

18-8369 LOMAX V. ORTIZ-MARQUEZ

DECISION BELOW: 754 Fed.Appx. 756

LOWER COURT CASE NUMBER: 18-1250

QUESTION PRESENTED:

A dismissal of a civil action without prejudice for failure to state a claim, is it or is it not a strike under 28 U.S.C. 1915(g)?

Courts have held that, unless otherwise specified, a dismissal for failure to state a claim under Rule 12(b)(6) is presumed to be both a judgment on the merits and to be rendered with prejudice, is this true or false?

"A district court's dismissal under Rule 12(b)(6) is, of course, with prejudice unless it specifically orders dismissal without prejudice, is this true or false? " [I]n the absence of a clear statement to the contrary, a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is presumed to be with prejudice."

The Fourth Circuit Court decided a dismissal without prejudice for failure to state a claim did not count as a strike under 28 U.S.C.S. 1915(g), but the Tenth Circuit Court decided that a dismissal without prejudice do count as a strike under the Prison Litigation Reform Act of 1995(PLRA)and/or 28 U.S.C.S. 1915(g), which court is right and, is this a legal conflict between these two courts?

Would this statement of the Tenth Circuit be legally right or wrong, A dismissal for failure to state a claim under Rule 12(b)(6) satisfy the plain text of 1915(g) and therefore will count as a strike, without making an y legal interpretation of this provision, inquiry, or analysis thereof in regard to congress intent or purpose? When Congress directly incorporates language with an established legal meaning into a statute, we may infer that Congress intended the language to take on its established meaning. United States v. Langley, 62 F. 3d 602, 605 (4th Cir. 1995) ("It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law; that is with the knowledge of the interpretation that courts have given to an existing statute."); see also Miles v. Apex Marine Corp., 498 U. S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990) (" We assume that

Congress is aware of existing law when it passes legislation.").

Is it the Court task here to determine whether Congress intended an action or appeal "that was dismissed on the grounds that it...fails to state a claim upon which relief may

be granted" to count as a strike under 28 U.S. C. 1915(g) if that dismissal was specifically designated to be "without prejudice?"

The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b) (6) is a "judgment on the merits and, the type of prior dismissal for failure to state a claim contemplated by subsection 1915(g) is one that constituted an adjudication on the merits and prejudiced the filing of a subsequent complaint with the same allegations, is this true or false?

Is it true, a dismissal without prejudice for failure to state a claim "does not" fall within the plain and unambiguous meaning of 1915(g)'s unqualified phrase "dismissed ... [for] fail[ure] to state a claim"? If true, As a result, a dismissal without prejudice for failure to state a claim does not count as a strike, is this true or false?

In any Circuit Court, will it be immaterial to the strikes analysis [whether] the dismissal was without prejudice, as opposed to with prejudice? The U.S. Court of Appeals for the Tenth Circuit stated, " [i]n this circuit, it is immaterial (Not material; not pertinent; of no consequence) to the strikes analysis [whether] the dismissal was without prejudice," as opposed to with prejudice.

Immaterial issue. An issue which occurs where a material allegation in the pleadings is not answered, but an issue is taken on some point which will not determine the merits of the case, so that the court must be at a loss to determine for which of the parties to give judgment. *Garland v. Davis* (US) 4 How 131, 146, 11 L Ed 907, 914.

Is it true, a dismissal without prejudice for failure to state a claim is not an adjudication on the merits, and, if true, does it permits a plaintiff to refile the complaint as though it had never been filed? See *Mendez v. Elliot*, 45 F.3d 75, 78(4th Cir. 1995).

GRANTED LIMITED TO THE FOLLOWING QUESTION: DOES A DISMISSAL WITHOUT PREJUDICE FOR FAILURE TO STATE A CLAIM COUNT AS A STRIKE UNDER 28 U.S.C. §1915(G)?

CERT. GRANTED 10/18/2019