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## **Prison Litigation Reform Act: Exhaustion of Remedies**

### *Contents*

#### **Part One: (April Issue)**

- **Introduction**
- **Exhaustion Required Regardless of Remedy Sought**
- **Exhaustion Required Even in Cases Involving Single Incidents**
- **Prisoners Must Comply With Procedural Rules for Grievances**
- **Resources**

#### **Part Two: (This Issue)**

- **Failure to Exhaust is an “Affirmative” Defense**
- **Exceptions to Exhaustion Requirement**
- **Recommendations**
- **Conclusion**
- **References**

To read Part One of this two-part article, click [here](#).

### **❖ Failure to Exhaust is an “Affirmative” Defense**

Some courts interpreted the exhaustion of administrative remedies requirement as something that prisoners had to plead in their complaints that they had complied with, or else the lawsuit had to be dismissed.

Additionally, some courts believed that the prisoner had necessarily failed to properly and fully exhaust his available administrative remedies if he failed to mention, in his filed grievance, each individual later named as a defendant in his lawsuit.

Further, some courts ruled that a prisoner’s entire lawsuit should be dismissed if it contained some claims on which he had not exhausted his available administrative remedies, and others on which he had.

The U.S. Supreme Court, in [Jones v. Bock](#), #05-7058, 549 U.S. 199 (2007), unanimously held that:

***Failure to exhaust is an affirmative defense*** under the PLRA, and inmates are not required to specifically plead or demonstrate exhaustion in their complaints--instead, defendant prison officials must specifically raise the failure to do so as a defense. If they do not, the defense may well be waived.

***Exhaustion is not per se inadequate*** under the PLRA when an individual later sued was not named in the grievance, and the applicable procedural rules that a prisoner must properly exhaust are not defined by the PLRA, but by the prison grievance process itself. In this case, at the time each grievance was filed here, the correctional system's policy did not specifically require a prisoner to name anyone in the grievance.

***The PLRA does not require dismissal of the entire complaint*** when a prisoner has failed to exhaust some, but not all, of the claims included in the complaint. The court can and should dismiss the claims on which the prisoner has not exhausted his available administrative remedies, but allow other claims, on which he has exhausted his administrative remedies, to proceed.

#### ❖ **Exceptions to Exhaustion Requirement**

Under [\*Woodford v. Ngo\*](#), #05-416, 548 U.S. 81 (2006), the requirement to exhaust administrative remedies is mandatory, but it is not "jurisdictional," that is, it does not deprive the court of the ability to consider whether, under the circumstances at hand, the failure to do so should be excused.

A wide variety of arguments has been advanced by plaintiff prisoners as to when compliance should be excused. The following are just a few examples:

***The unavailability of the opportunity to grieve on particular topics under the applicable grievance rules of a facility.*** If it is absolutely clear that no administrative remedy is available, there may be nothing to "exhaust." In [\*Steele v. Fed. Bureau of Prisons\*](#), #02-1492, 355 F.3d 1204 (10th Cir. 2003), however, a court stated that despite the fact that a prisoner thought that the claims being asserted in his lawsuit could not be grieved, his pursuit of a grievance was not excused when he was wrong about that.

***Their own illiteracy or lack of education (either altogether or in the English language).*** See for example, [\*Langford v. Ifediora\*](#), #5:05CV00216, 2007 WL 1427423 (E.D. Ark. 2007), ruling that the inmate's age, deteriorating health, and lack of education, along with the failure to render assistance in filing his grievances, created a factual issue on the availability of any administrative remedy to him. See also, [\*Ramos v. Rosevthal\*](#), #4:06cv3158, 2007 U.S. Dist. Lexis 37360 (D. Neb. 2007), denying summary judgment to defendant prison officials when a prisoner who was largely only Spanish-speaking

claimed that he could not understand or follow the grievance procedure due to their unavailability in Spanish, and the failure to render him any assistance.

***A disability, illness, or mental incompetence.*** See [\*Macahilas v. Taylor\*](#), #06-0502, 2008 U.S. Dist. Lexis 13314 (E.D. Cal. 2008), in which the court denied summary judgment to defendants because the prisoner claimed that “his mind was too clouded” by a physical illness to file a timely grievance, and [\*Ricketts v. AW of Unicor\*](#), #1:CV-07-0049, 2008 U.S. Dist. Lexis 37058 (M.D. Pa. 2008), which denied dismissal for non-exhaustion because the prisoner asserted he was in the hospital paralyzed when the grievance had to be filed. On the other hand, in [\*Ferrington v. La. Dep’t of Corr.\*](#), 315 F.3d 529 (5th Cir. 2002), the court found that a prisoner’s near blindness did not excuse his failure to exhaust administrative remedies, in light of the fact that he was able to file the lawsuit.

***The alleged refusal of staff members to provide them with required grievance forms has been an excuse accepted by a number of courts.*** See [\*Dale v. Lappin\*](#), #03-1023, 376 F.3d 652 (7th Cir. 2004) (per curiam); [\*Mitchell v. Horn\*](#), #98-1932, 318 F.3d 523 (3d Cir. 2003); and [\*Miller v. Norris\*](#), #00-1053, 247 F.3d 736 (8th Cir. 2001);

***Individual staff members’ alleged threats of force or retaliation should a grievance be filed.*** See [\*Hemphill v. New York\*](#), #02-0164, 380 F.3d 680 (2d Cir. 2004), and [\*Turner v. Burnside\*](#), 541 F.3d 1077, 1084 (11th Cir. 2008) which say that it is possible for the threat of retaliation to make administrative remedies unavailable. Such retaliation may be the subject of separate federal civil rights claims on its own. See [Retaliation Against Prisoners for Protected First Amendment Expression](#), 2010 (3) AELE Mo. L. J. 301.

***Other obstruction or barriers to filing, pursuing, or appealing a grievance.*** See [\*Dole v. Chandler\*](#), #05-1868, 438 F.3d 804 (7th Cir. 2006), in which the court cautioned that “prison officials may not take unfair advantage of the exhaustion requirement, ... and a remedy becomes ‘unavailable’ if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting.” In that case a prisoner’s filed grievance allegedly vanished, and who then was not given any information about what he should then do was found to have done everything he reasonably could.

## ❖ Recommendations

Here are a few recommendations related to the topic of exhaustion of remedies that may be helpful:

***Think carefully*** before making a specific topic “off-limits” for the filing of an inmate grievance or other administrative proceeding. If there is no “available” administrative remedy, there is nothing for the prisoner to have to “exhaust” before filing a lawsuit with the court over an incident, and you give up the ability to get notice of the problem, see if

it's legitimate, attempt to remedy it, and develop a record in the event litigation still ensues.

**Consider** adding a procedural requirement that a prisoner filing a grievance include the names of the person or persons he or she believes are responsible for the alleged deprivation. The U.S. Supreme Court decision stating that a prison could sue individuals not named in the grievance was based on a grievance system that did not require that anyone be named.

**Consider** other reasonable procedural requirements, including reasonable time limits, for the filing of inmate grievances.

**Train** staff members on why they should not obstruct inmates from filing grievances or retaliate against them for filing and pursuing them.

**Inform** inmates of the availability of grievance procedures, and the rules to following in filing or appealing them. Do so in writing, and keep a record of inmates receiving this information, and make needed forms available.

**Consider** alternative mechanisms for illiterate, foreign language speaking, disabled, ill, or segregated/locked down prisoners to be able to file grievances or to receive assistance in doing so.

**Document** the processing of grievances, and create a good administrative record that can be easily used by your attorneys in the event of litigation.

**When appropriate**, use the information gathered through the processing of inmate grievances to determine whether there are real problems in the facility, including problems with particular personnel, which should be remedied, either through changes in policy or procedure, additional training, the providing of additional or different resources, or supervisory/disciplinary action.

**Be aware** that the failure to exhaust available administrative remedies is an “affirmative” defense to an inmate lawsuit. This means that you must raise the defense in a timely manner, or it may be waived. Further, keep in mind that this defense should be raised as to individual claims in a lawsuit even if there are other claims also asserted on which the prisoner did properly and fully exhaust available administrative remedies.

## ❖ Conclusion

The failure to exhaust requirement of the Prison Litigation Reform Act can be a powerful weapon in the arsenal available in defending against civil lawsuits, as well as providing

correctional management and employees with adequate notice to enable them to remedy problems before they get out of hand.

The voluminous caselaw generated by the courts concerning the failure to exhaust requirement is complicated, and there are many specific questions on which different federal appeals courts and individual federal district judges differ. This brief article cannot even touch on them all and is no substitute for consultation with competent legal counsel.

We do hope, however, that this has served as a useful introduction to the topic, that some potentially useful recommendations were provided, and that readers will avail themselves of some of the resources and references listed below to further explore this important topic.

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