LEGAL BULLETIN 1.4
Prison Litigation Reform Act (PLRA)

Disclaimer: While we have attempted to provide information that is current and useful, the law changes frequently. We cannot guarantee that all information is current. If you have access to a prison library, we suggest that you confirm that the cases and statutes are still good law.

Lewisburg Prison Project
P.O. Box 128
Lewisburg, PA 17837
(570) 523-1104
www.lewisburgprisonproject.org
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I. INTRODUCTION

The Prison Litigation Reform Act of 1995 (PLRA) was passed by Congress in 1995 and signed into law by the President in 1996. This law imposes significant restrictions on federal litigation filed by prisoners and makes it more difficult for incarcerated people to prevail in (or even to file) lawsuits about prison conditions. This bulletin does not delve into all of the issues surrounding the PLRA – only the highlights are covered. We advise you to conduct legal research regarding the PLRA in the Circuit where your case will be filed to gain a clearer understanding of how the PLRA's provisions may impact your case.[1]

II. WHEN DOES THE PLRA APPLY AND TO WHOM?

The PLRA applies to lawsuits (including appeals) filed by "prisoners." A "prisoner," as defined by the PLRA, is "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." *See* 42 U.S.C. § 1997e(h).

To determine a plaintiff's status as a "prisoner" or non-prisoner, a court looks at where the plaintiff was living at the time the complaint was filed in court and the type of restrictions placed on the person, if any. Plaintiffs who who file their complaints while they are on probation or parole and are not confined in a facility that restricts their movement or ability to leave the facility have usually not been considered "prisoners" within the meaning of the PLRA. *See, e.g., Simpson v. Davenport*, No. 3:20-cv-0024, 2022 WL 125389, *2 (W.D. Pa. Jan. 13, 2022) (plaintiff who was under supervision by a federal Residential Reentry Center but was living and sleeping in his home at the time he filed the amended complaint was not a "prisoner" under PLRA). By contrast, if at the time he or she files the complaint, a plaintiff is residing in a halfway house and is not free to leave without permission or is subject to other restrictions, courts have usually considered the plaintiff to be a "prisoner" subject to the PLRA. *See Jackson v. Johnson*, 475 F.3d 261, 265-67 (5th Cir. 2007) (parolee living in a halfway house which he could not leave without permission was considered a "prisoner" under the PLRA); *Clemens v. SCI Albion*, No. 05-325 Erie, 2006 WL 3759740, *5 (W.D. Pa. Dec. 19, 2006) (halfway house with random urine tests and limited visiting was an "other correctional facility").

The PLRA does not apply to lawsuits that are filed when the plaintiff is no longer incarcerated. Even if the incident giving rise to the claims happened while the plaintiff was in prison, if he or she files the lawsuit raising those claims after release from prison (and when not in a restrictive setting like a halfway house), the PLRA does not apply to that lawsuit. If you are anticipating being released in the near future after the incident you wish to sue about and the statute of limitations (the deadline for filing your case in court) permits you to wait until you are released, you may want to wait to file your lawsuit

[1] This bulletin addresses only the federal PLRA. You should be aware that some states have enacted their own versions of the PLRA, which would apply to lawsuits brought in state court by incarcerated people.

when you are no longer incarcerated so that the restrictions imposed by the PLRA will not apply. Note that if you are released but are then re-incarcerated – even if at a different institution – the PLRA's provisions will apply if you file your lawsuit while incarcerated.

The PLRA does not apply to lawsuits or appeals brought by families or estates of prisoners who have died in custody, as these plaintiffs are not "prisoners." Similarly, it does not apply to people who have been arrested and charged with a crime but not yet incarcerated. (Although pretrial detainees, who are incarcerated while awaiting trial are considered "prisoners.") The PLRA does not apply to people who are being civilly detained (such as immigration detainees). *See Ziglar v. Abbasi*, 582 U.S. 120, 171 (2017) (Breyer, J., dissenting) ("By its express terms, [the PLRA] does not apply to immigration detainees.") (citing 42 U.S.C. § 1997e(h)); *Agyeman v. INS,* 296 F.3d 871, 886 (9th Cir. 2002) ("[W]e hold that an alien detained by the INS pending deportation is not a 'prisoner' within the meaning of the PLRA.").

The PLRA applies to all civil actions brought by a prisoner in federal court which pertain to prison conditions (or incidents that occurred in prison), including cases brought under the United States Constitution and federal statutes such as the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Religious Freedom Restoration Act (RFRA – for federal prisoners), the Americans With Disabilities Act (ADA), the Rehabilitation Act (RA), and the Administrative Procedures Act (APA)..[2]

In addition, when the PLRA was enacted, the Federal Tort Claims Act (FTCA) was amended to incorporate certain PLRA provisions, such as the physical injury requirement (discussed below). The FTCA already had its own exhaustion of administrative remedies provision which is specific to the FTCA.

III. MAIN PLRA ISSUES

A. The PLRA provides for screening and possible dismissal at early stages of the case.

If a case is filed by a prisoner against a governmental entity or its employees, the PLRA requires the court to screen the complaint before it is served on the defendants and to dismiss it if it is "frivolous, malicious, or fails to state a claim for which relief can be granted." *See* 28 U.S.C. § 1915A(a) and (b)(1). The court must also dismiss the complaint (or claims within the complaint) if it seeks monetary relief from a defendant who is immune from such relief. *See* § 1915A(b)(2). Section 1915A applies to cases brought by prisoners even if they have paid the full filing fee up front and are not proceeding "*in forma pauperis.*"

The PLRA also amended the statute governing the screening of all cases brought "*in forma pauperis*" - meaning that the plaintiff (including prisoners and non-prisoners) is seeking permission from the court to file the case without pre-paying the filing fee. This statute, 28 U.S.C. § 1915(e)(2), provides that a court "shall dismiss the case at any time if the court determines that –

(A) the allegation of poverty is untrue; or

(B) the action or appeal -

(i) is frivolous or malicious;

[2] The PLRA generally does not apply to habeas corpus petitions which challenge the fact or duration of a prisoner's sentence and which seek the prisoner's release as opposed to monetary relief or improvements in prison conditions. *See* 18 U.S.C. § 3626(g)(2); *Wilson v. Williams*, 961 F.3d 829, 837-39 (6th Cir. 2020) (concluding that because petitioners' claims seeking release from federal prison sounded in habeas corpus the PLRA did not apply).

(ii) fails to state a claim on which relief may be granted; or,

(iii) seeks monetary relief against a defendant who is immune from such re lief.

See 28 U.S.C. § 1915(e)(2).

Both of these statutes permit a court to dismiss a complaint on its own at the earliest stage of the case - even before the complaint is served on the defendants.

What is a "frivolous" claim?

The Supreme Court has held that a claim is factually frivolous if it "describes fantastic or delusional scenarios." *See Neitzke v. Williams,* 490 U.S. 319, 328 (1989). A claim is legally frivolous if it does not raise an "arguable question of law" or if it is based on an "indisputably meritless legal theory." *See id.* at 327. This means that there is no legal basis for the plaintiff's claim for relief, given the facts alleged. For example, in *McFadden v. Lehman*, 968 F. Supp. 1001, 1004 (M.D. Pa. 1997), the plaintiff asserted that prison officials had denied him access to rehabilitation programs while he was incarcerated. The court dismissed his claims as frivolous, finding that there was no constitutional right to rehabilitation programs in prison, therefore there was no legal basis for the claims.

The ability of a court to dismiss your case as "frivolous" underscores the importance of alleging sufficient facts to support your claims and being clear about the legal basis for your claim. *See* Bulletin 1.1 "Civil Actions" for more information on how to plead sufficient facts in your complaint to avoid dismissal.

What is a "malicious" claim?

A claim is "malicious" if it was filed for an improper purpose, such as vengeance or disrespect to the court. If it appears to the court that you filed your lawsuit for some reason other than to seek legal relief on a meritorious claim, then your case might be dismissed as "malicious." *See e.g., Lewis v. Alison*, No. 2:21-cv-00366-CKD P, 2023 WL 4399179, at *4 (E.D. Cal. Jul. 7, 2023) (making false representations to the court by filing a fraudulent declaration constituted maliciousness); *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) (a claim is "malicious" if it was filed with the intent or desire to harm another).

When does a complaint "fail to state a claim"?

This PLRA screening standard is the same as that set forth in Federal Rule of Civil Procedure 12(b)(6): a complaint fails to state a claim when a court determines that even if all of the facts alleged are taken as true, the plaintiff has not set forth sufficient facts to support a claim for legal relief.[3] If an affirmative defense, such as the statute of limitations or failure to exhaust administrative remedies, appears on the face of the complaint, this is also considered a failure to state a claim. *See Jones v. Bock*, 549 U.S. 199, 215-16 (2007).

When is a defendant immune from damages claims?

When you are deciding which types of claims to assert in your lawsuit, be sure to research which type of relief you can seek for each claim and against each defendant. If you seek monetary relief from a defendant who is immune from such claims, your claim is subject to dismissal under 28 U.S.C. § 1915(e)(2)(B)(iii). For example, a claim seeking monetary damages from a state government employee acting in his or her official capacity would be dismissed on this basis. *See Fisher v. Patton*, 742 F. Supp. 3d 778, 779-780 (E.D. Mich. 2024) (inmate's claims seeking monetary relief from prison

[3] See Bulletin 1.1 (Civil Actions) for more information about Rule 12(b)(6) dismissals for failure to state a claim.

employee were dismissed because the defendant was sued in her official capacity, making her immune from monetary damages). Similarly, a claim for monetary relief brought under the Administrative Procedures Act (APA), 5 U.S.C. § 701, *et seq.*, would be subject to dismissal under Section 1915(e)(2)(B)(iii), because the APA does not provide for monetary damages as a form of relief. *See* 5 U.S.C. §§ 702, 704.

What should I do if my complaint is dismissed by the court at the screening stage?

If a court finds that a complaint is subject to dismissal at the screening stage, it may provide you with an opportunity to file an amended complaint in order to correct the problems. If the court lets you file an amended complaint be sure to do so within the time frame given by the court. If the court does not include the option to file an amended complaint in its order, you could file a motion for reconsideration and ask the court for permission to amend your complaint. You could also appeal the court's order.

B. The "Three Strikes" provision limits a prisoner's ability to proceed "*in forma pauperis*."

The PLRA's "three strikes" provision is found in 28 U.S.C. § 1915(g), which provides:

> "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

What is a "strike"?

Although the word "strike" is not found in Section 1915(g), this informal term refers to a dismissal of a case on the ground that it is frivolous, malicious, or fails to state a claim upon which relief may be granted. The "three strikes" provision requires a court to deny your request for IFP status if, at the time you file your case in federal court[4] (or file a notice of appeal), you have had three (or more) prior cases (or appeals) dismissed because the court found them to be "frivolous" or "malicious" or that they failed to state a legal claim.[5] **Importantly, the "three strikes" provision does not mean that you cannot file a lawsuit – in only means that you cannot proceed in IFP status and will be required to pay the full filing fee up front.** If you do not or cannot pay the full filing fee within the time period set by the court, your case might be dismissed on that basis.[6]

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[4] If you filed your case in state court and the defendants removed it to federal court, Section 1915(g) does not apply, because you did not "bring" your case in federal court – the defendants did.

[5] Section 1915(g) does not refer to the dismissal of a complaint because it seeks monetary relief from a defendant who is immune from such relief, as set forth in the PLRA's screening statutes, 28 U.S.C. § 1915(e)(2)(B)(iii) and § 1915A(b)(2). Despite this, some courts have equated such dismissals with dismissals for frivolousness. *See, e.g., Mosseri v. Woodstock Housing Dev. Fund-Corp.*, No. 18-CV-9431 (VSB), 2019 WL 2287964, at *2 (S.D.N.Y. May 28, 2019) (citation omitted) (dismissing APA claims as frivolous because plaintiff sought monetary relief). Other courts disagree, finding that a dismissal on the basis of immunity should not automatically be considered a "strike." *See, e.g., Crump v. Blue*, 121 F.4th 1108, 1113 (6th Cir. 2024); *Ball v. Famiglio*, 726 F.3d 448, 463 (3d Cir. 2013) (a "dismissal based on the immunity of a defendant . . . does not constitute a PLRA strike, including a strike based on frivolousness, unless the dismissing court explicitly and correctly concludes so.").

[6] Being denied IFP status also deprives a plaintiff of several other benefits. For example, the U.S. Marshals Service carries out service of process for free for IFP plaintiffs. IFP litigants receive transcripts from District

Who makes the determination that a prior dismissal should be counted as a "strike"?

The court in your *current* case (in which you have asked for IFP status) decides whether you have accumulated "three strikes" before filing your complaint (or appeal). If the court does not make this decision at the time it screens your case, the defendants can file a motion asking the court to deny you IFP status on this basis. Defendants can also file motion to revoke your IFP status if it was previously granted. If the defendants file such a motion, they have the burden to prove that three prior dismissed cases constitute "strikes" under Section 1915(g). After they present their evidence regarding this you should have an opportunity to oppose it.

Are "strikes" tallied up separately at the district court and appellate levels, such that I can have three strikes at the district court level and three strikes (separately) at the appellate level?

You can only have three strikes total. All of your "strikes" - regardless of whether they occurred at the district court or appellate level - are added together for purposes of the Section 1915(g) "three strikes" determination. Note that it is possible to accumulate two strikes within one case – if you get one strike at the district court level and one strike on appeal in the same case. Also – a "strike" never goes away – it does not matter how long ago it was incurred or if it was incurred in a different federal court.

What if one of my past cases was dismissed partially because of the grounds set forth in 1915(g) but partially for another reason – does this type of dismissal count as a "strike" for purposes of the "three strikes" provision?

This type of dismissal is referred to as a "mixed dismissal" or a "partial dismissal" and, in most Circuits, does not count as a "strike." The reasoning for this is that Section 1915(g) has been interpreted to require that the *entire case* (the "action or appeal") be dismissed under the grounds listed in Section 1915(g) in order to be considered a "strike" – not merely one or more claims. *See*, *e.g.*, *Escalera v. Samaritan Vill.*, 938 F.3d 380, 381- 382 (2d Cir. 2019); *Brown v. Megg*, 857 F.3d 287, 290-92 (5th Cir. 2017). Therefore, if there were multiple claims in your complaint and not all of them were dismissed for the grounds set forth in Section 1915(g), in most Circuits the dismissal of your case should not count as a strike. As some Circuits handle "mixed dismissals" differently, you should conduct research to determine how the courts in your Circuit handle this issue.

What if one of my past cases was dismissed for failure to state a claim, but the district court gave me permission to file an amended complaint?

The Supreme Court has held that if a district court dismisses a complaint for failure to state a claim but grants the plaintiff leave to amend the complaint, then a "strike" does not accrue because "the suit continues." *See Lomax v. Ortiz-Marquez*, 140 S.Ct. 1721, 1724, n.4 (2020). If you are given permission to file an amended complaint, be sure to do so within the time frame given by the court. If you do not, the court may close the case and enter judgment against you, and your case may later be determined to constitute a "strike" under the PLRA. *See Harris v. Mangum*, 863 F.3d 1133, 1141-1143 (9th Cir. 2017) (dismissal with leave to amend complaint counted as a "strike" when plaintiff failed to amend within time limit and district court issued a formal order closing the case).

Is there any way to overcome the "three strikes" provision?

Yes. If a prisoner plaintiff demonstrates that he or she is in "imminent danger of serious physical injury," then a court can grant them permission to proceed IFP despite having had "three strikes" in the past. *See* 28 U.S.C. § 1915(g). As with the "three strikes" provision, the "imminent

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Court proceedings for free for use on appeal and can have the record on appeal printed at the government's expense.

danger" exception has generated a lot of conflicting case law. We present only the highlights here and encourage you to conduct your own legal research.

When is a danger "imminent" under the "three strikes" provision?

There is no definition in the statute. "Imminent" generally means "about to happen," but this does not provide very clear guidance. Courts have held that the danger of serious physical injury must be present at the time the complaint or notice of appeal is filed. *See, e.g., Abdul-Akbar v. McKelvie*, 239 F.3d 307, 312 (3d Cir. 2001) (complaint); *Pinson v. DOJ*, 964 F.3d 65, 69 (D.C. Cir. 2020) (notice of appeal). Past dangers are not "imminent." *See, e.g., Ball*, 726 F.3d at 468 (inmate's allegations of burns and bruises sustained in a single past incident, with no allegations that suggested a threat of future harm did not demonstrate imminent danger). *Cf. Hall v. United States*, 44 F.4th 218, 225 (4th Cir. 2022) (although allegations of past danger or threats of harm, on their own, are insufficient to satisfy the imminent danger exception, such allegations may be considered in a court's evaluation of whether the danger was imminent at the time the complaint was filed); *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998) (allegations that prison officials continued to place plaintiff near his enemies despite two prior stabbings fulfilled the imminent danger exception). Ongoing or chronic serious untreated medical conditions or diseases can constitute "imminent danger" if they seem likely to continue and cause harm. *See, e.g., Partin v. Harmon*, 113 F. App'x 717, *718, 2004 WL 2319828 (8th Cir. Oct. 15, 2004) (unpublished) (allegations that inmate was denied medical treatment for tuberculosis, prostate cancer, and colon cancer and was deprived of prosthetic boots, and medical treatment for injured knee and ankle satisfied imminent danger exception).

What constitutes "serious physical injury"?

Again, the statute does not define this term, and courts have interpreted it differently. Obviously, the injury must be physical rather than mental. Other than that, courts have generally found injuries that are lasting or that have significant consequences to the plaintiff's health to qualify. *See Hall*, 44 F.4th at 231 (allegations that prison's continued denial and delay of medical treatment were directly causing plaintiff's worsening physical and medical conditions constituted "serious physical injury"). Physical effects of dangerous conditions of confinement have been held to be "serious physical injuries." *See, e.g., Gibbs v. Cross*, 160 F.3d 962, 965-966 (3d Cir. 1998) (severe headaches, change in voice, mucus full of dust and lint, and watery eyes allegedly suffered by prisoner as a result of cell vent emitting particles of dust and lint constituted "serious physical injury"); *compare Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003) (allegations that plaintiff was forced to work outside in inclement conditions on two occasions despite his high blood pressure condition did not fulfill the imminent danger exception). Chronic or extreme physical pain have been found to qualify as serious injury. *See, e.g., Patterson v. Corr. Corp. of America*, No. 1:16-cv-0005, 2016 WL 540710, at *3 (M.D. Tenn. Feb. 11, 2016) (denial of treatment for a diagnosed broken big toe, causing ongoing pain and numbness, along with other complaints of ongoing pain, fulfilled imminent danger exception). Untreated mental illness has been held to create a risk of serious physical injury if it causes the plaintiff to engage in self-harm. *See Wallace v. Baldwin*, 895 F.3d 481, 485 (7th Cir. 2018) (allegations that plaintiff "spent eleven years in solitary confinement, suffers from serious mental illness, and has a history of attempting to harm himself . . . raises a genuine concern that the negative psychological effects of his segregation will drive him to self-harm")

When and where do I assert the allegations regarding "imminent danger of serious physical injury"?

While some courts have held that a plaintiff's "imminent danger" allegations need not be included in any particular type of filing, such as a complaint, *see e.g., Asemani v. USCIS*, 797 F.3d 1069, 1074 (D.C. Cir. 2015), others have held the opposite and have required the allegations of

imminent danger to be made in the complaint itself. *See, e.g., Vandiver v. Prison Health Servs., Inc.*, 727 F.3d 580, 585 (6th Cir. 2013) ("The imminent danger exception is essentially a pleading requirement subject to the ordinary principles of notice pleading.") (citation omitted). We suggest that if your past litigation history shows that you have "three strikes" at the time you file your complaint and you are seeking *in forma pauperis* status, you should include allegations of imminent danger of serious physical injury in your complaint in order to save time and streamline the IFP process.

Does the imminent danger of serious physical injury have to be related to the claims in my law suit?

Yes. Most courts have held that the imminent danger allegations must have some relationship to the claims being asserted in the complaint. *See, e.g., Pinson*, 964 F.3d at 71; *Pettus v. Morgenthau*, 554 F.3d 293, 298-99 (2d Cir. 1999). In addition, some courts have extended this requirement to apply to every claim in the complaint. *See, e.g., Brown v. Lyons*, 977 F. Supp. 2d 475, 482-483 (E.D. Pa. 2013) (conducting a claim-by-claim imminent danger analysis and permitting only those claims to proceed for which credible imminent danger allegations were made). Other courts have rejected this rule, holding that if a plaintiff alleges imminent danger in connection with one of the claims in the complaint this is sufficient for all of the claims to proceed. *See Chavis v. Chappius*, 618 F.3d 162, 171-72 (2d Cir. 2010).

How detailed do my allegations about imminent danger of serious physical injury need to be?

Many courts have found the "imminent danger" exception inapplicable when the plaintiff's allegations were "speculative" or "conclusory." This essentially means that the court did not think that the plaintiff's allegations were supported with enough facts. We suggest that you make sure your allegations are as **detailed and fact-filled as possible**.

If I am denied IFP status because the court found that I had "three strikes" at the time I filed my complaint or my notice of appeal, and I have not demonstrated "imminent danger," what are my options?

You will have to pay the full filing fee within the time frame set by the court. As of the date this fact sheet was finalized, the filing fee for a civil action in a federal district court is $405, which includes a $55.00 administrative fee. The fee for filing a notice of appeal is $605. (This fee is paid in the District Court which is where the notice of appeal is filed.) If you do not pay the full filing fee by the deadline set by the court, your case will likely be dismissed.

Is the denial of IFP status on the basis of "three strikes" immediately appealable?

Yes. A District Court order denying permission to proceed IFP is an appealable order. *Roberts v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 339 U.S. 844, 844-845 (1950) (citing 28 U.S.C. § 1291). An alternative to filing an immediate appeal might be filing a motion asking the district court to reconsider its decision. If that motion is denied and your case is then dismissed because you failed to pre-pay the filing fee, you can then file an appeal. If you wish to proceed IFP on appeal, you will need to ask for permission to do so at the time you file your notice of appeal in the District Court. If the District Court denies you permission to proceed IFP on appeal, you can file a motion in the Court of Appeals seeking permission to proceed IFP. *See* Fed R. App. P. 24(a)(5).

C. The PLRA requires that prisoners pay the full filing fee, even if they obtain IFP status.

Unlike non-prisoner plaintiffs who are granted "*in forma pauperis*" status by the court, under the PLRA, a prisoner plaintiff must pay the court's full filing fee even if she obtains "*in forma pauperis*" status. Although the filing fee will be taken out of the inmate's prison account on a monthly

basis, and it may take a long time for the full filing fee to be paid, the full amount must be paid by the inmate. As mentioned above, at the time this fact sheet was finalized, the filing fee in the district court is $405 and the filing fee for an appeal is $605.

The relevant provision of the PLRA provides:

> "Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal *in forma pauperis*, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of –
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> (A) the average monthly deposits to the prisoner's account; or
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> (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.
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> (2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid. . . ."
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> 28 U.S.C. § 1915(b)(1)

Do I have to pay the full filing fee even if my case is dismissed at the screening stage – before it is even served on the defendants?

Yes. Most courts have held that the full filing fee must be paid even if the case is dismissed at the earliest stages of the case.

What if I have more than one filing fee to pay – will my prison account be charged a total of 20% of incoming funds, or will it be charged 20% times the number of fees I have to pay?

In *Bruce v. Samuels*, 577 U.S. 82 (2016), the Supreme Court held that a prisoner with multiple filing fees to pay must make payments on all of the fees simultaneously, rather than sequentially. *See Bruce*, at 87-90. So, if you have more than one filing fee to pay off, your account will be charged 20% of the incoming money for each fee you owe money on. For example, if you have three cases that you owe filing fees on, that's 3 X 20%, or 60% of the incoming money to your account which will be set aside to pay off the fees.

D. The PLRA's exhaustion of administrative remedies requirement imposes a significant hurdle for prisoner plaintiffs to clear.

The PLRA provides that "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." *See* 42 U.S.C. § 1997e(a). If you have not exhausted your available administrative remedies at the time you file your complaint, your complaint will almost certainly be dismissed by the court.

What is "exhaustion of administrative remedies"?

"Exhaustion" means that you have completed all of the steps in the grievance process in place at the institution where the incident occurred. For example, if the prison's grievance system has three levels, you must complete all three levels in order to "exhaust" your remedies. In addition, exhaustion must be "proper"- meaning that you must follow all of the rules and meet all of the time frames

imposed by your prison's grievance system. *See Woodford v. Ngo*, 548 U.S. 81, 93-95 (2006). **This requirement cannot be stressed enough – some prisons have an extremely short deadline for filing the initial grievance, such as five days from the date of the incident.** Missing the initial grievance filing deadline means that you cannot "properly" exhaust administrative remedies. If you file your lawsuit while incarcerated without first "properly exhausting" your administrative remedies, your complaint will likely be dismissed. Be sure to read your prison's current grievance policy closely to make sure that you understand the rules and the deadlines (and any exceptions to the rules or deadlines).[7]

What types of claims does the PLRA's exhaustion requirement apply to?

The PLRA exhaustion requirement applies to all inmate suits about prison life. *Porter v. Nussle*, 534 U.S. 516, 532 (2002). Claims based on conditions of confinement (housing conditions, health and safety issues), specific incidents of violence (by staff or inmates), medical care, mental health care, denial of religious rights, failure to accommodate physical or mental disabilities – pretty much anything pertaining to your life inside the institution must be addressed through the prison's grievance process before you can file a lawsuit.[8]

The Supreme Court has held that the purpose of exhaustion is to give prison officials an opportunity to resolve the problem, thereby possibly eliminating the need for litigation. *See Jones v. Bock*, 549 U.S. 199, 204 (2007). The exhaustion requirement applies even if you believe that completing all of the steps of the grievance process is futile and will not result in any relief. *See Woodford*, 548 U.S. at 91, n.2. It also applies even if the type of relief you are seeking (for example, monetary relief) is not available through the grievance system. *See Booth v. Churner*, 532 U.S. 731, 739 (2001). Exhaustion is mandatory, and there is no exception based on "special circumstances." *Ross v. Blake*, 578 U.S. 632, 638 (2016).

What information do I need to include in my grievance in order for my administrative remedies to be considered "exhausted"?

In *Jones v. Bock*, the Supreme Court held that exhaustion under the PLRA is to be determined with regard to the specific institution's grievance policy. S*ee Jones,* 549 U.S. at 218. Therefore, you need to review your prison's grievance policy and procedures carefully to see what is required.

> ***Tip:*** Be sure to keep copies of all documents you submit and receive during the exhaustion of administrative remedies process. You may need to supply copies to the court to prove that you exhausted your remedies. Do not rely on the prison to keep copies – although the burden is on the defendants to raise the defense of failure to exhaust, the burden is on you to rebut (or overcome) that defense.

What if I do not have access to all of the information required by the prison's grievance policy?

Sometimes prisoners are not able to pull together many details to include in their prison grievances – especially if there is a very short deadline for submitting the initial grievance. If you can't

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[7] You should be able to find your prison's grievance policy and procedures in the prison's library or law library. If it is not there, you should ask prison staff, in writing, where you can obtain a copy of the grievance policy and procedures.

[8] Claims arising in private prisons or from the conduct of employees of private contractors working inside a prison (such as private healthcare company employees) must also be "exhausted" before they can be asserted in a lawsuit. Check your institution's grievance policy or the inmate handbook to find out if there is a separate procedure for exhausting claims against an employee of a private contractor or if you must use the prison's procedure to exhaust such claims.

provide all of the information required by the policy, then you should include all of the information you have and explain, in as much detail as possible, why you do not have all of the information. If the grievance system permits (or requires) you to amend or correct your initial grievance after obtaining more information, you should do this. If you are later faced with a motion to dismiss your complaint for failure to exhaust, you will need to include your explanation about the missing information when you file your response.

In my grievance, do I have to name the individuals who I later want to sue in order to exhaust my claims against those individuals?

The PLRA does not require an inmate to name a prospective defendant in his or her grievances. *Jones*, 549 U.S. at 218. However, if your prison's grievance system requires you to "name the defendants," then you must comply with this rule. For example, the Pennsylvania Department of Corrections' grievance policy requires that inmates "identify the individuals directly involved in the event(s)." *See* DC-ADM 804, Section 1, A, # 11(b) (effective May 1, 2015). Courts in the Third Circuit have held that a Pennsylvania DOC inmate's failure to comply with this requirement means that the inmate has failed to exhaust administrative remedies. *See Jackson v. Carter*, 813 F. App'x. 820, 823-824 (3d Cir. 2020) (unpublished) (citing *Spruill v. Gillis*, 372 F.3d 218, 231 (3d Cir. 2004). If you are not able to obtain an individual's name in time to meet the deadline for submitting your grievance, you should include descriptive information about the person (including their title and shift, if known), so that prison officials can identify them. You should also explain why you do not know the person's name. Again, if your prison's grievance system permits or requires you to amend your grievance if you obtain more information, you need to follow this rule.

What if the grievance system does not permit me to file a grievance about my problem?

Some grievance systems specifically state that certain issues are not "grievable" through the usual procedure and direct prisoners to use a different process for presenting those issues. For example, the Pennsylvania Department of Corrections' general grievance policy (DC-ADM 804) requires all grievances regarding misconduct charges, disciplinary hearings, and placement in administrative custody to be submitted using the procedures set forth in policies DC-ADM 801 ("Inmate Discipline") and DC-ADM 802 ("Administrative Custody Procedures"). *See* DC-ADM 804, Section 1, A, # 7 (effective May 1, 2015). All grievances regarding sexual abuse or harassment by staff or sexual abuse by inmates are to be submitted through the DC-ADM 008 (Prison Rape Elimination Act) policy. *See* DC-ADM 804, Section 1, A, #'s 2 and 6 (eff. May 1, 2015).

If you have a question about which procedure to follow, you should ask prison officials, in writing. If you are facing a short deadline for filing a grievance and you are unsure which system to follow, you should probably file a grievance in each system that you believe might be correct – noting in each grievance that you are submitting your grievance in multiple systems because it was not clear to you which one was correct. Be sure to save all responses from prison officials as well as copies of all documents you submit to them. You may need these documents when you file your lawsuit so that you can show the court that you did everything you could to "exhaust" administrative remedies.

What if I want to file a lawsuit for monetary relief, but I know that I will not likely be given monetary compensation through the prison's grievance system – do I need to include a request for monetary relief?

Per the Supreme Court's rule in *Jones v. Bock*, you need to follow the specific rules of your prison's grievance policy. Some policies require that an inmate include a request for monetary compensation in their grievance. For example, the Pennsylvania DOC's grievance policy, DC-ADM 804 requires this in Section 1, A, # 11(d). If your prison's grievance policy requires you to request

compensation if you want to seek monetary relief in a later lawsuit, you must do so – even if you think you have no chance of obtaining any money through the grievance process.

What if I try to complete the grievance process but prison officials do not respond or take some other action that prevents me from exhausting?

There is no question that exhaustion is mandatory under the PLRA. *Jones*, 549 U.S. at 211. However, in *Ross v. Blake*, 578 U.S. 632 (2016), the Supreme Court clarified that the PLRA requires exhaustion of administrative remedies only if they are "available" to a prisoner. *Ross,* at 642; 42 U.S.C. § 1997e(a). The Supreme Court discussed some situations when an administrative remedy might be considered unavailable, including when:

(1) the prison's grievance procedure ". . . operates as a simple dead end-with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; or,

(2) the grievance procedure is "so opaque that it becomes, practically speaking, incapable of use"; or,

(3) "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation."

Ross at 643-44 (citations omitted).

If prison officials do not respond to your grievance (or take any other action that prevents you from completing the process), check the prison's grievance policy to see if there is a procedure you should follow. If there is no specific procedure, you should follow up and ask for a response, explaining that you need their response in order to proceed to the next step in the grievances process. If they still do not respond you should move to the next step of the process and explain (in writing) that you are interpreting the prison officials' failure to respond as a denial of your grievance and are moving on to the next step. If prison officials continue to fail to respond, you need to continue to complete the next steps of the process until you have completed all steps – noting at each step why you are moving on even though prison officials did not respond. With this "paper trail" established, you should be able to argue later in court either that you did complete the administrative remedy process or that it was not available to you because of prison officials' failure or refusal to respond.

If you are faced with a situation where prison officials are actively thwarting your attempts to grieve, be sure to document all of your attempts to exhaust and all of the actions by prison staff. If there are witnesses to your attempts (or staff's actions), find out if they would be willing to submit an affidavit and testify on your behalf in court proceedings, if necessary.

If I exhausted some of the claims in my complaint but not others will my entire lawsuit be dis missed for failure to exhaust administrative remedies?

No. In *Jones v. Bock*, the Supreme Court rejected the "total exhaustion" rule which had been used by some district courts. *See Jones*, 549 U.S. at 219-224. Under *Jones*, the proper procedure for a district court to follow is to dismiss the unexhausted claims and permit the exhausted claims to proceed. *See id.*

What if the problem is ongoing? Do I have to file a new grievance for each instance or episode of the problem, or can I file one grievance that encompasses the ongoing problem?

Under *Jones v. Bock*, the prison's grievance procedure is the yardstick by which exhaustion is measured. *See Jones*, 549 U.S. at 218. Be sure that you carefully review your institution's grievance policy and procedures to see if there is an instruction on how to grieve ongoing problems. If there are

no specific instructions, you should research how courts in your Circuit handle exhaustion of ongoing problems. Generally speaking, if there are different instances or episodes of an ongoing problem but all of the instances are based on the same facts and involve the same defendants, courts have held that a separate grievance does not need to be filed for each specific instance of the problem. *See, e.g., Sheltra v. Christensen*, 124 F.4th 1195, 1203-1205 (9th Cir. 2024) (inmate's failure to protect claim for an attack suffered from a fellow inmate was exhausted because it was part of the same continuing harm or course of conduct that plaintiff had described in his grievance filed before the attack; an inmate need not file repeated grievances if he has identified one continuing harm or a single course of conduct of which later events are a part). On the other hand, if different incidents occurring as part of an ongoing problem are based on different facts, then multiple grievances should be filed. *See Weightman v. O'Brien*, No. 24-1543, 2025 WL 487214, at *2 (7th Cir. Feb. 13, 2025) (citation omitted) (plaintiff needed to separately grieve delayed appointment and denial of surgery in claim related to his broken foot, because these were qualitatively different events and different actors were involved in each discrete act).

What if the issue is too time-sensitive for me to complete the exhaustion process before filing a lawsuit?

Under *Jones v. Bock*, the court will look to the provisions of the prison's grievance system to determine whether an inmate has exhausted a claim arising from an emergency or urgent situation. Many prison systems have emergency grievance procedures, which you must follow if they exist. For example, the Pennsylvania Department of Corrections' current grievance policy states that the grievance system "is not meant to address incidents of an urgent or emergency nature. . . [w]hen faced with an incident of an urgent or emergency nature, the inmate shall contact the nearest staff member for immediate assistance." *See* DC-ADM 804, Section 1, A, # 2 (effective May 1, 2015). Third Circuit courts have excused inmates from exhaustion under this provision in a variety of emergency circumstances. *See, e.g., Downey v. PA DOC*, 968 F.3d 299, 307 (3d Cir. 2020) (inmate diagnosed with severe glaucoma for whom doctors had ordered immediate surgery to avoid loss of sight was not required to complete the grievance process before filing lawsuit); *Major v. Halligan*, No. 1:21-cv-00068-RAL, 2023 WL 6389038, at *6, (W.D. Pa. Sept. 29, 2023) (inmate experiencing severe chest pains, later found to be having a heart attack); *Warrington v. Pa. Dep't Corr.*, No. 1:19-00237, 2022 WL 525846, at *4-5, (M.D. Pa. Feb. 22, 2022) (inmate rushed to hospital in helicopter after assault).

Unlike the Pennsylvania DOC grievance policy, the federal BOP Administrative Remedy Program (Program Statement 1330.18, effective January 6, 2014) does not provide an exception to the remedy filing requirement, but it does state that if the issue is "determined [by the BOP] to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond not later than the third calendar day after filing." *See* P.S. 1330.18, at p. 9, # 12 "Response Time." (effective Jan. 6, 2014),

If your institution does not have a procedure for emergency or time-sensitive issues, you should complete the regular grievance process to the extent you can. If your problem is urgent and the relief you are seeking is to stop a currently occurring harm or prevent a future harm, you could file a motion for a preliminary injunction to try to get relief from the court before you have completed the grievance process. If you do this, you should be prepared to respond to non-exhaustion arguments from the defendants and present evidence that you made every effort you could to exhaust.

Do I have to include information about my exhaustion of administrative remedies in the com plaint that I file in court?

No. An incarcerated plaintiff is not required to plead or demonstrate exhaustion in the complaint. *See Jones*, 549 U.S. at 212. Instead, failure to exhaust administrative remedies under the

PLRA is an affirmative defense which must be pleaded and proved by the defendants. *See id.* at 216. Defendants may raise failure to exhaust as an affirmative defense in their answer to the complaint. They may then file a motion arguing that the court should dismiss your complaint (or specific claims) on the ground that you failed to exhaust. You will need to respond to that motion and argue either that you did exhaust or, if you did not, that this was because administrative remedies were not available to you within the meaning of the PLRA under *Ross v. Blake*.[9]

Although failure to exhaust issues usually come up at the beginning of a case, they can be raised at any point. Because of this, a plaintiff should be prepared to provide evidence of exhaustion to the court from the moment the complaint is filed. Before you file your complaint, make sure that you have gathered up all of the grievance documents (including responses, replies, appeals) to support your argument that you did exhaust or that you took every possible step available to you to try to exhaust. You should also be prepared to obtain inmate statements to support your exhaustion argument, if you have witnesses who can support it. Although you should collect these documents (including drafts of inmate affidavits) for future possible use, we *do not advise* that you refer to them in or attach them to your complaint. Instead, you simply need to have these documents ready for use if you need to respond to a "failure to exhaust" argument.

What grievance process should I use if my issue is related to sexual abuse?

First, check your institution's grievance policy to find out whether there is a specific procedure for you to use. A federal regulation that went into effect in 2012 in connection with the Prison Rape Elimination Act (PREA) provides that if an institution has administrative procedures to address grievances regarding sexual abuse, the institution cannot impose a time limit on the submission of inmate grievances about sexual abuse. *See* 28 C.F.R. § 115.52(b)(1). Related regulations require prisons to establish emergency procedures for inmates to use if they are at risk of imminent sexual abuse, with a provision for protective action within 48 hours and a final decision within five days. *See* 28 C.F.R. § 115.52(f)(1), (2). The regulations also impose other requirements on prisons regarding, among other things, how grievances about sexual abuse must be processed and investigated and about who can assist inmates in filing such grievances. *See* 28 C.F.R. § 115.52, *et seq*.

What if the prison officials respond in writing to my grievance by telling me that they will grant me the relief I ask for, but then they do not act on that statement?

You should follow up with prison officials (in writing) using the grievance process if this happens. Be sure to keep copies of everything you file and all responses you receive, as you may need them in court to demonstrate that you did everything you could to exhaust administrative remedies.

[9] We suggest that you carefully consider whether to include *anything* in your complaint about the grievances you've filed (or attempted to file). Since, under *Jones v. Bock*, exhaustion of administrative remedies is an affirmative defense that the defendants must prove, it may be better if you omit allegations about exhaustion from your complaint. Let the defendants do their job and file a motion with the court seeking dismissal of your complaint on the basis of non-exhaustion. You can then respond to the motion and include all of the relevant information (with supporting documents) that shows that your complaint should not be dismissed. If you decide to include information in your complaint pertaining to exhaustion, or if you are using a form complaint provided by the court and it includes questions about your efforts to exhaust, you may wish to provide facts about *why* you were not able to exhaust your remedies. If you simply state that you did not exhaust remedies (or if you check the "no" box for the exhaustion question on a form complaint) without providing an explanation, the court may decide that your complaint establishes "on its face" that you failed to exhaust and dismiss your case on this basis without first determining whether administrative remedies were "available" to you, as required under *Ross v. Blake*. Regardless of which way you choose to proceed, if your complaint is dismissed for failure to exhaust and you have facts that show that administrative remedies were not available to you, as discussed in *Ross v. Blake*, you should ask the court to reconsider its dismissal decision (or file an appeal) so that you can present those facts.

What if I get part of what I asked for in the grievance process, but did not get everything I asked for – do I need to file appeals so that I have completed all levels of the process?

Yes. If you receive part of what you asked for but were denied some of the relief you asked for, you need to appeal the denial to the highest level in order to preserve your ability to file a lawsuit about all of the issues that you grieved. For example, if you asked for medical care and for monetary damages in your prison grievance and were given medical care but denied monetary damages, you need to file an appeal about the denial of damages in order to exhaust your administrative remedies for your damages claim.

Note to Federal Prisoners regarding exhaustion of administrative remedies in *Bivens* cases: As discussed in the *Bivens* Fact Sheet, under current Supreme Court precedent, the ability of a federal prisoner to obtain monetary relief (also called "damages") from an individual defendant for a constitutional violation under the *Bivens* doctrine is almost non-existent unless the claim is based on denial of adequate medical care. Given the current state of the law, you may wish to consider whether to move forward in the administrative remedy process *unless* your *Bivens* claim is based on denial of adequate medical care OR you are asserting a non-*Bivens* claim for injunctive or declaratory relief.

E. The PLRA's "Physical Injury" requirement limits a prisoner's ability to obtain compensatory damages for mental or emotional injuries.

The PLRA imposes a restriction on prisoners' ability to obtain compensatory damages for mental or emotional injuries if they prevail on their claims. Section 1997e(e) states:

> "Limitation on recovery. 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 or the commission of a sexual act (as defined in section 2246 of title 18)."

42 U.S.C. § 1997e(e).

This provision (often referred to as "the physical injury requirement") applies to a plaintiff's ability to obtain damages (monetary relief) – it does not apply to claims seeking declaratory or injunctive relief. ***Importantly, this requirement does not preclude prisoners from bringing a lawsuit: it is focused solely on the type of relief they can get if they prevail on their claims.*** The questions of which types of damages claims the physical injury requirement applies to and under what circumstances it applies have generated much confusion and conflicting holdings among the federal courts. Before getting to that, though, a short explanation of the different types of damages usually at issue in prisoners' civil rights cases may be helpful.

The term "damages" means "money claimed by or ordered to be paid to a person as compensation for loss or injury." *Black's Law Dictionary*, Abridged 7th ed. at 320. In most civil rights cases, there are three main categories of damages: compensatory, punitive, and nominal.

Compensatory damages

Compensatory damages consist of money that is paid to a plaintiff to compensate them for the loss or injury they suffered. A plaintiff usually must "prove" their damages by providing evidence. For example, if a plaintiff seeks compensatory damages based on a physical injury, then the plaintiff's medical records and/ or testimony from a doctor is often offered as evidence.

Punitive damages

Unlike compensatory damages, punitive damages do not compensate a plaintiff for the injuries they suffered. Instead, the purpose of punitive damages is to punish a defendant for willful or malicious conduct and to deter others from engaging in similar conduct. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306, n.9 (1986). *See also Smith v. Wade*, 461 U.S. 30, 54 (1983) (focus of punitive damages is on the character of the tortfeasor's conduct).

What do I need to show in order to prove a claim for punitive damages?

The decision whether to award punitive damages is up to the jury (or, in a case where the judge is the fact finder – the judge). *See Smith* at 56 (jury may award punitive damages in a Section 1983 case "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."). However, unlike compensatory damages, punitive damages are "never awarded as of right, no matter how egregious the defendant's conduct." *See id.* at 52.

Nominal damages

Nominal damages (usually a very small sum, such as $1.00) are awarded when a "legal injury has been suffered but when there is no substantial loss or injury to be compensated." *See Black's Law Dictionary*, Abridged 7th ed. 322. An award of nominal damages serves to acknowledge the importance of a constitutional right to organized society. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978). To obtain nominal damages, a plaintiff must prove that a constitutional (or other) violation occurred but does not need to provide evidence about the existence or extent of an actual injury. *See id.*

Courts' Varying Interpretations of the PLRA's Physical Injury Requirement

Federal courts are divided on the question of when Section 1997e(e) (the "physical injury requirement") applies. Some have held that it applies whenever a prisoner asserts a claim for damages based on *anything other than* a physical injury. Courts following this theory reason that mental or emotional injuries are the only types of injuries that could be alleged other than physical injuries and therefore the physical injury requirement applies. *See, e.g., Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (holding that PLRA barred compensatory damages for a First Amendment claim involving interference with access to religious services, reasoning that the only injury that could result from such a violation would be mental or emotional injury); *Geiger v. Jowers*, 404 F.3d 371, 374-75 (5th Cir. 2005) (dismissing First Amendment retaliation claim based on prison officials' mail tampering because no physical injury was alleged); *Searles v. Van Bebber,* 251 F.3d 869, 873-76 (10th Cir. 2001) (same – First Amendment free exercise claim).

In contrast, some courts recognize a constitutional violation as an injury in and of itself for which a prisoner can seek compensation. For example, if a prison official infringes on a prisoner's First Amendment right to freedom of speech, the resulting injury would not be physical and may not be "mental or emotional" either. Instead, a First Amendment violation causes an *intangible* constitutional injury – one that does not fall into the categories of "physical, mental, or emotional." *See*, *e.g.*, *King v. Zamiara*, 788 F.3d 207, 212 (6th Cir. 2015) (". . . deprivations of First Amendment rights are themselves injuries, apart from any mental, emotional, or physical injury that might also arise from the deprivation, and [] Section 1997e(e) does not bar all relief for injuries to First Amendment rights"); *Wilcox v. Brown*, 877 F.3d 161, 169-170 (4th Cir. 2017) (compensatory damages not barred by Section 1997e(e) because plaintiff sought damages for the violation of his First Amendment right to practice his religion – not "for mental or emotional injury"); *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999) (deprivation of a constitutional right is itself a cognizable injury, regardless of any resulting

mental or emotional injury). These courts have held that Section 1997e(e) does not preclude a plaintiff from obtaining damages for First Amendment violations even if they have not demonstrated a physical injury.

Courts have also found Section 1997e(e) inapplicable beyond the First Amendment context. *See, e.g.*, *Guy v. LeBlanc*, 400 F. Supp. 3d 536, 545 (M.D. La. 2019) (hearing impaired inmate's ADA and RA claims for nominal and lost-wages damages were not barred by PLRA's physical injury requirement, because such damages were unrelated to "mental or emotional injury."); *Aref v. Lynch*, 833 F.3d 242, 264-265 (D.C. Cir. 2016) (Section 1997e(e) was inapplicable to plaintiffs' Fifth Amendment procedural due process claims where the injuries consisted of plaintiffs being denied access to prison programs, communication with their families, and the ability to socialize); *Mitchell v. Horn*, 318 F.3d 523, 534 n.10 (3d Cir. 2003) (compensatory damages claims for due process violations under the Fifth and Fourteenth Amendments, resulting in loss of status, custody level and any chance of commutation, were distinct from mental injury claims and not subject to Section 1997e(e)'s requirements); *Oliver v. Keller*, 289 F.3d 623, 630 (9th Cir. 2002) (compensatory, nominal, or punitive damages available if premised on alleged unconstitutional conditions of confinement and not on emotional or mental distress suffered).

> ***Tip:*** If you are in a Circuit which recognizes that the violation of a plaintiff's constitutional rights is – in and of itself – an injury for which compensatory damages can be awarded, and your claim does not involve a physical injury, you may wish to make it clear in your complaint that you are not seeking compensatory damages for mental or emotional injury for that claim but are, instead, seeking damages for an intangible injury for the violation of your constitutional rights. This should support your argument that the PLRA's physical injury requirement does not bar your claims for compensatory damages. *See Small v. Brock*, 963 F.3d 539, 543-544 (6th Cir. 2020) (plaintiff's request for compensatory damages was phrased broadly enough to include compensatory damages for the alleged constitutional injury and not only for mental or emotional injury); *Shapiro v. Falk*, No. 13-cv-3086-WJM-KMT, 2014 WL 4651952, at *9, *adopting report and recommendation*, (D. Colo. Sept. 18, 2014) (because plaintiff specifically stated in his amended complaint that he did not seek damages for mental or psychological anguish in connection with group strip search, the PLRA's physical injury requirement did not apply) (citation omitted).

Only compensatory damages are barred by the physical injury requirement – not punitive or nominal damages and not injunctive or declaratory relief.

Almost every court to have considered this issue has held that the statute only precludes a plaintiff from seeking compensatory damages for mental or emotional injury – not punitive or nominal damages. *See Hoever v. Marks*, 993 F.3d 1353, 1362 (11th Cir. 2021) (collecting cases). Courts have also held that Section 1997e(e) does not apply to claims seeking injunctive or declaratory relief. *See Mitchell v. Horn*, 318 F.3d 523, 533-534 (3d Cir. 2003) (citing cases).

What counts (and does not count) as a "physical injury"?

Physical symptoms resulting from mental or emotional conditions do not usually fulfill the "physical injury" requirement. *See, e.g.*, *Davis v. Dist. Of Columbia*, 158 F.3d 1342, 1349 (D.C. Cir. 1998) ("somatic manifestations" of emotional distress, such as weight loss, appetite loss, and insomnia do not constitute "physical injury" for purposes of Section 1997e(e)); *Cain v. Virginia*, 982 F. Supp.

1132, 1135 & n.3 (E.D. Va. 1997) (headaches caused by emotional distress do not satisfy the physical injury requirement).

There is wide variation in courts' holdings on other allegations of "physical injury." The following examples should be used only as a starting point for your research.

physical pain and discomfort

Many courts have held that physical pain, on its own, does not qualify as "physical injury" under the PLRA. *See, e.g., Jones v. F.C.I. Beckley Med. Empl.,* No. 5:11-cv-00530, 2014 WL 2949390, at *5 (S.D. W.Va. June 30, 2014) (physical pain alone is "*de minimus*" injury and therefore is not "physical injury" under PLRA) (citation omitted); *Clifton v. Eubank*, 418 F. Supp. 2d 1243, 1246 (D. Colo. 2006) (citation omitted) (same). Others have held that if physical pain is intense, more than fleeting, and accompanied by injuries that require medical treatment, it can fulfill the physical injury requirement. *See Johnson v. Reyna*, 57 F.4th 769, 776-777 (10th Cir. 2023) (excruciating and lasting pain caused by injuries from guards' assaults on plaintiff's already-injured body, which required medical treatment, fulfilled the physical injury requirement). *See also Freeman v. Angle,* No. 3:20-CV-631-JD-MGG, 2023 WL 4763141, at *3 (N.D. Ind. July 25, 2023) (physical pain can be a physical injury for purposes of Section 1997e(e) (*citing Gray v. Hardy*, 826 F.3d 1000, 1008 (7th Cir. 2016)).

suicide attempts and self-inflicted injuries

Some courts have held that attempted suicide and other forms of self-harm do not fulfill the physical injury requirement. *See, e.g., Barnes v. Harris*, No. 5:21-CV-112 (MTT), 2022 WL 3718505, at *1 (M.D. Ga. Aug. 29, 2022) ("Self-harm, by whatever means, is simply not the type of 'physical injury' required to recover compensatory damages under the PLRA.") (collecting cases). Others have found that attempted suicide does qualify as "physical injury" under the statute. *See Lopes v. Beland*, No. 11-cv-12063, 2014 WL 1289455, at *11 (D. Mass. Mar. 29, 2014) (observing that some type of physical injury from the suicide attempt was presumed to exist); *Arauz v. Bell*, 307 F. App'x. 923, 929, 2009 WL 152148, at **5 (6th Cir. 2009) (concluding that "[b]y definition, attempting suicide involves hurting oneself, and we can presume the existence of some physical injury from [the petitioner's] statement that he attempted to commit suicide.").

inhumane conditions of confinement

Exposure to inhumane or harmful environmental conditions, on its own, does not usually qualify as physical injury. *See, e.g., Folts v. Grady Cty. Bd. Of Cty. Comm'rs*, No. CIV-15-996-M, 2016 WL 7116184, at *9 (W.D. Okla. Nov. 2, 2016), *report and recommendation adopted at* 2016 WL 7116192 (W.D. Okla. Dec. 6, 2016) (allegations of deprivation of sleep and exercise and unsanitary living conditions for seven days did not satisfy the PLRA's physical injury requirement). *But see Braswell v. Corr. Corp. of America*, 419 F. App'x. 622, 626-627 (6th Cir. 2011) (allegations that severely mentally ill prisoner had "languished in a filthy and unsanitary cell for nine consecutive months" without any opportunity for physical exercise asserts more than a *de minimis* physical injury and satisfied the PLRA's physical injury requirement).

"de minimis" injuries

"De minimis" is a Latin term meaning "so insignificant that a court may overlook it in deciding an issue or case." *See* Black's Law Dictionary, Abr. Seventh Ed. 2000, at 352. Even though this term does not appear in the statute, numerous courts have held that if the plaintiff suffers merely a "*de minimus*" physical injury, this is not sufficient to fulfill the PLRA's physical injury requirement. Courts have found a wide variety of physical injuries to be "*de minimis.*" *See, e.g.*, *Howard v. Barney,* No. 2:17-CV-01807-JAM-DB, 2019 WL 2448437, at *3 (E.D. Cal. June 11, 2019) (a skin rash on its

own is a *de minimis* physical injury that does not give rise to a claim for emotional or mental damages); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997) (bruised ear which lasted for three days insufficient to demonstrate "physical injury" under PLRA).

If an injury lasts longer, causes more pain, and requires medical treatment, a court is more likely to find that it is not "*de minimis*" for purposes of the physical injury requirement. For example, in *Johnson v. Reyna* (cited above) the Tenth Circuit held that the injuries inflicted by the guards were not "*de minimis*," because they were accompanied by intense pain, required medical treatment and lasted over a year after the incident. *See Johnson*, 57 F.4th at 777.

> ***Tip:*** If your physical injury allegations may not fulfill the standard set forth in Section 1997e(e) and your claim for compensatory damages for mental or emotional injuries may be dismissed because of that, you may want to include a claim for punitive damages against one or more individual defendants, if the facts of your case support this. You should also include a request in the relief section at the end of your complaint for "such other and further relief deemed just and appropriate." This is standard language in many civil complaints and may help prevent your complaint from being dismissed merely because you do not seek the correct type of relief for your specific claims.

Does the physical injury have to be caused by the unconstitutional act of the defendant?

Although there is nothing in the language of the PLRA stating that the physical injury must have been caused by a defendant, many courts have interpreted the physical injury requirement to require such a causal connection. *See e.g., Searles*, 251 F.3d at 881 (implying that physical injury must be caused by defendant); *Banks v. Katzenmeyer*, No. 13-cv-02599-KLM, 2015 WL 1004298, at *13 (D. Colo. Mar. 4, 2015) (plaintiff's failure to allege any facts that demonstrated that he suffered physical injury that was caused by defendants was fatal to his claim for compensatory damages). By contrast, a few courts have held – in the context of deliberately indifferent medical care - that the physical injury need not be caused by the defendant's conduct as long as it arises contemporaneously to the unconstitutional conduct. For example, in *McAdoo v. Martin*, 899 F.3d 521 (8th Cir. 2018), the plaintiff alleged that defendant prison officials were deliberately indifferent when they refused to permit him to take prescribed medication after he was assaulted by a guard. The court held that these allegations fulfilled the physical injury requirement even though the defendant medical care provider did not cause the initial injury. *See McAdoo*, 899 F.3d at 525-527 (noting that in the Eighth Amendment context, "[t]he PLRA's gatekeeper function against frivolous suits does not require a prison inmate to make a showing of a physical injury *caused* by an unconstitutional act.")

What does "the commission of a sexual act" mean in 42 U.S.C. § 1997e(e)?

This language was added to the physical injury requirement in 2013 in connection with an amendment to the Violence Against Women Act. In order for this exception to the physical injury requirement to apply, a plaintiff must allege facts that fulfill the specific definition of "sexual act" set forth in 18 U.S.C. § 2246(2), as follows:

> (2) the term "sexual act" means –
>
> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
>
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or,
>
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person;
>
> * * *

If a court finds that this exception applies then the plaintiff can seek compensatory damages for mental or emotional injury even if they did not sustain a physical injury.

Do I need to include allegations in my complaint to satisfy the physical injury requirement (or the "commission of a sexual act" exception)?

Courts disagree on whether the physical injury requirement is a pleading requirement (meaning that a plaintiff must include allegations in the complaint that show that the physical injury requirement has been satisfied) or if it is simply an issue that needs to be addressed later in the litigation in order for the plaintiff to obtain compensatory damages. *Compare Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003) (". . . physical injury is merely a predicate for an award of damages for mental or emotional injury, not a filing prerequisite for the federal civil action itself.") (*citing Robinson v. Page*, 170 F.3d 747, 749 (7th Cir. 1999)) *with White v. United States*, No. 21-6007, 2024 WL 3309752, at *9-11 (10th Cir. July 5, 2024) (affirming dismissal because complaint did not contain sufficient allegations to demonstrate more than *de minimis* physical injury) *and Mitchell v. Horn*, 318 F.3d 523, 533-534 (3d Cir. 2003) (permitting plaintiff to file an amended complaint upon remand to include allegations of more than *de minimis* physical injuries, if any, that stemmed from being denied food, water, or sleep for a period of four days). We suggest that if, after researching this issue, you are not certain whether your Circuit requires you to plead facts in your complaint to fulfill the physical injury requirement that you err on the side of caution and do so.

F. The PLRA imposes strict limits on prospective relief for prisoner plaintiffs.

In addition to the restrictions and limitations on damages discussed above, the PLRA restricts a prisoner plaintiff's ability to obtain prospective relief, such as an injunction. The relevant statute, 18 U.S.C. § 3626, provides:

> "Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."

18 U.S.C. § 3626(a)(1)(A).

This provision has often been referred to as the "Need-Narrowness" test. Generally speaking, it means that if you are seeking an injunction it must be as narrow as possible to address the violation of your rights. The "need narrowness" test is usually conducted after a court has found that a defendant is liable to the plaintiff. At that point, the court will determine what type of injunctive relief is appropriate and will make sure that the relief does not extend beyond the boundaries of the PLRA's "need narrowness" determination. If you are requesting injunctive relief in your case, you need to, at a minimum, make sure your request is related to the claims in your lawsuit. Then, you may need to convince the court that the relief you are seeking is both narrowly tailored and the least intrusive way for the court to grant you relief.

IV. MISCELLANEOUS PLRA PROVISIONS

Payment of costs by prisoner plaintiff who does not prevail in their lawsuit

Federal Rule of Civil Procedure 54(d)(1) provides that costs should be allowed to the prevailing party in a civil lawsuit. It is rare that a court orders a prisoner plaintiff to pay the defendants' costs, as most prisoner plaintiffs are indigent. However, it is possible. If you do not prevail in your case, and the court orders you to pay the costs incurred by the defendants, the PLRA requires that the payment of the costs be made from your prison account in the same way that filing fee payments are made. *See* 28 U.S.C. § 1915(f)(2)(A) – (C).

For Federal Prisoners - *Revocation of earned good time credit that has not vested*

Under 28 U.S.C. § 1932, if the court finds that a federal prisoner filed a case for a malicious purpose or solely to harass the party against which it was filed, or if the court finds that the prisoner testified falsely or presented false evidence or information to the court, the court can order that the prisoner's earned release credit (good time credit) that is not yet vested, be revoked. While this PLRA provision is not often invoked, it can be. For example, in *Rankins v. Carvajal*, No. 5:21-00453, 2022 WL 1261222 (S.D. W.Va. Feb. 9, 2022), *report and recommendation adopted at* 2022 WL 671001 (S.D. W.Va. Mar. 7, 2022), the U.S. Attorney asked the district court to revoke the plaintiff's earned good time credit, asserting that the plaintiff had presented false information to the court by omitting his past federal cases on his complaint form. *See Rankins*, at *3. The court did not revoke the credit, finding that it was possibly the first time that the plaintiff had made a misrepresentation to the court, but issued a warning that it would seriously consider revoking the plaintiff's good time credit if he made any future misrepresentations to the court. *See Rankins*, at *5.

V. CONCLUSION

As mentioned in the introduction, this bulletin is only a brief overview of the main components of the PLRA. We strongly urge you to use it as a starting point for research on how the courts apply and interpret the PLRA in your Circuit. We hope that you find this information useful in preparing to file your complaint and in responding to the PLRA issues that will likely arise if you file your complaint while you are a "prisoner" within the meaning of the PLRA.