

## Know Your Rights: The Prison Litigation Reform Act (PLRA)

The Prison Litigation Reform Act (PLRA) makes it harder for prisoners to file lawsuits in federal court. This fact sheet outlines the information you need to know before filing a lawsuit.

### THE PRISON LITIGATION REFORM ACT (PLRA)

If you are thinking about filing a lawsuit, then you should know about a 1996 law called the Prison Litigation Reform Act (PLRA), which makes it harder for prisoners to file lawsuits in federal court. There are many parts to the PLRA, but the following parts are the most important for you to understand.

#### I. EXHAUSTION OF ADMINISTRATIVE REMEDIES (42 U.S.C. § 1997e(a))

The First key to remember about the PLRA is that before you file a lawsuit, you must try to resolve your complaint through the prison's grievance procedure. This usually requires that you give a written description of your complaint (often called a "grievance") to a prison official. If the prison provides a second or third step (like letting you appeal to the warden), then you must also take those steps. If you file a lawsuit in federal court before taking your complaints through every step of your prison's grievance procedure, it will almost certainly be dismissed.

##### A. What is exhaustion?

Exhausting your remedies for the PLRA requires filing a grievance and pursuing all available administrative appeals.<sup>[1]</sup> In addition, every claim you raise in your lawsuit must be exhausted.<sup>[2]</sup> However, if a prisoner does not file a grievance because he is unable to obtain grievance forms, no administrative remedy is "available" and the prisoner may file in court.<sup>[3]</sup> In a multi-step grievance system, if staff fail to respond within the time limits established in the grievance system's rules, the prisoner must appeal to the next stage.<sup>[4]</sup> If the prisoner does not receive a response at the final appeal level, and the time for response has passed, the prisoner has exhausted.<sup>[5]</sup>

An exception to the requirement that all appeals be taken occurs if the prisoner cannot appeal without a decision from the lower level of the grievance system, and the lower level did not respond to the grievance.<sup>[6]</sup>

Courts have differed widely on when failure to exhaust might be excused.<sup>[7]</sup> But the safest course is always:

**with respect to each claim you want to raise, and each defendant you want to name, in your eventual lawsuit, you should file a grievance and appeal that grievance through all available levels of appeal.**

You should get a copy of your prison or jail's grievance policy and follow it as closely as you can.

##### B. What happens if you don't exhaust the grievance process?

Most courts have held that failure to exhaust is an affirmative defense that must be raised by the defendants.[\[8\]](#) Then, if the court finds that the prisoner has not exhausted, the case is dismissed without prejudice,[\[9\]](#) meaning that the lawsuit may be filed again once the prisoner has exhausted, as long as the statute of limitations has not run.

There is not a great deal of case law yet addressing whether a prisoner who misses a deadline in the grievance process (many grievance systems have very short deadlines) forever loses his/her constitutional or statutory claim. If you are in this situation, you should appeal through all the levels of the grievance system and explain in the grievance the reasons for the failure to file on time.[\[10\]](#)

Finally, the statute of limitations is tolled while a prisoner is in the process of exhausting.[\[11\]](#)

### **C. There are very few exceptions to the exhaustion requirement.**

Prisoners seeking to bring a damages action must exhaust available administrative remedies even if the administrative remedy in question, like almost all prison grievance systems, does not provide money damages as a possible remedy.[\[12\]](#)

Other means of notifying prison officials of your complaint, such as speaking to staff, putting in a kite, or writing to the warden, do not constitute exhaustion. You must use the grievance system.

In the only decision to address this issue, the District of Columbia Circuit Court of Appeals said that under PLRA, courts may still issue injunctions to prevent irreparable injury pending exhaustion of administrative remedies.[\[13\]](#)

The exhaustion requirement does not apply to detainees in INS facilities.[\[14\]](#) Also, the exhaustion requirement does not apply to cases filed before the effective date of PLRA, which is April 26, 1996.[\[15\]](#)

## **II. FILING FEES (28 U.S.C. § 1915(b)).**

The Second key to remember about the PLRA is that all prisoners must pay court filing fees in full. If you do not have the money up front, you can pay the filing fee over time through monthly installments from your prison commissary account, but the filing fee will not be waived.

A complex statutory formula requires the indigent prisoner to pay an initial fee of 20% of the greater of the prisoner's average balance or the average deposits to the account for the preceding six months. After the initial payment, the prisoner is to pay monthly installments of 20% of the income credited to the account in the previous month until the fee has been paid.

A major complication of this procedure is that it requires the prison or other facility holding the prisoner to cooperate administratively in the process for assessing the court's statutory fee. The courts can require the prison administration to provide the necessary information.[\[16\]](#)

### **III. THREE STRIKES PROVISION (28 U.S.C. § 1915(g))**

The Third key thing to remember about the PLRA is that each lawsuit or appeal you file that is dismissed because a judge decides that it is frivolous, malicious, or does not state a proper claim counts as a “strike.” After you get three strikes, you cannot file another lawsuit *in forma pauperis* – that is, you cannot file unless you pay the entire court filing fee up-front. The only exception to this rule is if you are at risk of suffering serious physical injury in the immediate future.

An appeal of a dismissed action that is dismissed is a separate strike.<sup>[17]</sup> Even dismissals that occurred prior to the effective date of PLRA count as strikes.<sup>[18]</sup>

An exception to the “three strikes” rule may be invoked if a prisoner is in imminent danger of serious physical injury.<sup>[19]</sup> A court will evaluate the “imminent danger” exception at the time the prisoner attempts to file the new lawsuit, not at the time that the incident that gave rise to the lawsuit occurred.<sup>[20]</sup>

### **IV. PHYSICAL INJURY REQUIREMENT (42 U.S.C. § 1997e(e))**

The Fourth key to remember about the PLRA is that you cannot file a lawsuit for mental or emotional injury unless you can also show physical injury.

The requirement of physical injury only applies to money damages, it does not apply to claims for injunctive and declaratory relief.<sup>[21]</sup> Some courts have suggested the possible availability of nominal and punitive damages even when compensatory damages are barred by the requirement of physical injury.<sup>[22]</sup> The courts are split on whether a claim for violation of constitutional rights is intrinsically a claim for mental or emotional injury in the absence of an allegation of a resulting physical injury (or injury to property).<sup>[23]</sup> Not surprisingly, the courts differ in their evaluation of what constitutes sufficient harm to qualify as a physical injury.<sup>[24]</sup>

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<sup>[1]</sup> White v. McGinnis, 131 F.3d 593 (6<sup>th</sup> Cir. 1997).

<sup>[2]</sup> See, e.g., Bey v. Pennsylvania Dept. of Corrections, 98 F. Supp. 2d 650 (E.D. Pa. 2000); Cooper v. Garcia, 55 F. Supp. 2d 1090 (S.D. Cal. 1999).

<sup>[3]</sup> Miller v. Norris, 247 F.3d 736 (8<sup>th</sup> Cir. 2001). \_

<sup>[4]</sup> White v. McGinnis, 131 F.3d 593 (6<sup>th</sup> Cir. 1997).

<sup>[5]</sup> Powe v. Ennis, 177 F.3d 393 (5<sup>th</sup> Cir. 1999). Cf. Lewis v. Washington, 300 F.3d 829 (7<sup>th</sup> Cir. 2002) (when prison officials do not respond to a prisoner’s initial grievance, administrative remedies are exhausted).

<sup>[6]</sup> Taylor v. Barrett, 105 F. Supp. 2d 483 (E.D. Va. 2000); see also Miller v. Tanner, 196 F.3d 1190 (11<sup>th</sup> Cir. 1999) (prisoner had exhausted when told by staff no appeal possible); Pearson v. Vaughn, 102 F. Supp. 2d 282 (E.D. Pa. 2000) (same). \_

<sup>[7]</sup> See, e.g., Miller v. Tanner, 196 F.3d 1190 (11<sup>th</sup> Cir. 1999) (prisoner who failed to sign and date grievance form did not fail to exhaust administrative remedies; inmate did not fail to exhaust remedies by failing to appeal institutional-level denial of his grievance, after being told unequivocally that no such appeal was possible); Nyhuis v. Reno, 204 F.3d 65 (3d Cir. 2000) (substantial compliance with grievance procedure will satisfy exhaustion requirement); cf. Camp v. Brennan, 219 F.3d 279 (3d Cir. 2000) (holding that investigation of complaint by Secretary of Corrections rather than regular grievance system

satisfied exhaustion requirement); but see Freeman v. Francis, 196 F.3d 641 (6<sup>th</sup> Cir. 1999) (investigations by use of force committee and state police are not exhaustion).

[8] Some of the circuits holding that failure to exhaust is an affirmative defense are Ray v. Kertes, 285 F.3d 287 (3d Cir. 2002); Wyatt v. Terhune, 315 F.3d 1108 (9<sup>th</sup> Cir. 2003); Fouk v. Charrier, 262 F.3d 687 (8<sup>th</sup> Cir. 2001) (treating failure to exhaust as affirmative defense but allowing amendment to raise defense); see also Jackson v. District of Columbia, 254 F. 3d 262 (D.C. Cir. 2001); Massey v. Helman, 196 F.3d 727 (7<sup>th</sup> Cir. 1999); Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999); Underwood v. Wilson, 151 F.3d 292 (5<sup>th</sup> Cir. 1998) (exhaustion requirement may be subject to waiver). The Sixth Circuit alone requires dismissal on the court's own initiative if the prisoner does not demonstrate exhaustion in the complaint. Brown v. Toombs, 139 F.3d 1102 (6<sup>th</sup> Cir. 1998).

[9] Perez v. Wisconsin Dept. of Correction, 182 F.3d 532 (7<sup>th</sup> Cir. 1999); Wendell v. Asher, 162 F.3d 887 (5<sup>th</sup> Cir. 1998); Wright v. Morris, 111 F.3d 414 (6<sup>th</sup> Cir. 1997).

[10] Harper v. Jenkins, 179 F.3d 1311 (11<sup>th</sup> Cir. 1999) (holding that prisoner who filed an untimely grievance was obliged to seek a waiver of the time limits in the grievance system); see also Days v. Johnson, 322 F.3d 863 (5<sup>th</sup> Cir. 2003) (when prisoner's grievance was untimely because he had a broken hand and could not write, dismissal for failure to exhaust was improper); Pozo v. McCaughtry, 286 F.3d 1022 (7<sup>th</sup> Cir. 2002) (prisoner who missed deadline on one of the levels of appeals of the grievance system barred from filing lawsuit).

[11] Johnson v. Rivera, 272 F.3d 519 (7<sup>th</sup> Cir. 2001); Brown v. Morgan, 209 F.3d 593 (6<sup>th</sup> Cir. 2000); Harris v. Hegmann, 198 F.3d 153 (5<sup>th</sup> Cir. 1999).

[12] Booth v. Churner, 121 S. Ct. 1819 (2001).

[13] Jackson v. District of Columbia, 254 F.3d 262 (D.C. Cir. 2001).

[14] Edwards v. Johnson, 209 F.3d 772 (5<sup>th</sup> Cir. 2000).

[15] See, e.g., Salahuddin v. Mead, 174 F.3d 271 (2d Cir. 1999); Bishop v. Lewis, 155 F.3d 1094 (9<sup>th</sup> Cir. 1998); Brown v. Toombs, 139 F.3d 1102 (6<sup>th</sup> Cir. 1996).

[16] Hall v. Stone, 170 F.3d 706 (7<sup>th</sup> Cir. 1999) (holding warden in contempt for failure to forward fees from the prisoner's account).

[17] Jennings v. Natrona Co. Detention Center, 175 F.3d 775 (10<sup>th</sup> Cir. 1999); Patterson v. Jefferson Corrections Center, 136 F.3d 626 (5<sup>th</sup> Cir. 1998).

[18] See e.g., Ibrahim v. District of Columbia, 208 F.3d 1032 (D.C. Cir. 2000); Welch v. Galie, 207 F.3d 130 (2d Cir. 2000).

[19] See Gibbs v. Cross, 160 F.3d 962 (3d Cir. 1998) (plaintiff alleged an imminent danger of serious physical injury where dust, lint and shower odor came from his cell vent, causing him to suffer "severe headaches, changes in voice, mucus that is full of dust and lint, and watery eyes."). See also Ashley v. Dilworth, 147 F.3d 715 (8<sup>th</sup> Cir. 1998) (allegations that staff placed plaintiff in proximity to known enemies satisfied imminent danger requirement).

[20] Abdul-Akbar v. McKelvie, 239 F.3d 307 (3d Cir. 2001)(en banc).

[21] See Harper v. Showers, 174 F.3d 716 (5<sup>th</sup> Cir. 1999); Perkins v. Kansas Dept. of Corrections, 165 F.3d 803 (10<sup>th</sup> Cir. 1999); Davis v. District of Columbia, 158 F.3d 1342 (D.C. Cir. 1998).

[22] See Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000) (claims for nominal and punitive damages can go forward); Searles v. Van Bebber, 251 F.3d 869 (10<sup>th</sup> Cir. 2001) (PLRA does not bar punitive and nominal damages for violation of prisoner's rights); Davis v. District of Columbia, 158 F.3d 1342 (D.C. Cir. 1998) (noting possibility that nominal damages would survive).

[23] See Rowe v. Shake, 196 F.3d 778 (7<sup>th</sup> Cir. 1999) (First Amendment claim not barred by physical injury requirement); Canell v. Lightner, 143 F.3d 1210 (9<sup>th</sup> Cir. 1998) (claim for violation of First Amendment is not a claim for mental or emotional injury); cases going the other way include: Thompson v. Carter, 284 F.3d 411 (2d Cir. 2002); Searles v. Van Bebber, 251 F.3d 869 (10<sup>th</sup> Cir. 2001); Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000) (First Amendment claims involve mental or emotional injuries); Davis v. District of Columbia, 158 F.3d 1342 (D.C. 1998) (claim for violation of privacy is claim for mental or emotional injuries).

[24] See Gomez v. Chandler, 163 F.3d 921 (5<sup>th</sup> Cir. 1999) (allegations of cuts and abrasions satisfy physical injury requirement); Liner v. Goord, 196 F.3d 132 (2d Cir. 1999) (intrusive body searches qualify as physical injury); compare to Herman v. Holiday, 238 F.3d 660 (5<sup>th</sup> Cir. 2001) (claim of "physical health problems" by prisoner exposed to asbestos does not specify a physical injury which would permit recovery for emotional or mental damages due to fear caused by increased risk of developing asbestos-related disease); Harper v. Showers, 174 F.3d 716 (5<sup>th</sup> Cir. 1999) (confinement in filthy cell where exposed to

mentally ill patients not physical injury); Sigler v. Hightower, 112 F.3d 191 (5<sup>th</sup> Cir. 1997) (bruised ear does not qualify as physical injury).