Conflicts Among Circuits in Applying the Prison Litigation Reform Act

John Boston
Legal Aid Society Prisoners' Rights Project
jboston@legal-aid.org

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There are several sharp and significant differences among circuits in the judicial application of the Prison Litigation Reform Act. The most important involve its administrative exhaustion requirement. This summary is intended to be used in conjunction with *The Prison Litigation Reform Act*, which addresses the statute in more detail.

I. Exhaustion of Administrative Remedies, 42 U.S.C. § 1997e(a):

"No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

A. Burden of pleading and proving exhaustion

Most circuits have held that PLRA exhaustion is an affirmative defense that must be raised and established by the defendants.

First: Casanova v. Dubois, 304 F.3d 75, 78 n.3 (1st Cir. 2002).

Second: Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004); Jenkins v. Haubert, 179 F.3d 19, 28-29 (2d Cir. 1999).

Third: Ray v. Kertes, 285 F.3d 287, 295 (3d Cir. 2002).

Fourth: Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 683 (4th Cir.2005).

Seventh: Massey v. Helman, 196 F.3d 727, 735 (7th Cir.1999).

Eighth: Nerness v. Johnson, 401 F.3d 874, 876 (8th Cir. 2005) (per curiam).

Ninth: Wyatt v. Terhune, 315 F.3d 1108, 1117-18 (9th Cir.), *cert. denied*, 540 U.S. 810 (2003).

D.C.: Jackson v. District of Columbia, 254 F.3d 262, 267 (D.C.Cir.2001).

A few circuits have held that the prisoner plaintiff has the burden of pleading exhaustion.

Sixth: Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir.) (per curiam), *cert. denied*, 525 U.S. 833 (1998).

Tenth: Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1209-10 (10th Cir. 2003), *cert. denied*, 125 S.Ct. 344 (2004).

Eleventh: 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.").

One circuit has not made up its mind.

Fifth: *Compare* Underwood v. Wilson, 151 F.3d 292, 296 (5th Cir. 1998) ("As long as the plaintiff has alleged exhaustion with sufficient specificity, lack of admissible evidence in the record does not form the basis for dismissal.") *with* Johnson v. Johnson, 385 F.3d 503, 516 n.7 (5th Cir. 2004) (noting that some prior decisions imply or assume exhaustion is part of the plaintiff's claim, but questioning whether the matter has been decided) *and with* Wendell v. Asher, 162 F.3d 887, 890 (5th Cir. 1998) (holding that PLRA exhaustion "imposes a requirement, rather like a statute of limitations").

Two circuits have imposed an extremely demanding pleading requirement:

Sixth: Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir. 2000) ("[A] prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome. . . . In the absence of particularized averments concerning exhaustion showing the nature of the administrative proceeding and its outcome, the action must be dismissed. . . .")

Tenth: Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1209-10 (10th Cir. 2003), *cert. denied*, 125 S.Ct. 344 (2004) (adopting Sixth Circuit requirement).

One circuit has compounded the difficulty of its pleading standard by holding that prisoners may not amend their complaints to cure deficiencies in exhaustion pleading identified by the district court at the initial screening required by other sections of the PLRA.

Sixth: Baxter v. Rose, 305 F.3d 486, 488 (6th Cir. 2002).

B. Effect of noncompliance with prison procedural requirements

Several circuits have adopted a procedural default rule, by analogy to habeas corpus, under which prisoners whose grievances are rejected for noncompliance with grievance procedures do not satisfy the exhaustion requirement.

Seventh: Pozo v. McCaughtry, 286 F.3d 1022, 1023-24 (7th Cir.), *cert. denied,* 537 U.S. 949 (2002)

Tenth: Ross v. County of Bernalillo, 365 F.3d 1181, 1185-86 (10th Cir. 2004).

Eleventh: Johnson v. Meadows, 418 F.3d 1152, 1157 (11th Cir. 2005).

One circuit has held there should be a "procedural default component," but one that "must . . . not be imposed in a way that offends the Federal Constitution or the federal policy embodied in § 1997e(a)," which it said means the same thing as its prior observation that compliance with grievance rules need only be "substantial."

Third: Spruill v. Gillis, 372 F.3d 218, 228-30, 232 (3d Cir. 2004).

One circuit has asserted a "strict approach" to compliance with grievance rules without analogizing to habeas corpus.

Fifth: Days v. Johnson, 322 F.3d 863, 866 (5th Cir. 2003); *accord,* Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir.2001) ("Nothing in the Prison Litigation Reform Act . . . prescribes appropriate grievance procedures or enables judges, by creative interpretation of the exhaustion doctrine, to prescribe or oversee prison grievance systems.")

One circuit has held that "special circumstances" may justify prisoners in failing to exhaust, or to exhaust correctly, and that similar circumstances may render administrative remedies unavailable or may estop prison officials from asserting the non-exhaustion defense.

Second: Giano v. Goord, 380 F.3d 670, 678-79 (2d Cir. 2004) (special circumstances were reasonable understanding of difference between grievances and disciplinary appeals); Hemphill v. New York, 380 F.3d 680, 689-90 (2d Cir. 2004) (lack of clarity in grievance regulations); Rodriguez v. Westchester County Jail Correctional Dept., 372 F.3d 485, 487 (2d Cir. 2004) (reasonable misunderstanding of grievance requirement).

Two circuits have held that violation of state procedural rules cannot bar a prisoner's federal claim as long as the prisoner exhausts by taking all available appeals, by analogy to Title VII and related statutory schemes requiring resort to state administrative forums.

Sixth: Thomas v. Woolum 337 F.3d 720 (6th Cir. 2003).

Ninth: Ngo v. Woodford, 403 F.3d 620, 631 (9th Cir. 2005).

C. Naming defendants in the administrative proceeding

One circuit has held that prisoners must have named all defendants in their administrative grievances.

Sixth: Curry v. Scott, 249 F.3d 493, 504 (6th Cir. 2001).

One circuit has ruled consistently with an "exhaust each defendant" rule without stating a general rule.

Eighth: Kozohorsky v. Harmon, 332 F.3d 1141, 1143 (8th Cir. 2003).

One circuit has held that prisoners must provide as much information as they "reasonably can" in their grievances, including identities of persons involved.

Eleventh: Brown v. Sikes, 212 F.3d 1205, 1207-08 (11th Cir. 2000).

One circuit has held that the necessity of naming defendants depends on what information is necessary to give fair notice of the problem to prison officials.

Fifth: Johnson v. Johnson, 385 F.3d 503, 517 (5th Cir. 2004).

One circuit has held that where the grievance system requires naming the staff members involved, failure to do so is a procedural default.

Third: Spruill v. Gillis, 372 F.3d 218, 234 (3rd Cir. 2004) (holding the default excused because the grievance process itself identified the staff member).

Two circuits have held that where the grievance system does not require naming involved staff members, failure to do so is not a failure to exhaust.

Seventh: Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004), *cert. denied*, 125 S.Ct. 1589 (2005) (holding sufficient a statement that "the administration" didn't do its job); *accord*, Barnes v. Briley, 420 F.3d 673, 678-79 (7th Cir. 2005); Cannon v. Washington, 418 F.3d 714, 718 (7th Cir. 2005) (rejecting plaintiffs' argument that confiscating his legal papers with the defendants' names kept him from grieving timely, since he didn't need their names for his grievance).

Ninth: Butler v. Adams, 397 F.3d 1181 (9th Cir. 2005).

D. "Total exhaustion"

Three circuits have adopted the rule that if a complaint contains both exhausted and unexhausted claims, the entire complaint must be dismissed for non-exhaustion.

Sixth: Jones Bey v. Johnson, 407 F.3d 801 (6th Cir. 2005). *But see* Garner v. Unknown Napel, 374 F.Supp.2d 582, 584-85 (W.D.Mich. 2005) (declining to apply *Jones Bey* on the ground that it is contrary to earlier circuit precedent, *Hartfield v. Vidor*, 199 F.3d 305 (6th Cir.1999)).

Eighth: Kozohorsky v. Harmon, 332 F.3d 1141, 1142 (8th Cir. 2003) (but stating prisoner

may be allowed to amend complaint to omit unexhausted claims).

Tenth: Ross v. County of Bernalillo, 365 F.3d 1181, 1188-90 (10th Cir. 2004). *But see* West v. Kolar, 108 Fed.Appx. 568, 570, 2004 WL 1834634 at *2 (10th Cir., Aug. 17, 2004) (holding district courts may allow plaintiffs to dismiss unexhausted claims and proceed).

One circuit has rejected the total exhaustion rule.

Second: Ortiz v. McBride, 380 F.3d 649 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 1398 (2005).

E. The Sixth Circuit's exhaustion rules: cumulatively, uniquely disadvantageous to prisoners.

Under the above cited Sixth Circuit decisions, prisoners must document exhaustion or plead it with specificity; if their pleading or documentation is inadequate, they may not amend their complaints to avoid dismissal; each defendant must have been named in the administrative grievance; the court adheres to a total exhaustion rule, so the inclusion of an unexhausted claim *or a single defendant not named in the grievance* requires dismissal of the entire complaint. Thus any error in exhaustion, or even in describing it in the complaint, is irrevocable and penalized with dismissal of the entire case without prejudice.

II. The "three strikes" provision, 28 U.S.C. § 1915(g) (excluding from *in forma pauperis* status prisoners who have had three complaints or appeals dismissed as frivolous, malicious, or not stating a claim)

One circuit has held that dismissal for failure to exhaust cannot be counted as a "strike" under 42 U.S.C. § 1915(g) for purposes of disqualifying the prisoner from *in forma pauperis* status.

Second: Snider v. Melindez, 199 F.3d 108, 111 (2d Cir. 1999).

One circuit has held, and others have stated in dictum or unpublished opinion, that dismissal for non-exhaustion is or can be a "strike."

Eighth: Millsap v. Jefferson County, 85 Fed.Appx. 539, 2003 WL 23021406 at *1 (8th Cir. 2003) (unreported) (holding that a failure to allege exhaustion should count as a strike because it is a failure to state a claim, while actual failure to exhaust contrary to the complaint's allegations should not).

Tenth: Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1213 (10th Cir. 2003) (stating in dictum that a dismissal for non-exhaustion may constitute a strike, without explaining why or when), *cert. denied*, 125 S.Ct. 344 (2004).

Eleventh: Rivera v. Allin, 144 F.3d 719, 731 (11th Cir. 1998) (stating in dictum that dismissal for non-exhaustion is "tantamount to" dismissal for failure to state a claim), *cert. dismissed*, 524 U.S. 978 (1998).

III. Prospective relief restrictions, 18 U.S.C. § 3626

A. Scope of injunctions in non-class actions

One circuit has held that under the PLRA's requirement that prospective relief be the "least intrusive" needed to remedy the violation, 18 U.S.C. § 3626(a), the court may generally enjoin an unconstitutional policy in a non-class action.

Ninth: Clement v. California Dept. of Corrections, 364 F.3d 1148, 1152 (9th Cir. 2004) (affirming statewide injunction against prohibition on receipt of materials downloaded from the Interent); Ashker v. California Dep't of Corrections, 350 F.3d 917, 924 (9th Cir. 2003) (citations omitted) (affirming injunction against a requirement that "approved vendor labels" be affixed to all books sent to prisoners").

One circuit has held that injunctive relief should be restricted to the specific plaintiff(s) in the litigation.

Seventh: Lindell v. Frank, 377 F.3d 655, 660 (7th Cir. 2004) (holding injunction against restrictions on receipt of clippings overbroad insofar as it applied to other prisoners besides the plaintiff).

B. Burden of proof on a motion to terminate prospective relief.

One circuit has held that defendants seeking to terminate an injunctive order have the burden of proof

Ninth: Gilmore v. California, 220 F.3d 987, 1008 (9th Cir. 2000).

Two circuits have held that plaintiffs bear the burden of proof.

First: Laaman v. Warden, 238 F.3d 14, 20 (1st Cir. 2001).

Fifth: Guajardo v. Texas Dep't of Criminal Justice, 363 F.3d 392, 395-96 (5th Cir. 2004) (per curiam).

IV. Limit on recovery for mental or emotional injury, 42 U.S.C. § 1997e(a): "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."

A. Availability of punitive damages where compensatory damages are barred

Most circuits have held that punitive as well as nominal damages may be recovered in cases of mental or emotional injury without physical injury.

Second: Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002).

Third: Allah v. Al-Hafeez, 226 F.3d 247, 252 (3d Cir.2000); Mitchell v. Horn, 318 F.3d 523 (3d Cir. 2003)

Seventh: Calhoun v. DeTella, 319 F.3d 936, 943 (7th Cir. 2003) (noting that nominal damages "are awarded to vindicate rights, not to compensate for resulting injuries," and that punitive damages "are designed to punish and deter wrongdoers for deprivations of constitutional rights, they are not compensation 'for' emotional and mental injury"); Cassidy v. Indiana Dep't of Corr., 199 F.3d 374, 376 (7th Cir. 2000).

Eighth: Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004), *cert. denied*, 125 S.Ct. 2528 (2005).

Tenth: Searles v. Van Bebber, 251 F.3d 869, 878-80 (10th Cir. 2001).

Others have held that punitive as well as compensatory damages are barred for claims to which the statute applies.

Eleventh: Harris v. Garner, 190 F.3d 1279, 1286-87 (11th Cir.1999), *vacated in part and reinstated in pertinent part,* 216 F.3d 970, 984-85 (11th Cir.2000) (en banc), *cert. denied*, 532 U.S. 1065 (2001).

D.C.: Davis v. District of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998).

One circuit appears to have held that no form of damages, even nominal, is available for claims to which the statute applies.

Fifth: Alexander v. Tippah County, Miss., 351 F.3d 626, 629, 631 (5th Cir. 2003).

B. Applicability of mental or emotional injury provision to First Amendment claims.

Two circuits have held that First Amendment claims are not subject to the statute.

Seventh: Rowe v. Shake, 196 F.3d 778, 781-82 (7th Cir. 1999) ("A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained.").

Ninth: Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir.1998) ("[T]he deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment [c]laims regardless of the form of relief sought.").

Other circuits have held that the statute is applicable to First Amendment claims, or to constitutional claims without exception.

Second: Thompson v. Carter, 284 F.3d 411, 417 (2d Cir. 2002).

Third: Allah v. al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000).

Fifth: Geiger v. Jowers, 404 F.3d 371, 374 (5th Cir. 2005) (per curiam).

Note: In my view the above conflict is part of a larger failure to think through the meaning of the statute and the appropriate categorization of constitutional injury, as set forth in § V.B of the separate materials, *The Prison Litigation Reform Act*.

C. Applicability of mental or emotional injury provision to claims arising in a prior period of incarceration unrelated to the current custody.

One circuit has held that the statute applies to a claim arising in an earlier, unrelated period of custody.

Eleventh: Napier v. Preslicka, 314 F.3d 528, 532-34 (11th Cir. 2002), *rehearing denied*, 331 F.3d 1189 (11th Cir. 2003), *cert. denied*, 540 U.S. 1112 (2004).

One circuit has held that such a rule would be absurd.

Eighth: Robbins v. Chronister, 402 F.3d 1047, 1050-51 (10th Cir. 2005).

V. Assessment of filing fees and costs in *in forma pauperis* cases

A. Consecutive or concurrent collection

One circuit has held that only one filing fee and one award of costs may be collected at one time (i.e., no more than 40% of a prisoner's funds may be taken).

Second: Whitfield v. Scully, 241 F.3d 264, 275-78 (2d Cir. 2001).

One circuit has held that all awards may be collected simultaneously even if the result is to take 100% of a prisoner's funds.

Fifth: Atchison v. Collins, 288 F.3d 177, 180-81 (5th Cir. 2002).

B. Treatment of filing fees in multi-plaintiff prisoner suits

One circuit has held that in multiple-plaintiff cases, fees and costs are to be equally divided among the prisoners.

Sixth: In re Prison Litigation Reform Act, 105 F.3d 1131, 1137-38 (6th Cir.1997). *But see* Jones v. Fletcher, 2005 WL 1175960 at *6 (E.D.Ky., May 5, 2005) (declining to follow *In re PLRA*, holding that each plaintiff must pay a separate filing fee).

Two circuits have held that each plaintiff must pay an entire filing fee.

Seventh: Boriboune v. Berge, 391 F.3d 852, 855-56 (7th Cir. 2004).

Eleventh: Hubbard v. Haley, 262 F.3d 1194, 1197 (11th Cir. 2001), *cert. denied*, 534 U.S. 1136 (2002).

One of these circuits has held that prisoners may not join in the same complaint, but must file

separate complaints.

Eleventh: Hubbard v. Haley, 262 F.3d 1194, 1197 (11th Cir. 2001), *cert. denied*, 534 U.S. 1136 (2002).

The other such circuit has rejected the view that the PLRA amends the federal joinder rules.

Seventh: Boriboune v. Berge, 391 F.3d 852, 854-55 (7th Cir. 2004).

VI. Attorneys' fees, limited to 150% of the rate "established under" the Criminal Justice Act.

Two circuits have held that the "established" rate is the rate set by the Judicial Conference based on a statutorily authorized procedure for inflation adjustments. *See* Johnson v. Daley, 339 F.3d 582, 584 and n.‡ (7th Cir. 2003) (en banc) (describing procedure), *cert. denied*, 541 U.S. 935 (2004).

Sixth: Hadix v. Johnson, 398 F.3d 863 (6th Cir. 2005).

Ninth: Webb v. Ada County, 285 F.3d 829, 838-39 (9th Cir.), *cert. denied*, 537 U.S. 948 (2002).

One circuit has held in dicta that the established rate is the lower rate actually paid based on Congress's failure to fund the Judicial Conference's authorized rate.

Third: Hernandez v. Kalinowski, 146 F.3d 196, 201 (3d Cir. 1998).