malicious, or failed to state a claim”; thus a dismissal alone can not be a strike), *and*  Rice v. Freeseman, No. CV415-257, 2016 BL 258829 at \*1 (S.D. Ga. Aug. 10, 2016) (citing Antonin Scalia, Bryan A. Garner, *Reading Law* 107-11 (West, 1st ed. 2012) (stating a dismissal for want of prosecution is not an enumerated ground for a strike)), *with* Hafedv. Fed. Bureau of Prisons, 635 F.3d 1172, 1179, 81 (10th Cir. 2011) (holding the filing of numerous civil cases in district and circuit courts and nine petitions for writ of certiorari, many of which resulted in dismissals for want of prosecution, constituted more than three strikes, thus the prisoner was required to pay full filing fees and failure to pay the full filing fee would result in dismissal for failure to prosecute), Tiedemann v. Church of Jesus Christ of Latter Day Saints, 631 Fed. Appx. 629, 632 n.1 (10th Cir. 2015) (agreeing with *Hafed* in that a failure to prosecute is not a strike unless the dismissal was due to PLRA grounds of frivolity, maliciousness, or improper claim), Thompson v. Drug Enf’t Admin., 492 F.3d 428, 433 (D.C. Cir. 2007) (holding dismissal of an appeal for want of prosecution *does* count as a strike under the PLRA *if* there is previous finding of frivolity and “but for” the previous finding of frivolity, the appeal would not have existed. At some point in the case, the dismissal for want of prosecution must have been based on one of the three enumerated grounds in the PLRA to be considered a strike. Alternatively, simply a lack of jurisdiction or want of prosecution alone, without more, can *not* constitute a strike) (emphasis added), O’Neal v. Price, 531 F.3d 1146, 1152 (9th Cir. 2008) (holding when a court denies a prisoner’s action without prepayment of filing fees, the court essentially dismisses the case on the grounds that the complain is frivolous, malicious, or an improper claim and thus is considered a strike).

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1. Thompson v. Drug Enf’t Admin., 492 F.3d 428, 430 (D.C. Cir. 2007) (citing 141 Cong. Rec. 14,570, 14,570 (1995) (quoting Senator Robert Dole)). [↑](#footnote-ref-1)
2. *Id.* [↑](#footnote-ref-2)
3. 28 U.S.C. § 1915(g) (1996); *In forma pauperis*, *Black’s Law Dictionary* (10th ed. 2014) (defining *in forma pauperis* as “in the manner of an indigent who is permitted to disregard filing fees and court costs”). [↑](#footnote-ref-3)
4. 28 U.S.C. § 1915(b) (1996); Know Your Rights: The Prison Litigation Reform Act (PLRA) II (2002), https://www.aclu.org/sites/default/files/images/asset\_upload\_file79\_25805.pdf. [↑](#footnote-ref-4)
5. 28 U.S.C. § 1915(e) (1996). [↑](#footnote-ref-5)
6. 28 U.S.C. § 1915(g) (1996). [↑](#footnote-ref-6)
7. *Id.*; *See* Nicholas v. American Detective Agency, 254 Fed. Appx. 116, 117 (3d Cir. 2007) (stating “only the strikes actually earned at the time the complaint was filed are relevant” and courts can not revoke *in forma pauperis* status at a later date if the prisoner earns three strikes after the complaint was filed). [↑](#footnote-ref-7)
8. Hafed v. Fed. Bureau of Prisons, 635 F.3d 1172, 1176 (10th Cir. 2011) (quoting Kinnell v. Graves, 265 F.3d 1125, 1127 (10th Cir. 2001)) (stating “the ‘three strikes’ provision of the IFP statute applicable to indigent prisoners[] requires . . . ‘frequent filer’ prisoners to prepay the entire filing fee before federal courts may consider their civil actions and appeals”). [↑](#footnote-ref-8)
9. 28 U.S.C. § 1915(g) (1996) (stating no “prisoner [shall] bring a civil action or appeal a judgment . . . if the prisoner has [three strikes] . . . unless the prisoner is under imminent danger of serious physical injury”); *But see* Jackson v. District of Columbia, 254 F.3d 262, 268 (D.C. Cir. 2001) (holding the PLRA did not require the district court to recognize an imminent injury exception when the prisoner failed to exhaust all the prison’s available grievance remedies). [↑](#footnote-ref-9)
10. Daker v. Comm’r, Ga. Dep’t of Corr., 820 F.3d 1278, 1282 (11th Cir. 2016); Sperow v. Melvin, 153 F.3d 780, 781 (7th Cir. 1998) (stating “[t]he failure to pay a filing fee normally leaads to dismissal for want of prosecution”). [↑](#footnote-ref-10)
11. *Compare* Daker v. Comm’r. Ga. Dep’t of Corr., 820 F.3d 1278, 1285 (11th Cir. 2016) (holding dismissal for want of prosecution does not constitute a strike and allows indigent prisoner to withhold payments of litigation fees) *and* El-Shaddai v. Zamora, No. 13-56104, 2016 WL 4254980, at \*4 (9th Cir. August 12, 2016) (holding a dismissal alone without a frivolous foundation did not constitute a strike) *with* Thompson v. Drug Enf’t Admin., 492 F.3d 428, 433 (D.C. Cir. 2007) (holding a dismissal for want of prosecution does constitute a strike if there is any previous finding of frivolity). [↑](#footnote-ref-11)
12. *Id.* [↑](#footnote-ref-12)
13. Daker v. Comm’r, Ga. Dep’t of Corr., 820 F.3d 1278, 1281 (11th Cir. 2016). [↑](#footnote-ref-13)
14. *Id.* [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. *Id.* at 1283-84 (stating “under the negative-implication canon, these three grounds are the *only* grounds that can render a dismissal a strike); *See also* Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2009) (holding prior dismissals only constitute strikes if the court dismissed the cases because they were frivolous, malicious, or failed to state a claim upon which relief can be granted). [↑](#footnote-ref-17)
18. 820 F.3d at 1284 (quoting Neitzke v. Williams, 490 U.S. 319, 325 (1989) (stating a “frivolous” assertion “lacks an arguable basis either in law or in fact”)). [↑](#footnote-ref-18)
19. *Id.* at 1285 (emphasis added).  [↑](#footnote-ref-19)
20. *Id.*; Fed. R. App. P. 27(c). [↑](#footnote-ref-20)
21. 820 F.3d at 1285. [↑](#footnote-ref-21)
22. *Id.* [↑](#footnote-ref-22)
23. *Hafed*, F.3d at 1179 (quoting Butler v. Dep’t of Justice, 492 F.3d 440, 442-44 (D.C. Cir. 2007) (holding a strike “involves dispositions that look to the merits of the suit [but] a dismissal for failure to prosecute is made without regard to the merits of the claim”)); Thompson v. Drug Enf’t Admin., 492 F.3d 428, 433 (D.C. Cir. 2007) (holding the judge’s determination of whether the dismissal counted as a strike or not was based on the “but for” test indicating if frivolous or malicious activity contributed to the dismissal). [↑](#footnote-ref-23)
24. 28 U.S.C. § 1915(a),(g) (1996); Hafed, 635 F.3d at 1179 (citing Thompson, 492 F.3d at 433) (agreeing with the D.C. Circuit that “it would be ‘hypertechnical’ to hold that a resulting dismissal for nonpayment was not a strike”). [↑](#footnote-ref-24)
25. Hafed v. Fed. Bureau of Prisons, 635 F.3d 1172, 1179 (10th Cir. 2011); 820 F.3d at 1285. [↑](#footnote-ref-25)
26. *Thompson*, 492 F.3d at 433. [↑](#footnote-ref-26)
27. *Id.*; 28 U.S.C. § 1915(e)(2)(B)(i) (1996) (allowing federal courts to dismiss actions and appeals if they determine the case to be frivolous at any time). [↑](#footnote-ref-27)
28. *Thompson*, 492 F.3d at 433. [↑](#footnote-ref-28)
29. *Id.* [↑](#footnote-ref-29)
30. *Thompson*, 492 F.3d at 433; *Hafed*, 635 F.3d at 1179. [↑](#footnote-ref-30)
31. *See* Thompson v. Drug Enf’t Admin., 492 F.428, 434-45 (D.C. Cir. 2007) (holding the defendant has the burden of proving the prisoner has reached three strikes); Andrews v. King, 398 F.3d 1113, 1119 (9th Cir. 2005) (holding the defendant must have the burden of proving prisoners were subject to the three strikes provision because the language of the PLRA would have included the burden as a requirement in the prisoner’s requirement list if it was meant for the prisoner). [↑](#footnote-ref-31)
32. Thompson v. Drug Enf’t Admin. 492 F.3d 428, 434-45 (D.C. Cir. 2007); Andrews v. King, 398 F.3d 1113, 1116 (9th Cir. 2005). [↑](#footnote-ref-32)
33. *Andrews*, 398 F.3 1116 (holding a defendant who failed to establish the PLRA exception to the prisoner’s *in forma pauperis* status did not meet their burden of proof). [↑](#footnote-ref-33)
34. *Thompson*, 492 F.3d at 434. [↑](#footnote-ref-34)
35. *Id.* (citing Schaffer v. Weast, 546 U.S. 49, 60, 62 (2005)). [↑](#footnote-ref-35)
36. *Thompson*, 492 F.3d at 434. [↑](#footnote-ref-36)
37. *Id.*; *See also* Butler V. Dep’t of Justice, 492 F.3d 440, 441 (D.C. Cir. 2007) (holding that a failure to prosecute does not constitute a strike under the PLRA but the court still exercises their discretion to deny prisoner *in forma pauperis* status due to excessive filing). [↑](#footnote-ref-37)