A GUIDE TO LITIGATION UNDER THE AMERICANS WITH DISABILITIES ACT IN PRISONS AND JAILS

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Although the Supreme Court held in *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998) that the Americans with Disabilities Act ("ADA") applies to prisons and jails, people with disabilities in correctional facilities still face tremendous obstacles in their efforts to achieve fair and equal treatment. Since these institutions control virtually every aspect of the lives of the individuals who must inhabit them, the types of barriers and discrimination they face are varied and pervasive. *See e.g., Montez v. Romer*, 32 F.Supp.2d 1235 (D.Colo. 1999) (prisoners with a wide range of disabilities, including mobility, hearing, and vision impairments, and diabetes, stated cognizable claims under the ADA and Rehabilitation Act because they alleged impermissible architectural barriers which create "imminent risks of serous injury," and because prison officials refused to make accommodations to allow them to use law libraries, visiting areas, yard areas, laundry facilities, dining halls, vocational training, recreational facilities, bathing and restroom facilities, medical clinics. They were also excluded from prison employment and rehabilitation services solely on the basis of their disabilities). Other cases recite similar problems. For example, paraplegic inmates are commonly housed in cell blocks with inaccessible toilets and showers. *See LaFaut v. Smith*, 839 F.2d 387 (4th Cir. 1987). Correctional officials may take away wheelchairs from inmates with mobility impairments. *See Beckford v. Irvin*, 49 F.Supp.2d 170 (W.D. N.Y.). Inmates with vision impairments have no readers to help them decipher prison rules and regulations. Inmates with hearing impairments may have to attend administrative hearings or appear before the parole board without sign language interpreters. *Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996); *Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D.N.Y. 1995). Some prison systems segregate inmates who are HIV-positive from the general prison population and deny them equal access to rehabilitative programs. *See Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999)(en banc). And inmates with mental illness or developmental disabilities face a range of discriminatory practices, including punishment for conduct they cannot control resulting in solitary confinement for years at a time. *See C.F. v. Terhune* 67 F.Supp.2d. 401(D.N.J. 1999); *Madrid v. Gomez*, 889

F.Supp. 1146 (N.D. Cal. 1995).

Although these problems can often be addressed by the ADA, litigation in the unique environment of prisons and jails has more than the normal share of pitfalls and difficulties. This memorandum attempts to provide practical guidance to ADA litigation in the correctional setting by discussing some of the special rules that apply to prisoner litigation, and some of the restrictive ways in which the courts have interpreted the ADA in the prison context.[1]

I. The Prison Litigation Reform ACT ("PLRA")

The PLRA was enacted in 1996 ostensibly to curtail frivolous prisoner litigation, but has also had the effect of making it much more difficult for inmates to bring meritorious claims. Specifically, the PLRA imposes a number of obstacles and limitations that must be kept in mind whenever a suit is filed on behalf of an inmate under the ADA, or any other federal statute or Constitutional provision.

a) Filing Fees - Under the PLRA, indigent prisoners are no longer excused from paying a filing fee in federal court. They must now submit a certified statement of their prison account for the preceding six months, and then pay the entire filing fee, albeit in installments, in accordance with a complicated formula set forth in the Act. 28 U.S.C. § 1915(b)(1-2). Former prisoners, however, are not subject to the filing fee provisions, even if the complaint concerns matters that took place while they were incarcerated. *Robbins v. Switzer*, 104 F.3d 895, 897 (7th Cir. 1997). Further, persons under civil commitment are not treated as prisoners, even if they are held in a facility run by a state correctional agency. *See King v. Greenblatt*, 53 F.Supp. 2d 117, 138-39 (D. Mass. 1999); *See also Page v. Torrey*, 201 F.3d 1136, 1139-40 (9th Cir. 2000).

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[1] It is possible that the Supreme Court will hold in *University of Alabama Board of Trustees v. Garrett* that Title II of the ADA is unconstitutional as applied to the States. In that event, prisoners with disabities could still bring discrimination claims under the Rehabilitation Act, and most of the points made in this memorandum would remain valid. Prisoners might also still be able to seek injunctive relief under the ADA pursuant to the doctrine set forth in *Ex Parte Young*. *But see Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000).

b) Exhaustion of Administrative Remedies - The PLRA requires inmates first to pursue all challenges "with respect to prison conditions" through the highest level of the "available" administrative procedures prior to filing a suit under the ADA or any other Federal law. 42 U.S.C. § 1997e(d)(2). There is considerable disagreement among the courts as to whether an administrative remedy is "available." For example, many courts hold that an inmate must utilize the prison grievance procedures before filing a damage action even though the grievance system does not authorize a damage remedy. *Nyhius v. Reno*, 204 F.3d 65 (3d. Cir. 2000); *Wyatt v. Leonard*, 193 F.3d 876 (6th Cir. 1999); *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir.1998), reh'g en banc denied, 172 F.3d 884 (11th Cir.1999. Others hold that exhaustion is not required where filing a grievance would be futile. *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999); *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998). The issue is important because non-exhausted claims are generally dismissed, even if exhaustion is completed after the complaint is filed. *See Perez v. Wisconsin Department of Correction*, 182 F.3d 532 (7th Cir. 1999). Where an inmate seeks both injunctive relief and monetary damages, exhaustion is likely to be required, even if the prison grievance procedures can only provide prospective relief. *See, e.g., Lavista v. A.F. Beeler*, 195 F.3d 254 (6th Cir. 1999)(dismissing for failure to exhaust the complaint of blind inmate who also uses a wheelchair who sought injunctive relief and damages because facility was not equipped to provide for safety of inmates with visual impairments and because he was compelled to sign documents he could not read). Some courts require that exhaustion be specifically pled in the complaint. *Knuckles-El v. Toombs*, 139 F.3d 640 (6th Cir. 2000); *Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998).

(c) Physical Injury Requirement - Prisoners with disabilities have often achieved remarkable success in obtaining damages for discriminatory treatment that violates the ADA. *See, e.g., Beckford v. Irvin*, 49 F.Supp.2d 170 (W.D. N.Y.)($150,000 in compensatory and punitive damages awarded to inmate with mobility impairment); *Love v. Westvile Correctional Center*, 103 F.3d 558 (7th Cir. 1996) (affirming a jury award of approximately $30,000 to a quadriplegic prisoner who was denied access to programs and services in the Indiana State Prison). Under the PLRA, however, an inmate may no longer bring a Federal civil action for a "mental or emotional injury" without a showing of a concomitant "physical injury." 42 U.S.C. § 1997e(e). *See Davis v. District of Columbia*, 158 F.3d 1342, 1348-49 (D.C.Cir.1998) (holding that § 1997e(e)

precludes prisoner's claim for emotional injury under the ADA if there is no prior showing of physical injury); *Cassidy v. Indiana Dept. of Correction*, 199 F.3rd 374 (7th Cir. 1999) (visually impaired inmate's damage action based on denial of meaningful access to law library, recreational areas, educational programs, job assignments, vocational training, other programs and training barred because no physical injury).

d) Restrictions on Prospective Relief - The PLRA mandates that "in any civil action with respect to prison conditions" a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). Under the PLRA, prospective relief in correctional ADA cases can be granted only if accompanied by these findings. This limitation applies to settlement agreements and consent decrees as well as to other court orders. The parties may, however, enter into "private settlement agreements" that do not meet the PLRA standards, but these are only enforceable as contracts in state court. 18 U.S.C. § 3636(c)(2). Further, prospective relief may be terminated after two years unless the court finds there is a "current and ongoing violation" of federal law. 18 U.S.C. § 3636(b)(1).

e) Limitations on Attorney Fees - The PLRA prohibits attorneys fees except when "directly and reasonably incurred in proving an actual violation of the plaintiffs rights." 42 U.S.C. §1997e(d)(1)(A). It is unclear whether this provision prohibits fees in cases that are settled, or whether fees may be awarded under the catalyst doctrine when the suit produced reform but there is no court order. Even when the suit is successful, the PLRA limits the hourly rate at which attorneys fees may be awarded under § 1988 to 150% of the rate paid to court appointed attorneys in criminal cases in that district. 42 U.S.C. §1997e(d)(3). And, in a damage case, attorneys' fees are limited to 150% of the amount of the judgment. 42 U.S.C.§ 1997e(d)(2). There is a strong argument, however, that the PLRA limitations on attorneys' fees do not apply to the ADA since that statute has its own attorneys' fees provision, 42 U.S.C. § 12205, that is separate from § 1988. *See McClendon v. City of Albuquerque*, CIV 95-24 (D.N.Mex. 2000) (the PLRA's attorney fee limitations do not preempt the ADA's attorney fee provisions); *Beckford v. Irvin*, 60 F.Supp. 2d 85 (W.D.N.Y.)(holding that where prisoner prevailed on both ADA and

§1983 claims, and where the claims were "inextricably intertwined," half of counsel's time should be compensated at PLRA rates and half at market rates under the ADA's fee provision). *But see Cassidy v. Indiana Dept. of Correction*, 199 F.3rd 374 (7th Cir.1999) (suggesting that PLRA attorney fee limitations apply to ADA cases).

II. What Is The Standard of Judicial Review in Prison ADA Cases?

The ADA requires prisons or jails, like other public entities, to provide reasonable accommodations for qualified inmates with disabilities. However, a requested accommodation is not reasonable if it either imposes undue financial and administrative burdens on a public entity, or requires a fundamental alteration in the nature of the program. *See* 28 C.F.R. S 35.150(a)(3). Furthermore, the ADA never obliges correctional officials to take any action that would create a "significant risk to the health and safety of others." Although terms like "reasonable accommodation" and "undue burden" can be difficult to apply in any context, their meaning in the correctional setting is especially controversial.

Some courts reject the ADA's framework altogether when reviewing claimed violations of prisoners' rights in favor of the very deferential standard articulated by the Supreme Court in *Turner v. Safley*, 482 U.S. 78 (1994) for review of practices that impinge on inmates' constitutional rights. *See Gates v. Rowland*, 39 F.3d 1439 (9th Cir.1994). Under *Turner*, a policy or practice is valid if it is "reasonably related to legitimate penological interests." 482 U.S. at 87. Thus, in *Armstrong v. Davis*, 215 F.3d 1332, 2000 WL 369622 (April 11, 2000)(9th Cir), the court reversed the district court's ruling that prison officials had to show that accommodating inmates' disabilities would be unduly burdensome. Rather, the *Turner* standard required that the burden of proof be placed on the inmates to establish that the challenged practices were not reasonably related to a legitimate penological interest. Similarly, in *Martinez v. California Department of Correction*, 1997 WL 207946 (9th Cir.(Cal.)) (unpublished disposition), the court affirmed the district court decision granting summary judgment to the prison officials against a quadriplegic prisoner who was restricted by prison authorities to the hospital area of the prison and denied access to the prison's general yard, classroom education, and vocational training programs on the same terms as other similarly classified inmates. Citing *Turner*, the court held that the restrictions were reasonably related to legitimate penological interests in security because the plaintiff

conceded that he could not defend himself from attack by other inmates. The court rejected the view that it is not rational to prevent misconduct by punishing the potential victim rather than those who misbehave.

Clearly, the use of the *Turner* standard can sharply limit the protection afforded prisoners by the ADA. But even when courts apply the standards set forth in the actual statute, they tend to be highly deferential to the views of prison administrators. As Judge Posner declared in *Crawford v. Indiana Dept. of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997), "[t]erms like "reasonable" and "undue" are relative to circumstances, and the circumstances of a prison are different from those of a school, an office, or a factory," and "[t]he security concerns that the defendant rightly emphasizes ... are highly relevant to determining the feasibility of the accommodations that disabled prisoners need in order to have access to desired programs and services." Thus, in *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999)(en banc), cert. denied, 120 S.Ct. 931 (2000), although the court rejected the view that the *Turner* standard should directly supplant the ADA and Rehabilitation Act framework in prison cases, it declared that whether an inmate met the essential eligibility requirements for participation in a prison program should be determined in part by the impact on legitimate penological interests, such as prison security and the cost of making accommodations. 171 F.3d at 300. Accordingly, it rejected the claim of HIV-positive inmates who alleged that their exclusion from the prison's general population yard, as well as classroom education and vocational training programs violated the Rehabilitation Act, reasoning that a "significant risk" of HIV transmission existed for any prison program in which HIV-positive inmates sought participation; the prison's segregation policy was not an exaggerated response to the risk of violence between inmates; cost was a proper consideration in the determination of whether hiring of additional guards to deter high-risk behavior was a reasonable accommodation allowing integrated programs; and the hiring of additional guards could therefore impose an undue burden on the prison system. *Id*. And in *Randolph v. Rogers*, 170 F.3d 850 (8th Cir. 1999), the court reversed a grant of summary judgment to a prisoner with a hearing impairment who was not given an interpreter during disciplinary hearings, even though a state statute required such an interpreter, because there was nonetheless a genuine issue of disputed fact regarding whether a sign language interpreter is a reasonable accommodation or imposes an undue burden considering

the heightened security concerns of a prison.

On the other hand, in *Amos v. Maryland Dep't of Pub. Safety and Correctional Servs.*, 178 F.3d 212, 220-22 (4th Cir. 1999), vacated on other grounds, 205 F.3d 687 (4th Cir.2000), the court expressly rejected grafting the *Turner* standard into the ADA because this would essentially mean the court was rewriting "unambiguous statutory language." Instead, the court argued for deference to Department of Justice ADA regulations and application of the "reasonable accommodation" language of the Act. This seems the better approach because it comports with the Supreme Court's conclusion in *Yeskey* that the ADA applies squarely to prisons and because the *Turner* test conflicts with the ADA by shifting the burden of justifying denial of access to programs and services from the institution to the inmate. Furthermore, the language of the ADA, requiring that modifications be "reasonable" and not impose "undue" burdens, allows for adequate consideration of the legitimate interests of prison administrators.