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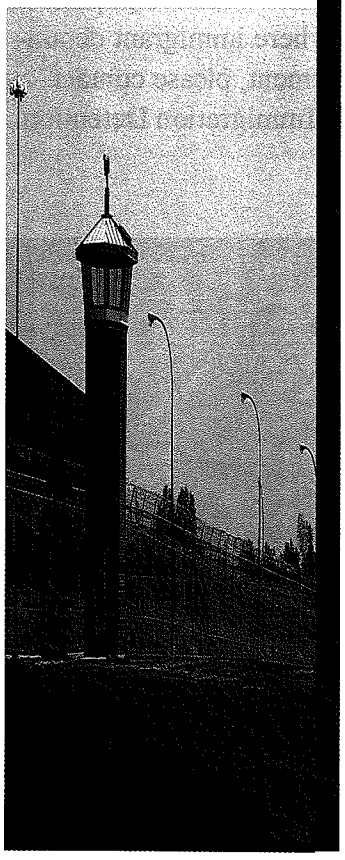


NPP Takes on Immigration Detention Centers

By Tom Jawetz, NPP Staff Attorney

Since 1972, the National Prison Project (NPP) of the American Civil Liberties Union has defended the constitutional rights of detained persons to humane conditions of confinement. The NPP regularly litigates on behalf of prisoners in more than 25 states, and represents tens of thousands of pretrial criminal detainees in large urban jails around the country.

But until recently, the NPP has never focused on the unique problems faced by persons detained by U.S. Immigration and Customs Enforcement (ICE) pursuant to civil immigration charges. Over the past ten years, this population has increased at an alarming rate. There are currently over 29,000 immigrants in detention on any given day, and nearly 300,000 each year. Plans already are in place to expand ICE's capacity to detain thousands more. Immigrant detainees are scattered across the country in hundreds of county jails as well as a handful of facilities run by the U.S. Department of Homeland Security (DHS) and private prison companies. Although some of these people may be detained for a matter of weeks, many are detained for months or years.

Since January 2007, the NPP has filed three lawsuits on behalf of immigrant detainees. In January, we filed Kiniti v. Myers, No. 05-cv-1013 (S.D. Cal.), an overcrowding lawsuit involving the San Diego Correctional Facility (SDCF). SDCF is run by Corrections Corporation of America (CCA), the largest for-profit correctional services provider in the nation. Hundreds of detainees were crammed three-to-a-cell, requiring the third detainee to sleep on the floor by the toilet. Conditions were filthy and the

Continued on page 2. See Immigration

Memorial Tribute to Pat McManus

By Alvin J. Bronstein, Director Emeritus, The National Prison Project of the ACLU

Patrick D. McManus, a longtime friend and consultant to the National Prison Project passed away on July 29, 2007 in Minnesota after a short illness. He is survived by his wife Nancy and his children Michael, Kathryn, and John, and grandchildren Meghan, Jenna, and Georgia. He was a very important part of the NPP's litigation program and appeared as an expert witness, consultant, special master, or court monitor in many of its significant cases.

Continued on Page 3. See Pat McManus

Immigration Detention

"There are currently over 29,000 immigrants in detention on any given day."

overcrowding caused tension at the facility and diminished access to health care. The NPP's account of overcrowding was recently bolstered by a U.S. Government Accountability Office report that described severe overcrowding at the facility and noted the potential safety and security issues raised by the problem. Hundreds of detainees were transferred out of SDCF just days after the NPP entered the case. The lawsuit is now proceeding as a class action.

In March, the ACLU filed a series of lawsuits against DHS officials for holding innocent children, including toddlers, in prison-like conditions at the T. Don Hutto Family Residential Center in Taylor, Texas, without sufficient access to recreation, medical care, or education. In the months that followed, DHS made improvements to the facility to correct the problems challenged by the ACLU. The 26 individual lawsuits were consolidated under the caption In re Hutto Family Detention Center, No. 07-cv-164 (W.D. Tex.), and on the eve of trial, we reached a landmark settlement with DHS. The Settlement Agreement guarantees that the improvements already made at the facility will remain, that additional changes will be made, and that ICE's compliance with the conditions reforms will be subject to external oversight.

In June, the ACLU filed a second lawsuit on behalf of the detainees at SDCF. This lawsuit, Woods v. Myers, No. 07-cv-1078 (S.D. Cal.), charges CCA, ICE, and the Division of Immigration Health Services, a government agency, with failing to provide adequate medical and mental health care to SDCF detainees. The Woods plaintiffs suffer from mental illness, chronic health conditions, and serious injuries that have not been appropriately treated while in ICE custody.

Major newspaper articles have recently highlighted the grossly deficient medical care provided to immigration detainees and have revealed previously unreleased figures on the number of detainees to have died in ICE custody in recent years. The editorial boards of the *Miami Herald*, *New York Times*, and *Washington Post* have called on DHS to promulgate binding regulations pertaining to conditions of confinement, and on Congress to investigate poor medical care and in-custody deaths.

The NPP's lawsuits, along with our public education and advocacy work on behalf of detained immigrants, are shining a spotlight on a problem that previously received scant public attention. Unlike persons going through the criminal justice system, immigration detainees have no right to a free attorney and the majority appear in court pro se. Many detainees face language barriers, are held in remote locations far from advocates and friends, and fear retaliation in their immigration case for speaking up about poor treatment. As a result, the problems faced by this community are often more difficult to uncover than those faced by other detained population. If you know of places where immigrant detainees are subjected to poor treatment, please contact the National Prison Project's Immigration Detention Initiative.

Pat McManus

He also became a close friend.

I first met Pat in the mid-1970's, when he was Assistant Commissioner of Corrections for the State of Minnesota. From 1979 until 1983, he served as the Director of the Kansas Department of Corrections, appointed by the Governor. It was after that, when he became an independent criminal justice consultant, that he began to assist lawyers at the NPP in their litigation. He first assisted us in a statewide prison conditions case in Tennessee as an expert witness at trial and then as the federal court's Special Master working with us and state officials in devising and implementing a remedial plan. He later worked with us as an expert witness, monitor, or master in cases in Alabama, Nevada, New Hampshire, Rhode Island, and Michigan.

I came to know Pat well when he served as an expert in our case against the State of Hawaii dealing with horrendous conditions at a large men's prison and the state's only women's prison, both on the island of Oahu. The case was settled on the eve of trial. After that Pat served on a panel of experts agreed to by the parties to assist in and oversee compliance with a consent judgment, and later as the federal court's Independent Monitor. As I was lead counsel in the case, Pat and I would make regular trips to Hawaii to review and monitor the state's progress in making the required changes and improvements. This entire process continued from 1985 until the court approved a final dismissal of the case in September 1999. During the last 10 years of that process, we made quarterly trips to Hawaii, all of them lasting about a week. Although we spent the entire day in one or the other prison, we had dinner together almost every evening telling each other stories about our respective lives.

I learned from Pat that as a young man in Minnesota he started out thinking of working in the Catholic Church. He had graduated from the Saint Paul Seminary of the University of Saint Thomas in Minnesota and then went to Italy where he received a graduate degree in Theology at the Gregorian University in Rome (with honors). He then returned to Minnesota and thought more about teaching and obtained a Master's degree in Education Administration at the University of Saint Thomas. I was fascinated by his stories of studying in Rome and his work in the Vatican. On finishing school in Minnesota, he began working with young people, first as a juvenile court probation officer in Minneapolis, then as Principal of a residential high school for delinquent or at-risk juveniles and then became Director of a Community Corrections training Center in Minneapolis. From there he went to the Department of Corrections where I first met him.

During his years as a consultant, he also worked for other lawyers, often as a consultant to state and federal courts as well as the United States Department of Justice, Civil Rights Division in matters involving jails in Georgia and Virginia. He more recently served as a member of an international advisory group to the International Centre for Prison Studies, Kings College, London, England. He assisted in the development of "A Human Rights Approach to Prison Management–Handbook for Prison Staff." Pat was also recently a member of an American Bar Association Task Force drafting standards on The Legal Status of Prisoners.

I knew that Margaret Winter, Associate Director of the NPP had worked with Pat and she gave me the following few sentences to include in this

Pat McManus

memorial tribute: "I worked with Pat in a major trial in 1994 to challenge Alabama's discrimination against prisoners with HIV. It was an unforgettable collaboration for me because of Pat's surpassing brilliance, humanity, compassion, imagination, humor, and his tireless fierce drive to get the job done right no matter how high the hurdles-he truly lived the phrase 'Let justice roll down like waters and righteousness like a mighty stream.'"

Pat was a wonderful friend and colleague and he will be missed by many.

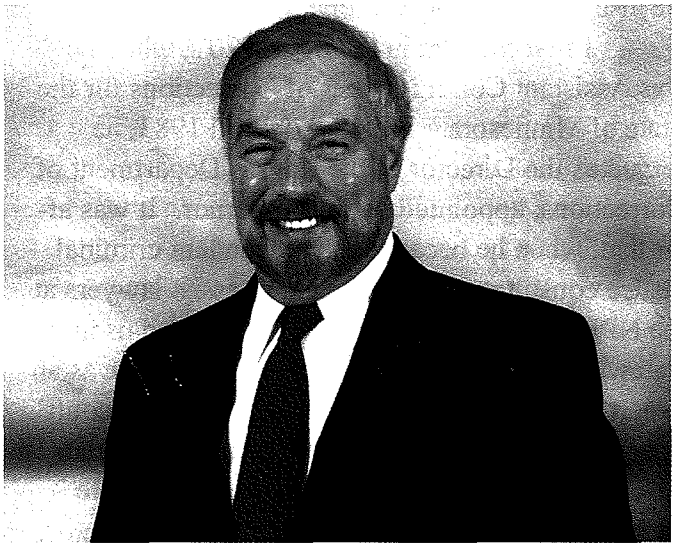


Photo courtesy Nancy McManus.

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.

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.[1] In addition, every claim you raise in your lawsuit must be exhausted. [2] 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.[3]

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.[4] If the prisoner does not receive a response at the final appeal level, and the time for response has passed, the prisoner has exhausted. [5]

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.[6]

Courts have differed widely on when failure to exhaust might be excused.[7] 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.

Ultimately, proper exhaustion depends upon the policy requirements of your particular jail or prison. [8] 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?

The Supreme Court held that failure to exhaust is an affirmative defense that must be raised by the defendants.[9] Then, if the court finds that the prisoner has not exhausted, the case is dismissed without prejudice,[10] meaning that the lawsuit may be filed again once the prisoner has exhausted, as long as the statute of limitations has not run. If you have exhausted some of your claims, but not all, the court will dismiss only the unexhausted claims. [11]

Missing a deadline in the grievance system will forfeit your right to file a lawsuit in almost all circumstances. 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. If the grievance system addresses your claim on the merits, courts will probably hold that you satisfied the exhaustion requirement.[12]

Finally, the statute of limitations is tolled while a prisoner is in the process of exhausting.[13]

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.[14]

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.

Some courts have suggested that under PLRA, courts may still issue injunctions to prevent irreparable injury pending exhaustion of administrative remedies.[15]

The exhaustion requirement does not apply to detainees in INS facilities.[16] Also, the exhaustion requirement does not apply to cases filed before the effective date of PLRA, which is April 26, 1996. [17]

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.[18]

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 pau-*

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.[19] Even dismissals that occurred prior to the effective date of PLRA count as strikes.[20]

An exception to the "three strikes" rule may be invoked if a prisoner is in imminent danger of serious physical injury.[21] 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.[22]

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.

[23] Some courts have suggested the possible availability of nominal and punitive damages even when compensatory damages are barred by the requirement of physical injury.[24] 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).[25] Not surprisingly, the courts differ in their evaluation of what constitutes sufficient harm to qualify as a physical injury.[26]

Last updated 10/07.

NOTES

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

[2] See Jones v. Bock, 549 U.S. ___, 127 S. Ct. 910, 925-26 (2007) (if exhausted claims and unexhausted claims are filed in the same lawsuit, the court should dismiss the unexhausted claims and allow the exhausted claims to proceed).

[3] Miller v. Norris, 247 F.3d 736 (8th Cir. 2001).

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

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

[6] Taylor v. Barrett, 105 F. Supp. 2d 483 (E.D. Va. 2000); see also Miller v. Tanner, 196 F.3d 1190 (11th 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).

[7] See, e.g., Miller v. Tanner, 196 F.3d 1190 (11th 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 (6th Cir. 1999) (investigations by use of force committee and state police are not exhaustion).

[8] Woodford v. Ngo, 548 U.S. 1015 (2006) (exhaustion requires going through all the steps the grievance system requires, and going through them as the grievance system requires, so that the prison addresses the grievance on the merits).

[9] Jones v. Bock, 549 U.S. ___ (2007) (exhaustion requirement under the PLRA is not a pleading re-

quirement that a prisoner must plead and prove before filing suit, rather it is an affirmative defense a defendant must plead or prove).

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

[11] Jones v. Bock, 549 U.S. ___ (2007) (rejecting 6th Circuit's requirement under the PLRA that a prisoner properly exhaust every claim in a lawsuit or face dismissal of the entire suit).

[12] Harper v. Jenkins, 179 F.3d 1311 (11th Cir. 1999) (holding that prisoner who filed an untimely grievance was obliged to seek a waiver of the time limits in the grievance system); Gates v. Cook, 376 F.3d 323, 331 n.6 (5th Cir. 2004) (relying on defendants' failure to reject grievance for rules noncompliance); Pozo v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002) (prisoner who missed deadline on one of the levels of appeals of the grievance system barred from filing lawsuit).

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

[14] Booth v. Churner, 532 U. S. 731 (2001).

[15] Marvin v. Goord, 255 F.3d 40 (2d Cir. 2001); Jackson v. District of Columbia, 254 F.3d 262 (D.C. Cir. 2001).

[16] Edwards v. Johnson, 209 F.3d 772 (5th Cir. 2000).

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

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

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

[20] 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).

[21] 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 (8th Cir. 1998) (allegations that staff placed plaintiff in proximity to known enemies satisfied imminent danger requirement).

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

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

[24] 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 (10th 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).

[25] See Rowe v. Shake, 196 F.3d 778 (7th Cir. 1999) (First Amendment claim not barred by physical injury requirement); Canell v. Lightner, 143 F.3d 1210 (9th 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 (10th 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. Cir. 1998) (claim for violation of privacy is claim for mental or emotional injuries).

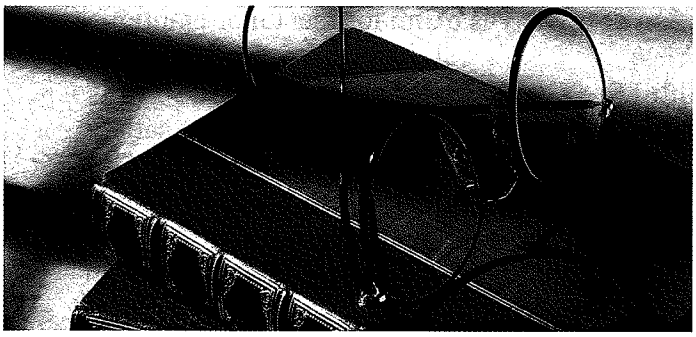
[26] See Gomez v. Chandler, 163 F.3d 921 (5th Cir. 1999) (allegations of cuts and abrasions satisfy physical injury requirement); Liner v. Goord, 196 F.3d 132 (2d Cir. 1999) (intrusive body searches qualify as physical injury); compare to Herman v. Holiday, 238 F.3d 660 (5th Cir. 2001) (claim of

"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 (5th Cir. 1999) (confinement in filthy cell where exposed to mentally ill patients not physical injury); Sigler v. Hightower, 112 F.3d 191 (5th Cir. 1997) (bruised ear does not qualify as physical injury).

Recent PLRA Decisions

Exhaustion of Administrative Remedies

Whitington v. Ortiz, 472 F.3d 804 (10th Cir. 2007). The 10th Circuit rejected a district court's application of the PLRA's exhaustion rule where the lower court dismissed a prisoner's suit because he filed his complaint before receiving a response on a third step grievance and because he allegedly included a new claim in his complaint that was not included in his grievances. Due to this latter alleged defect, the lower court applied the 10th Circuit's "total exhaustion" rule to dismiss the entire case. Id. at 807 (note: this case was decided before the Supreme Court's ruling in Jones v. Bock rejected total exhaustion). In reversing the lower court, the 10th Circuit noted that the Department of Correction's grievance process required a written response within 45 days of receipt and that the Plaintiff had in fact waited 196 days for a response before filing his complaint with the district court. Id. The court held that a prisoner is not required "to wait indefinitely" for prison officials to respond to a grievance before seeking judicial review. Therefore, when prison officials fail to timely respond to a grievance, the prisoner has exhausted "available" remedies under the PLRA. Id. at 807-08.



Kikumura v. Osagie, 461 F.3d 1269 (10th Cir. 2006). The Tenth Circuit joins the Seventh Circuit in holding that the determination of what an administrative grievance must contain is tied to the specific requirements of the relevant grievance process. Id. at 1282. In this instance, because the regulations governing the BOP's ARP do not specify what information is needed, the court fashions a default rule based on the approach adopted by the Second and Seventh Circuits: "a grievance will satisfy the exhaustion requirement so long as it is not 'so vague as to preclude prison officials from taking appropriate measures to resolve the complaint internally.'" Id. at 1283 (quoting Brownell v. Krom, 446 F.3d 305, 310 (2d Cir. 2006)). The court rejects for many reasons defendants' proposed rule that prisoners be required to name alleged wrongdoers; the BOP's ARP gives prisoners no notice of this specificity requirement, and the Supreme Court has long disfavored the creation of procedural technicalities in statutory schemes designed to be used by unrepresented laymen. See Kikumura at 1283-85.

Kaba v. Stepp, 458 F.3d 678 (7th Cir. 2006). Plaintiff claims that his case manager denied him grievance forms, threatened him, and solicited other prisoners to attack him in retaliation for filing grievances. Plaintiff was ultimately beaten by other prisoners and transferred to another facility to receive proper medical care. The Seventh Circuit reverses

the district court's grant of summary judgment to defendants, seemingly adopting the Second Circuit's Hemphill analysis of "availability" of remedies. See id. at 686. (The court never explicitly states that it is adopting the Hemphill inquiry of whether "a similarly situated individual of ordinary firmness would have deemed the grievance procedures to be available," see Hemphill v. New York, 380 F.3d 680, 688 (2d Cir. 2004), but ultimately considers what an "ordinary prisoner in [plaintiff's] shoes" would have done under the circumstances, see Kaba, at 686).

Brownell v. Krom, 446 F.3d 305 (2d Cir. 2006). Plaintiff lost property during transfer and made various efforts to exhaust his administrative remedies. The court of appeals concludes that "special circumstances" justify the plaintiff's noncompliance with the PLRA's exhaustion requirements because:

> (1) prison officials erroneously refused to investigate the circumstances of Brownell's lost-property claim and frustrated administrative appellate review of this error and (2) after Brownell subsequently conducted his own investigation into the circumstances surrounding his lost property, he reasonably believed that he could not raise the new facts discovered in administrative proceedings.

Id. at 313.

Dole v. Chandler, 438 F.3d 804 (7th Cir. 2006). The plaintiff attempted to file a grievance with the Administrative Review Board (ARB), as required by Illinois regulations. Because he was unable to mail the grievance himself, he placed the grievance in an envelope addressed to the ARB and left it in the "chuckhole" of his cell for pick up by a guard; the defendants agreed that a guard picked up the envelope. When the plaintiff later sent a follow-up letter to the ARB inquiring about this grievance, he was informed that the ARB had no record of receiving the grievance; he was given no instructions on how vance will be considered if a prisoner shows good cause, the plaintiff did not re-file his grievance. The district court granted summary judgment to the defendants based on the plaintiff's alleged failure to exhaust.

The 7th Circuit reverses, holding that the plaintiff strictly complied with the regulations, and prison officials were responsible for mishandling his grievance. Id. at 811. The court explains that the prison cannot use its mistake to shield it from possible liability, "relying upon the likelihood that a prisoner will not know what to do when a timely appeal is never received." Id. The court does not penalize the plaintiff for not re-filing his grievance and asking the ARB to exercise its discretion to consider an untimely grievance, because the plaintiff had already given the ARB a chance to consider his grievance, and the fault for not considering it lay entirely with prison officials. Moreover, had the plaintiff filed a late grievance and been rejected, he would be barred from future relief because the court would have found the claim to be indefinitely unexhausted. Id. at 810.

Three Strikes

Andrews v. Cervantes, 493 F.3d 1047 (9th Cir. 2007). Plaintiff had filed several dozen lawsuits and was barred from obtaining IFP status pursuant to 28 U.S.C. § 1915(g). However, some of the counts in the case at bar alleged that he was in imminent danger of contracting a contagious disease as a result of the defendants' failure to screen incoming prisoners upon reception. Plaintiff had previously contracted Hepatitis C. As an initial matter, the court of appeals held that if some of plaintiff's claims qualified under the "imminent danger" exception to the three-strikes rule, then he would be entitled to IFP status with respect to the action as a whole. Id. at *5. Similarly, the court held that "imminent danger of

serious physical injury" should be evaluated with respect to conditions as they existed at the time the complaint was filed. Id. at *4. However, the court qualified this ruling by requiring plaintiffs to alleged an "ongoing danger." As the court explained, "...a prisoner who alleges that prison officials continue with a practice that has injured him or others similarly situated in the past will satisfy the 'ongoing danger' standard and meet the imminence prong of the three-strikes exception." Id. at *8. Applying this standard, plaintiff adequately alleged imminent danger for the purposes of section 1915(g). Id.

Butler v. DOJ, 492 F.3d 440 (D.C. Cir. 2007). The D.C. Circuit held that a dismissal for failure to prosecute did not constitute a strike. Id. at 443-44. However, the court exercised its discretion to deny IFP status to a plaintiff who had filed several appeals that had been dismissed for failure to prosecute and who had engaged in a "pastime" of repetitive filings. Id. at 447.

Thompson v. DEA, 492 F.3d 428 (D.C. Cir. 2007). The D.C. Circuit considered five distinct questions regarding the definition of a strike pursuant to 28 U.S.C. § 1915(g). The court concluded the following: (1) Prisoners seeking IFP status are not required to produce evidence regarding the reasons for prior dismissals. The initial burden falls upon the defendant. Once such evidence is produced, the burden shifts to the prisoner to demonstrate why the dismissals should not be treated as strikes. Id. at 435-36. (2) Appellate affirmances of strikes do not count as additional strikes. Id. at 436. (3) Dismissals for lack of jurisdiction do not count as strikes. Id. at 437. (4) Unexhausted complaints dismissed on a 12(b)(6) motion or dismissed sua sponte expressly for failure to state a claim will count as strikes. However, dismissals on other grounds, including under Rule 12(b)(1) or on summary judgment, will not count as strikes. Id. at 438-39. (5) Not all actions dismissed pursuant to 28 U.S.C. § 1915A are strikes. Id. at 439.

Owens v. Isaac, 487 F.3d 561 (8th Cir. 2007). Plaintiff appealed denial of in forma pauperis status under the three-strikes rule. The court of appeals held that the summary appellate affirmance of a district court's dismissal did not count as a strike. Id. at 563. Further, the court of appeals criticized the district court's dismissal of one of the underlying actions as frivolous pursuant to 28 U.S.C. § 1915A. The court noted that plaintiff had filed multiple motions to amend and, when read together, the original complaint and amendments stated claims against some of the defendants. Id. at 563-64.

Campbell v. Davenport Police Dept., 471 F.3d 952 (8th Cir. 2006). A pro se prisoner filed his Section 1983 complaint after filing three other such complaints the month before. The district court dismissed the complaint on the basis that the dismissals of the three previous complaints constituted three "strikes" under the PLRA, 28 U.S.C. § 1915(g). The prisoner appealed and requested *in forma pauperis* status (IFP). Citing 10th and 5th circuit precedent, the court noted that the three dismissals could not be counted as strikes when the lower court cited them because the plaintiff had not yet exhausted or waived his appeals in those cases when he filed the instant case. The decision was remanded to the lower court to conduct initial review of the complaint under the PLRA and IFP status was granted. Id. at 953.

Ibrahim v. District of Columbia, 463 F.3d 3 (D.C. Cir. 2006). The D.C. Circuit grants plaintiff leave to appeal in forma pauperis despite having three prior strikes, because his pro se complaint, construed liberally, meets the Section 1915(g) requirement that

Recent PLRA Decisions

plaintiff is "under imminent danger of serious physical injury." Id. at 6-7. The court first holds that "failure to provide adequate treatment for Hepatitis C, a chronic and potentially fatal disease, constitutes 'imminent danger'" for purposes of the three strikes rule. Id. The D.C. Circuit then holds that plaintiff is in danger of "a serious physical injury," because Hepatitis C is "a chronic disease that could result in serious harm or even death." Id.

Green v. Young, 454 F.3d 405 (4th Cir. 2006). The Fourth Circuit holds that a "routine" dismissal for failure to exhaust administrative remedies does not constitute a "strike" for purposes of 28 U.S.C. § 1915(g). This statutory interpretation decision follows from Anderson v. XYZ Correctional Health Servs., Inc., 407 F.3d 674 (4th Cir. 2005) (holding that Congress did not authorize *sua sponte* dismissal of claims on exhaustion grounds). This decision creates a circuit court split. See Green v. Young, 454 F.3d at 409 n.2 (citing Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1210, 1213 (10th Cir. 2003) (concluding that a PLRA action that does not allege exhaustion does not state a claim and concluding without additional explanation that dismissal for failure to exhaust counts as a strike) and Rivera v. Allin, 144 F.3d 719, 731 (11th Cir. 1998) ("A claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted.").

Case Law Report: Highlights of the Most Important Prison Cases

By John Boston
Director, Prisoners' Rights Project of the NY Legal Aid Society

U.S. Court of Appeals Cases

Medical Care/Standards of Liability/Deliberate Indifference/Appointment of Counsel/Financial Resources

Johnson v. Doughty, 433 F.3d 1001 (7th Cir. 2006). The plaintiff had a hernia and several doctors found that it did not require surgery notwithstanding his complaints of pain and interference with ordinary activity.

The district court did not abuse its discretion in declining to appoint counsel. A district court "will be held to have abused its discretion under § 1915(e)(1) (not to appoint counsel) only if the denial of counsel made 'it impossible for [the plaintiff] to obtain any sort of justice.' . . ." This case does not meet that standard. It was not overly difficult. The plaintiff filed an acceptable complaint, a successful opposition to a motion to dismiss, and other litigation papers including a motion in limine. The plaintiff could have presented evidence concerning his pain and restricted activities and elicited from the defendants evidence of the alleged policy against hernia operations and accepted professional standards for treating hernias and hernia pain.

The district court correctly found the defendants had not been deliberately indifferent. A grievance counselor with no medical background who was aware of the plaintiff's complaints of pain did not disregard his complaints but investigated, made sure the medical staff was monitoring and addressing the problem, and reasonably deferred to the professionals' opinions. (1010) The same was true of the warden, who made sure that medical care was available to professionals could determine whether he needs surgery. (1011)

The same was true of higher officials who reviewed the grievance and of other non-medical professionals. Differences of medical judgment do not raise an Eighth Amendment claim. However, "a medical professional's erroneous treatment decision can lead to deliberate indifference liability if the decision was made in the absence of professional judgment." (1013) "The cost of treatment alternatives is a factor in determining what constitutes adequate, minimum-level medical care, but medical personnel cannot simply resort to an easier course of treatment that they know is ineffective. . . ." Here, the plaintiff's hernia was not strangulated (which is a medical emergency mandating surgery), so it was up to the doctors to determine if surgery was necessary and the treating doctor determined it was not. There was no evidence of a cost-saving policy against operating on hernias regardless of pain. This is a case of medical judgment." (The dissenting judge points out that the plaintiff could not stand up straight for long without pain, and that laughing, coughing, and bowel movements also caused pain; plaintiff needed an expert and needed discovery and didn't get it.)

Medical Care/Standards of Liability/Deliberate Indifference, Serious Medical Needs/Pre-Trial Detainees

Plemmons v. Roberts, 439 F.3d 818 (8th Cir. 2006). The plaintiff alleged that he told the booking officer he was a heart patient and about six hours later began experiencing classic heart attack symptoms–arm and chest pain, profuse sweating, and nausea. The court holds that he has established a material issue whether he had a serious medical need.

The plaintiff's allegations that the jailers were told of his cardiac history, did not respond to notice via the call box of his symptoms, then dismissed them as an anxiety attack; delayed in returning to check on him for 15 to 25 minutes; then left him in the booking room for another 10 to 15 minutes before summoning an ambulance were sufficient to raise a deliberate indifference claim. The defendants are not entitled to qualified immunity.

Medical Care/Denial of Ordered Care Medical Care/Standards of Liability/Deliberate Indifference/Personal Involvement and Supervisory Liability

Jett v. Penner, 439 F.3d 1091 (9th Cir. 2006). The plaintiff broke his thumb and the defendants never did manage to set it and cast it, although the doctor who initially treated it said he should see an orthopedist within a few days. The plaintiff's thumb is deformed as a result.

A doctor could be held deliberately indifferent who did nothing for almost three weeks after the plaintiff sent him a letter of complaint; the doctor's claim that he only found out later represented only a factual dispute, since there is a presumption that mail sent is timely received. There is also an issue of fact as to subsequent deliberate indifference, since the doctor allegedly told him everything was taken care of and he was supposed to go back to the hospital, but he was never taken. (The fact that the hospital under discussion was not one they had a contract with was no excuse for not sending him to a hospital they did have a contract with.) Deliberate indifference is also supported by the fact that the plaintiff continued to submit requests for care and that the doctor finally made an orthopedic referral two and a half months later, acknowledging that he did need to see an orthopedist. At 1098: "The fact finder could infer deliberate indifference from Dr. Penner's act of striking out the word 'obvious,' resulting in a statement of 'no malalignment' in his notes, after reviewing a radiology report which specifically indicates a deformity. . . . In our view, this is not a case involving differing medical opinions regarding treatment methods, . . . because Dr. Penner recognized, as did all other physicians who saw Mr. Jett, Mr. Jett

needed to see an orthopedist. . . ."

The warden and another doctor are not entitled to summary judgment. At 1098: "As prison administrators, [they] are liable for deliberate indifference when they knowingly fail to respond to an inmate's requests for help." The plaintiff is entitled to an inference at the summary judgment stage that they got the letters he swore he sent them.

Medical Care/Standards of Liability/Deliberate Indifference/Municipalities

Long v. County of Los Angeles, 442 F.3d 1178 (9th Cir. 2006). The decedent, 71 years old and weighing over 350 pounds with a history of congestive heart failure, died 18 days after being jailed without being seen by a doctor until a few hours before his death. His attorney had written a letter to the county jail medical director before he began serving his sentence detailing his medical needs for close supervision of medication and exercise. The committing judge ordered that he receive a medical examination and that the court be advised of the results, attaching letters from his doctor. The decedent was transferred to a jail hospital ward and then to the Medical Services Bureau, "a correctional treatment facility designated to provide health care to prisoners who do not require acute care services but are in need of professionally supervised health care" (1182), where he waited 38 hours in a wheelchair without his medications. He was subsequently observed by nurses with serious edema, labored respiration and a high pulse over the ensuing days, with no apparent physician response to his observed and documented worsening symptoms of heart failure.

The district court erred in dismissing the claim against the municipality. At 1185-86: "To impose liability against a county for its failure to act, a plaintiff must show: (1) that a county employee violated the plaintiff's constitutional rights; (2) that the county has customs or policies that amount to deliberate indifference; and (3) that these customs or policies were the moving force behind the employee's violation of constitutional rights." Here it is undisputed that there is a triable issue whether employees violated the decedent's rights. There is also a triable issue as to the municipality's failure to train. The court rejects the defendants' argument that if they hire and rely on trained professional doctors and nurses, they can't be held deliberately indifferent.

At 1188: "A county's failure adequately to train its employees to implement a facially valid policy can amount to deliberate indifference." The county knew of the decedent's condition and that the unit was not equipped to care for acutely ill patients. The fact that the decedent was seen 50 times by nurses did not eliminate the triable issue.

The plaintiff also challenged the lack of adequate policies. At 1189: "This court consistently has found that a county's lack of affirmative policies or procedures to guide employees can amount to deliberate indifference, even when the county has other general policies in place."

Medical Care/Standards of Liability/ Deliberate Indifference

Gordon v. Frank, 454 F.3d 858 (8th Cir. 2006). The decedent was sentenced to 10 days in jail for driving without a license. He was released to a hospital to treat heart problems and was not returned to jail. A year later he went to a hospital complaining of pain, left without receiving treatment, but called the police for a ride home. They arrested him on the outstanding warrant and took him to jail. In jail, he asked for help climbing the stairs and did not receive it; asked for a blood pressure test and complained of other medical problems and was told the information would be relayed; asked for medication and was told he had already been seen; and asked again for medication, saying he

could not breathe and was in extreme pain. On the last occasion, he was told he had been seen, there were no orders for medication, he could see medical staff in the morning, and he would be put in lock-down if he continued to buzz for "non-emergency issues." In the morning he was dead. The court rejected the defendants' qualified immunity defenses and upheld denial of their motion for summary judgment.

At 862: "Intentional delay in providing medical treatment shows deliberate disregard if a reasonable person would know that the inmate requires medical attention or the actions of the officers are so dangerous that a knowledge of the risk may be presumed." The officer who refused to help him up the stairs and saw him struggling, whom he told that he could not breathe and was in pain and who knew that these symptoms indicated high risk but delayed medical treatment and threatened to discipline him, knew he was at substantial risk. Another officer who refused him help climbing the stairs and watched him ascend, received one of his requests for medication, and knew about his other complaints but did nothing but promise to pass the information on, did also. A sergeant who knew he had "medical issues that required extra observation" and was told of his complaints of breathing troubles and chest pain but did nothing also knew he was at substantial risk.

At 863: ". . . [A] reasonable officer would consider chest pain and difficulty breathing to be symptoms that require medical attention in anyone who claims to have heart disease. The intentional delay by these officers shows deliberate disregard sufficient to reject qualified immunity." Id.: "A reasonable officer would know that it is unlawful for officers to delay medical treatment for an inmate with obvious signs of mental distress, especially one who communicates this distress directly to officers."

The defendants said their mistake was reasonable because they thought if the decedent could yell over the intercom he could not be having trouble breathing. The court, however, found this mistake to be unreasonable because the defendants did not act upon the available information that the decedent was experiencing shortness of breath and chest pain even though they were responsible for responding to medical emergencies and knew the decedent was on high observation. (863-64)

Cruel and Unusual Punishment/Proof of Harm/ Grievances and Complaints about Prison

Boxer X v. Harris, 437 F.3d 1107 (11th Cir. 2006). The plaintiff alleged that he was forced to masturbate for the entertainment of an officer. This states a constitutional privacy claim. At 1111: "We have reaffirmed the privacy rights of prisoners emphasizing the harm of compelled nudity. . . . Nonetheless, we 'continue to approach the scope of the privacy right on a case-by-case basis.'" To violate the Eighth Amendment, the prisoner must suffer objectively sufficiently serious injury. "We join other circuits recognizing that severe or repetitive sexual abuse of a prisoner by a prison official can violate the Eighth Amendment." However, the resulting injury must be more than de minimis. "We conclude that a female prison guard's solicitation of a male prisoner's manual masturbation, even under the threat of reprisal, does not present more than de minimis injury." This doesn't necessarily require dismissal of the privacy claim under the PLRA, since the mental/emotional injury provision does not affect the availability of declaratory relief.

Disabled-Medical Care/Medication/Use of Force/ Restraints/Denial of Ordered Care

Kiman v. New Hampshire Dep't of Corrections, 451 F.3d 274 (1st Cir. 2006). The plaintiff, a former prisoner, developed ALS in prison, though it was not diagnosed until shortly before his release. He sued under the ADA but not, apparently, under the Eighth Amendment. This opinion addresses how and to what extent medical deprivations can be ad-

dressed under the ADA, and the analysis turns out to look like a less stringent version of the Eighth Amendment analysis. At 284: "Medical care is one of the 'services, programs, or activities' covered by the ADA. . . . However, courts have differentiated ADA claims based on negligent medical care from those based on discriminatory medical care."

Under this analysis, summary judgment for the defendants was granted with regard to their actions concerning the plaintiff's diagnosis, medical consultations, physical therapy, or medical dosages because their actions were not "so unreasonable as to demonstrate that they were discriminating against him because of his disability." (285) The medical staff sought his medical records, arranged an outside specialist consultation, and made reasoned judgments about how to treat his condition.

Moreover, summary judgment was appropriate for plaintiff's claim regarding the denial of a cane when he was readmitted to prison on a parole violation and later when he was placed in SHU. During the intake quarantine period, he was capable of walking without a cane and did not have to walk much anyway, being locked in his cell most of the time, and the defendants were legitimately in the process of verifying his need for the cane. In SHU, defendants say they would have helped him get to the shower if he had asked, but with his cane he was not allowed to go to the prison yard for outdoor recreation. Upon learning of this, his doctor issued him a pass to have recreation in the day room. The defendants' security concern that he could have used a cane as a weapon justified their denial. (285) Also, the denial of plaintiffs' request for an "early chow" or "slow movement" pass (so slow-moving people can bypass the meal lines) did not violate the ADA, since he was in a unit for prisoners awaiting review of disciplinary infractions who were allowed "cell feed" rather than "slow movement."

Summary judgment as to the other claims, however, was denied. The plaintiff complained that his prescriptions were not dispensed on a timely and regular basis and the only response he got was that it was his responsibility to get them renewed, even though they had not expired. At 286-87: "Access to prescription medications is part of a prison's medical services and [287] thus is one of the 'services, programs, or activities' covered by the ADA." Defendants' failure to dispense prescriptions as written "is not a medical 'judgment' subject to differing opinion–it is an outright denial of medical services." (287)

Evidence that a shower chair was issued by prison officials in acknowledgment of the plaintiff's disability-related needs, but that correction officers would sit on it and refuse to let him use it, was also sufficient to withstand summary judgment. (288)

Finally, the plaintiffs' testimony that prison staff refused to honor his "front cuff pass" (issued because of the pain rear-cuffing inflicted on him) was sufficient to withstand summary judgment because the pain caused by the lack of front cuffing affected his access to a variety of the 'services, programs, or activities' covered by Title II of the ADA. (288-89) And plaintiff's testimony that he requested to be placed on a bottom tier and a bottom bunk, and that defendants acknowledged his needs for accommodation by issuing a bottom bunk pass and cane pass, but nonetheless placed him in a top bunk was sufficient to withstand summary judgment as to the provision of reasonable accommodations. (290)
because of the pain rear-cuffing inflicted on him) was sufficient to withstand summary judgment because the pain caused by the lack of front cuffing affected his access to a variety of the 'services, programs, or activities' covered by Title II of the ADA. (288-89) And plaintiff's testimony that he requested to be placed on a bottom tier and a bottom bunk, and that defendants acknowledged his needs for accommodation by issuing a bottom bunk pass and cane pass, but nonetheless placed him in a top bunk was sufficient to withstand summary judgment as to the

retaliation for his grievances. The court holds (at 686): "Retaliation against a prisoner is actionable only if it is capable of deterring a person of ordinary firmness from further exercising his constitutional rights." This standard is aimed at weeding out only "inconsequential" actions and is equivalent to a de minimis standard. Under this standard the plaintiff's job change is de minimis because he was only made to work in the kitchen for a week and in the unpleasant "pot room" for a day. But transfer to a more dangerous prison is a much more serious retaliatory act than what has been considered de minimis in other circuits. And it is clear that transfer to a more dangerous prison in retaliation for the exercise of constitutional rights has the potential to deter an inmate from the future exercise of those rights.

Federal Officials and Prisons/Color of Law and Liability of Private Entities/Medical Care

Holly v. Scott, 434 F.3d 287 (4th Cir. 2006). At 288: Individual employees of a privately operated prison cannot be held liable under the Eighth Amendment for allegedly providing inadequate medical care to a federal inmate. The court declined to extend the cause of action recognized in Bivens v. Six Unknown Named Agents to these circumstances, both because the actions of the private prison employees are not fairly attributable to the federal government and because the inmate has adequate remedies under state law for his alleged injuries.

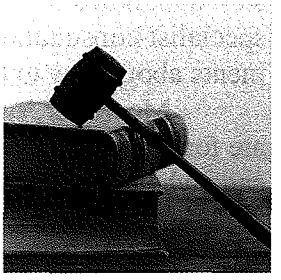
Government Benefits

Daimler Chrysler Corporation v. Cox, 447 F.3d 967 (6th Cir. 2006). State court orders were issued under the Michigan State Correctional Facility Reimbursement Act requiring state prison wardens to notify pension plans to send payments to prisoners' institutional accounts, where they would be garnished to reimburse the state for the prisoner's care in an amount up to 90% of the prisoner's assets. The Court finds these notices to be preempted by ERISA's anti-alienation provision, which requires every pension plan to prohibit assigning or alienating its benefits. Once benefit payments have been disbursed, creditors may encumber the proceeds, but the Michigan notices operated on the payments before they were sent. The court does not reach the question whether ERISA's general preemption provision also prevents the enforcement of the orders.

Law Libraries and Law Books/Pleading Access to Courts/Punishment and Retaliation

Marshall v. Knight, 445 F.3d 965 (7th Cir. 2006). The plaintiff alleged that restrictions on his law library time denied him access to courts.

Notice pleading in an access to courts case requires specific allegations as to the prejudice resulting from defendants' actions. The plaintiff sufficiently stated a claim. He alleged that defendants reduced his law library access to a "non-existent" level, and the resulting inability to research and prepare for a court hearing caused him to lose time credits that would have shortened his incarceration. The right of access to courts is not limited to filing of complaints but includes cases where the prisoner's denial of access caused a potentially meritorious claim to fail.



The plaintiff should have been allowed to file an amended complaint, since he requested to do so before the defendants had served an answer. His failure to attach a copy of the proposed amended complaint violated the local rules but the relevant rule said that was not a reason to deny the request.

The plaintiff's allegations that almost immediately after he filed his complaint he was placed on "idle" status with no pay, other inmates were authorized to charge him fees for library access, and he was denied educational and vocational opportunities, denied a transfer to minimum security, and placed with violent cellmates "certainly amount to a chronology from which retaliation may be inferred." (971)

Mental Health Care/Deference/Heating and Ventilation/Lighting

Scarver v. Litscher, 434 F.3d 972 (7th Cir. 2006). The plaintiff, held in the Wisconsin supermax prison, is schizophrenic and delusional and has murdered three people, two of them in prison. He spent five relatively well-adjusted years in federal prison and then was returned to the supermax, where he was subjected to extreme heat that interacted dangerously with his psychotropic medications and to constant illumination, and provided no audiotapes or any other source of sound to drown out the voices in his head. There were no windows, no air conditioning, and the prisoners were not allowed to have any possessions except one religious text, one box of legal documents, and 25 personal letters. The plaintiff attempted suicide twice, banged his head against the cell wall for protracted periods, cut his head with a razor, cut his wrists, etc. At 975: "It is a fair inference that conditions at Supermax aggravated the symptoms of Scarver's mental illness and by doing so inflicted severe physical and especially mental suffering." Defendants soon realized that the plaintiff was in severe distress, but there is no evidence that they attributed his distress to the heat, constant illumination, or the other conditions. They gave him psychiatric attention and medication and kept him under surveillance and thwarted his suicide attempts. At 976: "What is more, the treatment of a mentally ill prisoner who happens also to have murdered two other inmates is much more complicated than the treatment of a harmless lunatic. . . . Measures reasonably taken to protect inmates and staff from him may unavoidably aggravate his psychosis; in such a situation, the measures would not violate the Constitution."

Mental Health Care/Personal Involvement and Supervisory Liability/Heating and Ventilation Food

Clark-Murphy v. Foreback, 439 F.3d 280 (6th Cir. 2006). The decedent collapsed during a "heat alert" and was crying and talking nonsensically. He was taken to one of two observation cells near a control center, which have a small window and food slots in the door. Upon his placement there, the decedent started barking like a dog and screaming at the top of his lungs. A psychiatric referral was written. They took him back to his regular cell, but one defendant noted that his duffel bag was packed, from which he inferred that the decedent had planned to leave his cell and was a "manipulator." So they took him back to the observation cell. Over the next several days, the water was turned off in his cell, and though his behavior became progressively more bizarre, no mental health or other staff entered his cell. After five days in the observation cell, he was found dead, naked on the floor, in full rigor mortis, with eyes open and vomit encrusted on his mouth. The water was off and his toilet was dry. The viewing window was smeared with filth, obstructing visibility. An autopsy showed death by dehydration.

Defendants who helped the decedent when he initially collapsed could not be found deliberately indifferent; they conveyed information about his condition and had no reason to expect it would not be acted upon. As to other defendants, the court dismisses a couple who worked only one shift during the relevant time period, but holds a number of others (Deputy Warden, lieutenants, sergeants, officers, and a nurse and a psychologist) are not entitled to summary judgment (at 289-90). At 292: "At the time of this incident, it should come as no surprise that Clark had a clearly established right not to be deprived of food and water. . . . The same holds true for Clark's right to psychological treatment." The court rejects defendants' argument that plaintiff can't show proximate cause between their actions and the decedent's death. Plaintiff "need only demonstrate a link between each defendant's misconduct and Clark's injury, which may include his death as well as the 'pain and suffering' . . . that preceded his death." (293)

Municipalities Medical Care/Standards of Liability/Deliberate Indifference/Medication/ Drug Dependency Treatment

Davis v. Carter, 452 F.3d 686 (7th Cir. 2006).

The decedent, on methadone maintenance, spent six days in jail during which he received no methadone despite having notified jail personnel of his need for it on admission. He then died of a cerebral aneurysm. There was no claim that the death was related to the methadone denial.

The plaintiff produced sufficient evidence to defeat summary judgment by demonstrating that Cook County has a widespread practice or custom of inordinate delay in providing methadone treatment. A pharmacist testified that there are essentially no policies and procedures to ensure that methadone maintenance status is timely verified, or that once verification is obtained, security personnel are notified and the prisoner brought to the pharmacy in a reasonable time. There are essentially no checks and balances to ensure that patients undergoing withdrawal do not fall through the cracks for days, especially if admitted on a weekend. (692-93) Other personnel confirmed a widespread practice of at least three days' delay in confirming the regimen, even though only a phone call is required. One employee's statement "Cook County don't work that fast" is evidence that the delays are customary. A PA testified that she often prescribed other medications for several days to limit withdrawal symptoms pending receipt of methadone.

The court also found that an officer who allegedly failed to contact the paramedics or the emergency room immediately when he learned that the decedent was "dope sick," observed that he was suffering, "and heard that 'it felt like somebody was ripping [his] insides out,'" could be found deliberately indifferent. Further, a sergeant who was allegedly notified of the decedent's condition, but did not file an unusual incident report or take any action to get medical treatment for him, and apparently did not speak to the decedent contrary to his alleged policy of speaking directly with prisoners who reported ill, could be found deliberately indifferent. Finally, a social worker who allegedly did not contact the paramedics on the decedent's behalf could be found deliberately indifferent. But the officer who said "Cook County don't work that fast" was not deliberately indifferent, since he then transferred the call to the person responsible for the decedent's medical care.

RLUIPA and RFRA

Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006). Religious activity need not be "fundamental" to be "substantially burdened" within the meaning of RLUIPA. Whatever "substantial burden" meant before RLUIPA, the statute "substantially modified and relaxed the definition of religious exercise" to include all religious exercise "whether or not compelled by, or central to, a system of religious belief." (662) So this circuit's pre-RLUIPA case law suggesting a "fundamental" requirement in religion cases is wrong as applied under RLUIPA.

Psychotropic Medication/Medical Care/ Standards of Liability/Deliberate Indifference/ Summary Judgment/Evidentiary Questions

Spann v. Roper, 453 F.3d 1007 (8th Cir. 2006) (per curiam). A nurse assistant mistakenly required the plaintiff to take someone else's psychotropic medication. He passed out and hit his head. The court found that the nurse's action did not constitute deliberate indifference because it was undisputedly "a mistake." However, a jury could find the nurse to be deliberately indifferent to the plaintiff's serious medical needs when she left him in his cell for three hours even though she knew he had just taken a large dose of mental health medications prescribed for another inmate. The court noted that not only could a jury find that the nurse was aware of the plaintiff's serious medical condition and ignored it, but that even a lay person would know that taking a large dose of mental health medications prescribed for someone else is potentially dangerous. (1008-09) Moreover, the court held that a jury could find that the three-hour delay allowed the medication to

fully enter the plaintiff's system, whereas immediate medical attention would have enabled medical staff to pump his stomach or take other action to remove the medication from his system before it was totally absorbed. (1009)

Statutes of Limitations Recreation and Exercise Procedural Due Process/ Administrative Segregation, Disciplinary Proceedings Equal Protection/ Classification Good Time/Religion– Services Within Institution/ Grievances and Complaints about Prison Law Libraries and Law Books

Fogle v. Pierson, 435 F.3d 1252 (10th Cir. 2006). The plaintiff alleged that he was improperly placed in administrative segregation for three years, and filed suit 22 months after he was released. The Colorado limitations period is two years. Anything that happened more than two years previously is time-barred unless the plaintiff is entitled to the benefit of equitable tolling, which the state recognizes. The plaintiff's allegation that he was kept in 23-hour lock-in five days a week and 24-hour lock-in for the other two, with no access to law library clerks or prison lawyers, might meet the "extraordinary circumstances" test for equitable tolling. The district court should not have dismissed the complaint as time-barred. (1258-59)

There is an arguable basis for asserting that three years in administrative segregation with only five hours a week out of cell is atypical and significant under Sandin. (1259) At n. 3: Allegations of daily cell searches, 24-hour electric lighting, and no privacy should be considered in determining the atypical and significant question.

An allegation of three years with no outdoor exercise at all presented an arguable Eighth Amendment claim; this court has previously noted "substantial agreement" that regular outdoor exercise is important to psychological and physical well-being and that some courts hold denial of "fresh air and exercise" to be cruel and unusual under some circumstances. (1260)

The plaintiff had no equal protection claim, since defendants have discretion to consider whatever they think relevant in classifying inmates, including minor differences, so it is not arguable that there is no relevant difference between him and other prisoners treated differently.

Placement in administrative segregation for an escape for which the plaintiff was criminally punished did not constitute double jeopardy because prison disciplinary sanctions are not essentially criminal in nature and do not implicate double jeopardy protections.

Loss of the ability to earn time credits by virtue of placement in segregation did not raise a constitutional claim, since the credits are awarded discretionarily and the plaintiff therefore has no liberty interest in receiving them.

The plaintiff's allegation that he was punished for complaining about his placement in administrative segregation by being transferred to long-term administrative segregation arguably stated a First Amendment retaliation claim. (1263-64)

The plaintiff's allegation that he was denied all opportunity for "Christian fellowship" while in administrative segregation arguably stated a claim. (1264)

The plaintiff's allegation that he was completely denied access to the law library and its accompanying resources and that this denial prevented him from filing the claims in this case, some of which are not frivolous, was not "indisputably meritless." (1264-65)

State Officials and Agencies

Thomas v. St. Louis Bd. of Police Commissioners, 447 F.3d 1082 (8th Cir. 2006). The city Board of Police Commissioners is not entitled to Eleventh Amendment immunity because it is an arm of local, not state, government. A state supreme court decision calls that conclusion into question, but the U.S. Supreme Court has ruled it was not a state agency and only the Supreme Court can overrule that holding.

Voting, Standing Procedural, Jurisdictional and Litigation Questions

Muntaqim v. Coombe, 449 F.3d 371 (2d Cir. 2006). The plaintiff's challenge to New York's felon disenfranchisement statute is dismissed for lack of standing because the plaintiff, who has been incarcerated in New York for 30 years, is not really a New York resident. A prisoner retains the domicile he had before entering the institution. Because the plaintiff lived in California before incarceration he was never eligible to and never did vote in New York. Moreover, this plaintiff had disavowed any intention to remain in New York in the future. Accordingly, he is not being deprived of the right to vote in New York by the felon disenfranchisement statute but by his residency-based lack of eligibility.

Use of Force/Verbal Abuse/Hygiene/ Municipalities

Johnson v. Blaukat, 453 F.3d 1108 (8th Cir. 2006). The plaintiff alleged that she, her sisters, and another prisoner were put into lockdown after complaints that they had been bullying other inmates, and were put into the same cell. One of them banged a shampoo bottle on the desk and threw toilet paper at the wall. When officers decided to enter the cell, the plaintiff stepped in front of them and told them not to touch her sister because she and the other prisoner could calm the sister down. An officer tackled her to the floor and tried to cuff her, with difficulty since one hand was under her and officers were piling on top of her. One of them placed an Orcutt Police Nunchaku around her neck and choked her until it broke; her head was slammed on the floor, her hair was pulled, she was maced, and she emerged with bruising and lacerations on her arms, a broken thumb, and two black eyes.

Summary judgment should not have been granted for the defendants, since the plaintiff's allegations raised questions whether their acts were defensive in nature; whether they were necessary to maintain order or were excessive reactions by frustrated officers; whether the amount of force used was commensurate with the situation; whether the plaintiff failed to comply with orders; whether she was actively resisting; whether verbal orders or less force would have been sufficient; whether there was a warning before application of pepper spray. (1113)

Summary judgment was properly granted to supervisory officers who allegedly used a racial epithet and removed the plaintiff's personal hygiene items. These allegations do not support an Eighth Amendment claim, and there was no evidence that they were deliberately indifferent to or tacitly authorized excessive force.

Use of Force/Chemical Agents/Criminal Proceedings/Rights of Particular Groups/Medical Care–Standards of Liability–Deliberate Indifference

U.S. v. Gonzales, 436 F.3d 560 (5th Cir. 2006). The defendant deportation officers were convicted of deprivation of civil rights after they "took down" a suspect, breaking his neck, and did not summon medical assistance despite the fact that he said he was paralyzed, dragged him into a van, and across a parking lot, and maced him although he was handcuffed as well as paralyzed, then drove him to another jail lying on the van floor for three hours.

At 621-22: The plaintiff's allegation that he was strapped into a wheelchair for several hours, forced to urinate on himself, and left sitting in his urine for several hours while in a manic state, and that the jail knew of his mental condition, stated an Eighth Amendment claim. The lack of physical injury does not negate the constitutional claim. At 623: The gratuitous infliction of pain is not limited to physical pain, but includes psychological pain. Intentionally denying an inmate the use of a bathroom for hours and requiring him to sit in his own urine could constitute the requisite psychological pain to support this claim.

At 623-24 (access to courts): "Policies or acts that prevent either convicted prisoners or pretrial detainees from going to court and that limit their access to attorneys are not allowed." The court links this proposition to the actual injury requirement of Lewis v. Casey; apparently it is satisfied by the allegation that the plaintiff has been prevented

from preparing defenses to charges against him. The plaintiff's claim of denial of confidential consultation with an attorney in some instances and denial of any consultation in others states a court access claim.

At 625 (equal protection): The plaintiff's allegation that he was discriminated against based on mental illness by being confined in a wheelchair stated an equal protection claim.

Use of Force/Personal Involvement and Supervisory Liability

Valdes v. Crosby, 450 F.3d 1231 (11th Cir. 2006), cert. dismissed, 127 S.Ct. 2028 (2007). The estate of an inmate in the capital unit who died of traumatic injuries from head to ankle sued the warden and others at the facility where guards claimed the inmate died because he repeatedly threw himself onto a concrete floor.

The central question at issue was the warden's supervisory liability. The court found insufficient evidence that the warden personally participated in the beating or that anyone was following the warden's specific direction in doing so. But there was sufficient evidence to support a finding that the warden was placed on notice of a history of widespread abuse so a causal connection between his actions or inaction and the decedent's death was established. Therefore supervisory liability was established in this case. (1237)

The evidence establishing supervisory liability included the fact that: the warden had been warned by his predecessor about certain guards who he believed to be abusive towards inmates; one of the guards involved in this incident was one of those same guards; his predecessor had moved this guard away from the capital unit and wanted to terminate him, but the defendant warden merely reprimanded the guard and then promoted him and reassigned him back to the capital unit; the warden was instrumental in bringing another defendant in this suit to the prison despite his prior use of force history and his having been investigated for teaching CO trainees "improper practices" (like how to kick inmates without leaving bootprints); the warden transferred out the assistant warden who had been brought in to help fight excessive force; the warden ended the practice of videotaping cell extractions; the warden had a more "hands-off" approach than prior wardens and the culture changed markedly; the warden did not read use of force complaints and reports but delegated this task to his secretary, who had no law enforcement background; the complaints the warden did not read included numerous allegations of excessive force; the warden received a specific warning that the inmate who died was at risk of assault by staff; two days before the inmate was killed, there was another complaint from the capital unit that officers had repeatedly beaten a prisoner. (1243-44)

The evidence taken together is sufficient for a jury to find that the warden established customs and policies that resulted in deliberate indifference to constitutional violations that he then failed to take reasonable measures to correct. Moreover, the warden is not entitled to qualified immunity because at the time of this incident (1999) it was well established that a warden charged with directing the governance, discipline, and policy of the prison and enforcing its orders, rules, and regulations, would bear such liability. (1244)

Chemical Agents

Norton v. City of Marietta, 432 F.3d 1145 (10th Cir. 2005) (per curiam). Several police officers entered the plaintiff's cell, restrained him, handcuffed him to a backboard, and sprayed him with pepper spray. The plaintiff said that he had been kicking his cell door and was not combative when they entered his cell; they said they had to spray him to subdue him. The district court should not have granted summary judgment to defendants because there were two factual disputes. At 1154: Whether defendants' use of the spray was objectively harmful

enough to violate plaintiff's Eighth Amendment rights, which depended in part on how long plaintiff was sprayed and whether he was adequately irrigated afterwards or left to suffer unnecessarily. Defendants' state of mind was also in dispute.

Procedural Due Process/Disciplinary Proceedings

Morgan v. Dretke, 433 F.3d 455 (5th Cir. 2005). The petitioner challenged a disciplinary conviction for assaulting an officer causing non-serious injury. The court notes that it is the protected liberty interest in good time that implicates due process here (the segregation sentence was only 15 days), and state law determines whether good time credits constitute a liberty interest. They don't decide here whether Texas law creates a liberty interest since defendants waived the issue by not raising it. (457 n.2)

The conviction denies due process because it fails to meet the "some evidence" standard. The issue is not the amount or quality of evidence, but that "the evidence in the record does not fit the charge." (458) There is evidence that the petitioner assaulted an officer, but no evidence of injury, and injury was part of the charge.

U.S. District Court Cases

Protection from Inmate Assault—Procedural Due Process—Cruel and Unusual Punishment

David v. Hill, 401 F.Supp.2d 749 (S.D.Tex. 2005). The plaintiff alleged that as a result of his refusal to become an informant defendants retaliated against him by filing false disciplinary charges, rifling through his mail, taking his property, and holding him in solitary confinement. The court rejects defendants' argument that there is no constitutional right to avoid being pressured to participate in a prison investigation. At 756: "Courts have long recognized that being labeled a 'snitch' in the prison environment can indeed pose a threat to an inmate's health and safety in violation of the Eighth Amendment. . . . Because being labeled a snitch could place an inmate's life in danger, it follows that he would have a protected liberty interest in not being labeled one. Indeed, the Fifth Circuit has stated that, when officials are aware of a danger to an inmate's health and safety, such as when an inmate participates in an official prison investigation, it violates the constitutional prohibition against cruel and unusual punishment to fail to afford that inmate reasonable protection." The court "assumes without deciding that plaintiff has a constitutional right to not participate in a prison investigation" and therefore has satisfied the first prong of the retaliation analysis. He establishes a chronology supporting his retaliation claim for some defendants but not others.

Searches–Person–Prisoners/Sexual Abuse Grievances and Complaints about Prison Searches/Living Quarters

Rodriguez v. McClenning, 399 F.Supp.2d 228 (S.D.N.Y. 2005). The plaintiff alleged he was pat searched by the defendant officer in a sexually suggestive manner. The officer said it was more fun that way. After plaintiff filed a grievance about it, he was subjected to a cell search that turned up contraband and charges were brought against him but eventually all charges were either dismissed or expunged.

The allegations about the pat search support an Eighth Amendment claim. At 237-38: "Contemporary standards of decency have evolved to condemn the sexual assault of prison inmates by prison employees." In 1998, there were fifteen states that did not prohibit sexual contact between prison employees and inmates; now, only four states fail to outlaw such behavior. This demonstrates "a national consensus that any sexual assault of a prisoner by a prison employee constitutes cruel and unusual punishment."

Qualified immunity, at 238-39: The officer was not entitled to qualified immunity because the sexual assault of a prison inmate is outside the scope of a corrections officer's official duties. If proved that the officer did make the alleged comments "don't even think about screaming because no

one is going to help" and "we do what we want because we always win," this would indicate that the officer was not performing the pat-frisk in a manner he reasonably believed to be lawful.

Retaliation, at 239-40: The First and Fourteenth Amendments prohibit retaliation for filing grievances. The plaintiff can pursue a retaliation claim for the alleged retaliatory planting of evidence and retaliatory misbehavior report. The plaintiff meets both requirements of a retaliation claim, in that he engaged in constitutionally protected conduct (filing a grievance) and provided circumstantial evidence of retaliatory motive, i.e., the short time between grievance and alleged retaliation, plus prior good behavior on his part (he was in the honor block) and success in the disciplinary proceeding.

Contact Information

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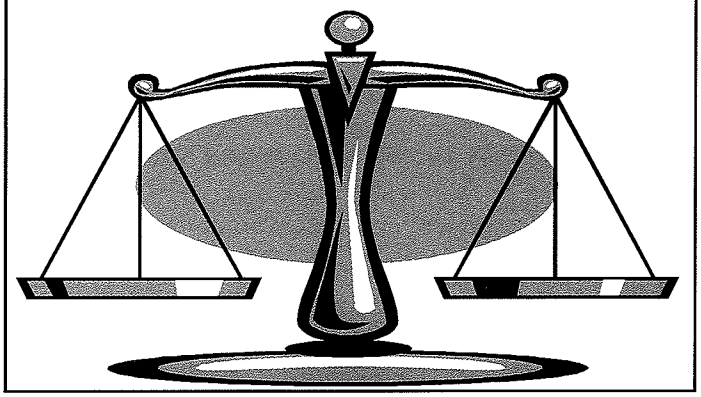

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