KNOW YOUR RIGHTS: PRISONERS

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ACLU of Nevada
Attn: Intake Manager
1325 Airmotive Way, Suite 202
Reno, Nevada 89509

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SUMMARY OF RIGHTS AND ISSUES:

Visitation: Inmates do have a right to legal visits, but not full and unfettered contact with attorneys. With respect to other visits, an absolute ban is not allowed, but visitation restrictions generally do not violate the Constitution unless they have no reasonable relationship to a legitimate penological goal, in other words to a valid reason related to running the facility. The Nevada Department of Corrections ("NDOC") views visitation as a privilege for inmates that can be suspended for several reasons. *For more information, see page 2.*

Mail privileges: prisoners have a right to send and receive mail but officers are allowed to read and censor or withhold mail for security reasons. Non-privileged mail can be opened and inspected outside of the inmate's presence without probable cause. Legal mail is subject to more protection. NDOC requires that legal mail be inspected only in the inmate's presence. To ensure protection, mail to and from attorneys or possible attorneys should be clearly marked on the envelope as legal mail. *For more information, see page 3.*

Disciplinary sanctions and punishment: Courts give deference to prison officials' decisions about disciplinary punishment. Punishments that fulfill legitimate penological interests are generally upheld. Although courts would find most punishments with legitimate penological interests constitutional, they have found punishments that involve physical abuse or degrading conditions of punitive confinement unconstitutional. *For more information, see page 5.*

Religion: Generally, beliefs that are "sincerely held" and "religious" are protected by the Free Exercise Clause of the First Amendment to the United States Constitution. This means that an inmate has an absolute right to believe in anything he or she wants. However, an inmate does not always have a constitutional right to do things (or not do things) because of his or her religious beliefs. The government may not impose a substantial burden on the religious exercise of prisoners unless that burden (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that interest. *For more information, see page 6.*

The Prison Litigation Reform Act ("PLRA"): The PLRA makes it harder for prisoners to file lawsuits in federal court because it imposes several requirements on prisoners before they can bring a lawsuit in court. These requirements relate to using prison grievance procedures, filing fees, restrictions due to frivolous lawsuits, and when suits for mental or emotional injury are allowed. *For more information, see page 9.*

Restrictions on Visitation

1. Can prisoners be denied visitation rights?

Visitation restrictions do not violate the Constitution unless they have no reasonable relationship to a legitimate penological goal (a goal related to prison management and/or criminal rehabilitation.[1] Courts are generally deferential to the decisions of corrections officials under this standard. The Supreme Court has stopped short of holding that prisoners have no rights of association, but has upheld severe limits on visitation, including an indefinite denial of all non-legal visiting for prisoners convicted of infractions related to substance abuse.[2]

NDOC views visitation as a privilege for inmates that can be suspended for several reasons, including institutional space restriction, safety, disciplinary, and medical reasons. If visitation privileges are suspended, inmates and their visitors are to be given notice and the reason for suspension. If visitation privileges are suspended indefinitely, the Warden should reconsider every six (6) months upon written request by the visitor.[3]

2. What different kinds of restrictions are allowed?

a. Time, place, and manner of visit:

Courts will generally uphold restrictions on the time, place, and manner of visiting.[4] Courts may give prisons great deference because the prisons may not have the resources to allow visits or ensure safe environments for visitors.[5] NDOC provides that the warden/designee of each facility will regulate the number of visitors, the visiting hours, and termination of visits based on security, space, and institutional emergency considerations.[6]

It is not unconstitutional to place convicted prisoners in a facility so distant that it is difficult or impossible for them to receive visits.[7] The Constitution also does not require contact visits (prison visitations that permit visitors and inmates to have a limited degree of contact without a glass barrier)[8] or conjugal visits (unsupervised visits between inmates and their spouses that permit sexual contact).[9]

b. Who may visit

Courts have upheld rules restricting visitors.[10] NDOC requires that visitors obtain prior approval before showing up at the facility. Anyone who arrives without prior approval will not be allowed to visit unless the warden/designee grants an exception.[11]

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[1] *See Overton v. Bazzetta*, 539 U.S. 126, 141-42 (2003); *Turner v. Safley*, 482 U.S. 78, 89 (1987).

[2] *Overton*, 539 U.S. 126, 136-37.

[3] State of Nevada Department of Prisons, Administrative Regulation No. 719, Visitation (1992).

[4] *See Overton*, 539 U.S. at 136-37.

[5] *Id.* at 129.

[6] State of Nevada Department of Prisons, Administrative Regulation No. 719, Visitation (1992).

[7] *See Olim v. Wakinekona*, 461 U.S. 238, 247 (1983) (holding that even if transfer of a prisoner to another prison involves long distances and an ocean crossing, the confinement remains constitutional).

[8] *See Block v. Rutherford*, 468 U.S. 576, 588-89 (1984).

[9] *See Champion v. Artuz*, 76 F.3d 483, 486 (2nd Cir. 1996).

[10] *See Overton*, 539 U.S. at 129-31.

Minor children under the age of sixteen (16) may visit if supervised by their parents or grandparents. Minor children between sixteen (16) and eighteen (18) will be allowed to visit without adult supervision if they present a notarized authorization by their parent or guardian.[12]

In certain circumstances (e.g., visit by former inmates or persons on parole or probation, visits between former employees of NDOC and current inmates), prior written approval from the warden/designee or director may be needed.[13]

c. Legal visits

All inmates have a right to legal visits, but the Sixth Amendment does not require full and unfettered contact between an inmate and his or her attorney in all circumstances.[14] NDOC stipulates that attorneys do not need to be placed on the approved visiting list but their authorized representatives (e.g., paralegals, law students) must be cleared by the warden/designee prior to visiting. Attorneys and their authorized representatives may be permitted to visit in reasonable numbers during normal visiting hours (set by the warden/designee of each facility), consistent with the security needs of the institution. Any exceptions must be approved by the warden/designee.[15]

New laws passed in the wake of September 11th have placed some limitations on the privilege of confidential communications with an attorney. If the Attorney General believes there is "reasonable suspicion" that a person in custody "may" use communications with attorneys or their agents "to further or facilitate acts of terrorism," the Justice Department "shall . . . provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege." 28 C.F.R. § 501.3(d). In such instances, the Justice Department must either provide written notice to the inmate and attorneys involved or get court authorization to monitor the communications. *Id.* These regulations are being challenged on constitutional grounds by several organizations.

MAIL PRIVILEGES

1. Do prisoners have a right to send and receive mail?

The Supreme Court has held that the First Amendment of the United States Constitution entitles prisoners to receive and send mail, subject only to the institution's right to censor letters or withhold delivery if necessary to protect institutional security, and if accompanied by appropriate procedural safeguards.[16]

Restrictions on **mail received by prisoners** must be rationally related to a legitimate penological interest.[17]

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[11] State of Nevada Department of Prisons, Administrative Regulation No. 719, Visitation (1992).

[12] *Id.*

[13] *Id.*

[14] *See Casey v. Lewis*, 4 F.3d 1516, 1523 (9th Cir. 1993) (holding that prohibiting certain inmates from contact visitation with attorneys was rationally related to legitimate penological interests and did not violate right of meaningful access to courts).

[15] State of Nevada Department of Prisons, Administrative Regulation No. 719, Visitation (1992).

[16] *Hudson v. Palmer*, 468 U.S. 517, 547 (1984).

[17] *Turner*, 482 U.S. at 89-91.

Restrictions on prisoners' **outgoing correspondence** must meet a more exacting standard. They must be "no greater than is necessary or essential" to protect an "important or substantial" government interest.[18]

Prison officials' ability to inspect and censor mail depends on whether the mail is privileged or not.

a. Non-privileged mail (including commercial mail, letters from family members, friends, and businesses)

The Constitution permits incoming non-privileged mail to be opened outside the prisoner's presence.[19] Prison officials can read non-privileged mail for security or for other correctional purposes without probable cause and without a warrant.[20]

NDOC requires that all **incoming general correspondence** (mail between an inmate and someone other than those approved for privileged correspondence) be opened for the inspection of contraband, unauthorized items, and scanned by mailroom staff.[21]

The warden/designee may prohibit **outgoing mail** under certain circumstances, including correspondence that would be detrimental to the security, good order, or discipline of the institution, or for protection of the public. If a particular correspondence has been prohibited for any reason, the inmate shall receive a written notice from the institution.[22]

b. Privileged mail (including attorney-client communications)

"Privileged" mail is entitled to greater confidentiality and freedom from censorship. NDOC Administrative Regulation 750 provides a list of "privileged correspondence." All legal mail is classified as privileged mail.[23] These mailings can be can be inspected for contraband, but such inspection must occur in the presence of the inmate[24] unless the inmate waives this process in writing.[25]

NDOC allows incoming and outgoing legal or privileged mail to be censored in some circumstances. If censorship occurs, the sender and the inmate need to be notified of the confiscation. The inmate can then appeal the censorship through the grievance process.[26]

2. What can a prisoner do if privileged mail is opened outside his/her presence?

A court will not necessarily rule for the prisoner in every case in which privileged mail was opened outside of the prisoner's presence.[27] This reflects the deference courts give to prisoner administrators.

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[18] *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

[19] *See Martin v. Tyson*, 845 F.2d 1451, 1456-57 (5th Cir. 1988), *cert. Denied*, 488 U.S. 863 (1988).

[20] *See Smith v. Boyd*, 945 F.2d 1041, 1043 (8th Cir. 1991).

[21] Nevada Department of Corrections, Administrative Regulation No. 750, Inmate General Correspondence and Mail (2003).

[22] *Id.*

[23] Nevada Department of Corrections, Administrative Regulation No. 722, Inmate Legal Access (2008).

[24] *McCabe v. Wolff*, 995 F. 2d 232 (9th Cir. 1993) (unpublished table decision).

[25] Nevada Department of Corrections, Administrative Regulation No. 722, Inmate Legal Access (2008).

[26] *Id.*

[27] *McCabe*, 995 F.2d 232 (defendant officers entitled to summary judgment because there was no evidence showing that the opening of McCabe's mail was anything more than negligent or inadvertent); *see also Stevenson v. Koskey*, 887 F.2d 1435,

A prisoner will have a greater chance of winning a lawsuit if there is a showing that he or she was actually harmed by the opening of the letter outside the prisoner's presence. Examples of actual harm would be if the prison official's policy is to open all privileged mail outside the recipient's presence, if the letter is copied, or if information contained in the letter is used against the prisoner.

When a prisoner receives a piece of privileged mail that has been opened outside his or her presence, the prisoner should file a grievance. The prisoner should keep a copy of this grievance and any responses in case this act happens again. If the error happens again, the prisoner should file another grievance, mentioning the previous one and the response. If the prisoner can establish that the prison has a policy of opening privileged mail outside the recipient's presence, then the prisoner has a better chance of succeeding in a lawsuit.

DISCIPLINARY SANCTIONS AND PUNISHMENT

1. How can an inmate challenge the nature of the punishment he or she received?

Courts give deference to prison officials' decisions about disciplinary punishment. Punishments that fulfill legitimate penological interests are generally upheld. The Supreme Court has provided four factors to decide whether prison regulations violate the Constitution.[28] These factors are: (1) whether the regulation has a "valid, rational connection" to a legitimate governmental interest, (2) whether alternative means are open to inmates to exercise the asserted right, (3) what impact an accommodation of the right would have on guards, inmates, and prison resources, and (4) whether there are "ready alternatives" to the regulation.[29]

For example, the Supreme Court has held that a prison administration's decision to restrict visitation for prisoners with two substance abuse violations served the legitimate goal of deterring drug and alcohol use within prison, even though the ban on visits lasted a minimum of two years.[30]

Although courts would find most punishments with legitimate penological interests constitutional, they have found punishments that involve physical abuse or degrading conditions of punitive confinement unconstitutional.[31] Courts probably dislike punishments that are disproportionate, or that offend idealistic concepts of dignity, civilized standards, humanity, and decency.[32]

NDOC's inmate disciplinary manual states that disciplinary sanctions imposed may not include: medication, religious items, basic cell furnishings, basic personal hygiene items, food (except as authorized by Administrative Regulation 732, Alternative Diet), bedding and state issued clothing, access to the courts, or any item that has been determined to be a constitutional entitlement.[33]

1441 (9th Cir. 1989) (holding that officer's conduct in allowing a guard to inspect prisoner's legal mail was at most negligent and, thus, did not reach the level of intent necessary to permit a finding of liability).

[28] *See Turner*, 482 U.S. at 89-91.

[29] *Id.*

[30] *Overton*, 539 U.S. at 136-37.

[31] *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (Eight Circuit enjoined the use of the strap until proper regulations and safeguards against abuse were implemented); *Foster v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009) (court found that deprivation of sixteen meals over a twenty-three day period because prisoner covered up a window was sufficiently serious to demonstrate violation of Eighth Amendment).

[32] *Jackson*, 404 F.2d at 579.

[33] Nevada Department of Corrections, Administrative Regulation No. 707.1, Inmate Disciplinary Manual (2008).

2. How can an inmate challenge the disciplinary sanction itself?

Prisoners may challenge disciplinary sanctions imposed on them under the Due Process Clause of the Fourteenth Amendment. The Supreme Court has said that inmates are **not** entitled to hearings (or other due process procedures) for disciplinary punishments unless (1) there is a state-created liberty interest in freedom from such punishment, and (2) the punishment imposes atypical and significant hardship.[34] The Supreme Court has not defined "atypical and significant hardship." Most circuits have found that administrative segregation without more does not rise to the level of an atypical and significant hardship.[35] However, in *Wilkinson v. Austin*, the Supreme Court concluded that being sent to a supermax facility with limited human contact for an indefinite sentence and with no opportunity to parole does satisfy the "atypical and significant hardship" test.[36]

Once a prisoner asserts that the discipline imposed is significant and atypical, he or she must still establish that the procedural safeguards in place were inadequate. To make this determination, a court must consider three factors: (1) the private interests involved, (2) the risk of an erroneous deprivation of such interest and the probable value of additional or substitute procedural safeguards, and (3) the government's interest, including the burdens that different or additional procedural requirements would entail.[37] For example, although the Supreme Court concluded in *Wilkinson v. Austin* that being sent to a supermax facility could violate the Due Process Clause, it ultimately concluded that the procedural safeguards were sufficient, and that there was no constitutional violation. In reaching this decision, the Court emphasized the fact that the prisoner was given notice and an opportunity to be heard, and was provided with many opportunities to challenge an erroneous supermax placement.[38]

The Supreme Court has held that prisoners cannot sue for monetary damages under 42 U.S.C. § 1983 for loss of good time until they get their disciplinary conviction set aside through the prison appeal system or in state court.[39]

FREEDOM OF RELIGION

1. When is religious exercise protected?

Generally, beliefs that are "religious" and "sincerely held" are protected by the Free Exercise Clause of the First Amendment to the United States Constitution.

Courts often disagree about what qualifies as a religion or a religious belief. So-called "mainstream" belief systems, such as Christianity, Islam, and Judaism, are universally understood to be religions. Less well-known or nontraditional faiths, however, have had less success being recognized as religions. While Rastafari, Native American religions, and various Eastern religions have generally been protected, belief systems such as the Church of the New Song, Satanism, the Aryan Nations, and the Five Percenters have often gone unprotected. The Supreme Court has never defined the term

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[34] *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995).

[35] *See Beverati v. Smith*, 120 F.3d 500, 504-05 (4th Cir. 1997); *Mackey v. Dyke*, 111 F.3d 460, 463 (6th Cir. 1997); *Pichardo v. Kinker*, 73 F.3d 612, 612 (5th Cir. 1996).

[36] 545 U.S. 209, 223-24 (2005).

[37] *Id,* at 224-25.

[38] *Id.* at 225-29.

[39] *Edwards v. Balisok*, 520 U.S. 641, 646-48 (1997).

"religion." However, in deciding whether something is a religion, lower courts have asked whether the belief system addresses "fundamental and ultimate questions," is "comprehensive in nature," and presents "certain formal and external signs."[40] If an inmate wants a nontraditional belief system to be recognized as a religion, he or she may have better luck by showing how the nontraditional beliefs are similar to other, better-known religions: Does the nontraditional system have many members? Any leaders? A holy book? Other artifacts or symbols? Does it believe in a God or gods? Does it believe that life has a purpose? Does it have a story about the origin of people?

In addition to proving that a belief system is a religion, the inmate must also convince prison administrators or a court that the beliefs are sincerely held. In deciding whether a belief is sincere, courts sometimes look at how long a person has believed something and how consistently he or she has followed those beliefs.[41] Just because an inmate has not believed something his or her entire life, or has violated beliefs in the past, does not automatically mean that a court will find him or her to be insincere.[42] However, a recent convert or someone who has repeatedly acted in a manner inconsistent with a belief system will probably have a hard time convincing a court of his or her sincerity.

2. What restrictions can be placed on religious activity?

An inmate has an absolute right to believe in anything he or she wants. An inmate does not always have a constitutional right to do things (or not do things) because of his or her religious beliefs.

A prisoner's right to exercise his or her religion is balanced against the government's interests. The general balancing test is that the government may not impose a substantial burden on the religious exercise of prisoners unless that burden (1) is in furtherance of a **compelling governmental interest**, and (2) is the **least restrictive means** of furthering that interest. NDOC tracks this language and stipulates that any limitation or prohibition against religious practice must be consistent with these two requirements.[43]

This balancing test applies to federal and District of Columbia prisoners under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb.[44] The test applies to state prisoners under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C.S. § 2000cc.[45]

3. What restrictions can be placed on religious foods?

[40] *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3rd Cir. 1981); *see also Alvarado v. City of San Jose*, 94 F.3d 1223, 1229 (9th Cir. 1996) (court found no cognizable religious interest at issue in case after applying the test from *Africa*).

[41] *See Sourbeer v. Robinson*, 791 F.2d 1094, 1102 (3rd Cir. 1986); *Vaughn v. Garrison*, 534 F. Supp. 90, 92 (E.D.N.C. 1981).

[42] *See Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988); *Weir v. Nix*, 890 (F. Supp. 769, 775-76 (S.D. Iowa 1995).

[43] Nevada Department of Corrections, Administrative Regulation No. 810, Religious Faith Group Activities and Programs (2008).

[44] *Guam v. Guerrero*, 290 F.3d 1210, 1220-21 (9th Cir. 2002) (holding that the RFRA is constitutional as applied in the federal realm).

[45] *Cutter v. Wilkinson*, 544 U.S. 709, 709-11 (2005) (finding that RLUIPA's institutionalized persons provision is constitutional).

Inmates have enjoyed a fair amount of success with claims protecting religious dietary practices.[46]

Courts have often found that inmates have a right to avoid eating foods that are forbidden by their religious beliefs.[47] Where reasonable accommodations by the prison can be made to provide religious meals, courts have ordered such diets be made available to inmates.[48] Courts have also required accommodations for special religious observances related to meals.[49] Some courts have rejected efforts by prison officials to charge inmates for religious diets.[50]

4. What restrictions can be placed on religious services and the Sabbath?

Courts have generally protected prisoners from regulations that interfere with their ability to attend religious services or engage in prayer according to their religious beliefs.[51]

Courts have also found that restrictions requiring prisoners to violate the Sabbath or other religious duties violate the First Amendment.[52]

5. What religious objects and literature are inmates allowed to have?

Courts have often concluded that prison officials can generally ban religious objects if they could make a plausible claim that the objects could pose security problems.[53] However, officials cannot ban some religious objects and not others without any justification.[54] Courts have also concluded that prison officials are not required to provide religious objects as long as inmates are free to purchase or

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[46] *Ford v. McGinnis*, 352 F.3d 582, 597 (2nd Cir. 2003) ("[A] prisoner has a right to a diet consistent with his or her religious scruples."); *Lomholt v. Holder*, 287 F.3d 683, 684 (8th Cir. 2002) (prisoner's allegation that he was punished for religious fasting stated a First Amendment claim).

[47] *See Moorish Science Temple of Amer., Inc. v. Smith*, 693 F.2d 987, 990 (2nd Cir. 1982); *see also McElyea v.. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987) ("Inmates . . . have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion.").

[48] *See Ashelman v. Wawrzaszek*, 111 F.3d 674, 677-78 (9th Cir. 1997) (holding that prison's policy of supplying Orthodox Jewish prisoners with one frozen kosher dinner supplemented with nonkosher vegetarian or nonpork meals violated prisoner's free exercise rights when reasonable alternatives existed).

[49] *See Makin v. Colorado Dep't of Corrections*, 183 F.3d 1205, 1213 (10th Cir. 1999) (failure to accommodate Muslim fasting requirements during Ramadan infringed on inmate's First Amendment rights); *Levitan v. Ashcroft*, 281 F.3d 1313, 1321-23 (D.C. Cir. 2002) (reversing summary judgment for defendants in Catholic prisoners' challenge to denial of communion wine).

[50] *See Beerheide v. Suthers*, 286 F.3d 1179, 1192 (10th Cir. 2002) (finding no rational relationship between penological concerns and a proposed co-payment requirement for inmates requiring kosher diet).

[51] *Mayweathers v. Newland*, 258 F.3d 930, 938 (9th Cir. 2001) (upholding injunction against disciplining Muslim prisoners for missing work to attend Friday services); *Omar v. Casterline*, 288 F. Supp. 2d 775, 781 (W.D. La. 2003) refusal to tell Muslim prisoner the date or time of day to allow him to pray and fast states First Amendment claim).

[52] *Hayes v. Long*, 72 F.3d 70, 74 (8th Cir. 1995) (requiring Muslim prisoner to handle pork violated First Amendment); *Murphy v. Carroll*, 202 F. Supp. 2d 421, 423-25 (D. Md. 2002) (prison officials' designation of Saturday as cell-cleaning day violated Free Exercise rights of Orthodox Jewish prisoner).

[53] *See Spies v. Voinovich*, 173 F.3d 398, 406 (6th Cir. 1999); *Mark v. Nix*, 983 F.2d 138, 139 (8th Cir. 1993); *Allen v. Toombs*, 827 F.2d 563, 567 (9th Cir. 1987) (inmates could be denied access to perform religious ceremony because the objects used to prepare for ceremony created substantial security risk).

[54] *See Lucero v. Hensley*, 920 F. Supp. 1067, 1075-76 (C.D. Cal. 1996) (employing full-time rabbi but not full-time Native American spiritual leader when there are equal numbers of Jewish and Native American inmates is sufficient to state equal protection claim).

obtain the objects themselves.[55] NDOC provides a list of recognized faith groups as well as the religious objects members of those groups may have.[56]

Courts have concluded that restrictions on a prisoner's right to religious literature violate the First Amendment.[57]

6. What restrictions can be placed on personal grooming?

Prisoners have rarely been successful in challenging grooming and dress regulations. Courts have generally upheld restrictions on haircuts.[58] This has also been true with regard to headgear and other religious attire.[59]

A prison rule about grooming may be vulnerable to attack if it is not enforced equally against all religions.[60] Additionally, a prison rule regarding grooming may be vulnerable if the prison provides no factual justification for it.[61]

NDOC provides that "[i]nmates shall be permitted freedom in personal grooming as long as their appearance does not conflict with the institution's requirements for safety, security, identification and hygiene." Male inmates are allowed to have sideburns, beards, and moustaches if they are kept clean and neat. However, these may be required to be removed for security reasons.[62]

The Prison Litigation Reform Act ("PLRA")

The PLRA makes it harder for prisoners to file lawsuits in federal court. There are many parts to the PLRA, but the following are most important for inmates.

1. Exhaustion of administrative remedies (42 U.S.C. § 1997e(a))

The first key to remember about the PLRA is that before an inmate files a lawsuit, he or she must try to resolve the complaint through the prison's grievance procedure. This usually requires giving a written description of the complaint to a prison official. If the prison provides a second or third step, then the inmate **must** also take those steps. If the inmate files a lawsuit in federal court before taking the complaint through every step of the prison's grievance procedure, it will almost certainly be dismissed.

a. What is exhaustion?

[55] *See Frank v. Terrell*, 858 F.2d 1090, 1091 (5th Cir. 1988).

[56] Nevada Department of Corrections, Administrative Regulation No. 810, Religious Faith Group Activities and Programs (2008).

[57] *Sutton v. Rasheed*, 323 F.3d 236, 251-58 (3rd Cir. 2003).

[58] *See Hines v. South Carolina Dep't of Corrections*, 148 F.3d 353, 357-58 (4th Cir. 1998); *Sours v. Long*, 978 F.2d 1086, 1087 (8th Cir. 1992); *Abordo v. State of Hawaii*, 142 F.3d 442 (9th Cir. 1998) (prison's ban on long hair did not violate right to free exercise of religion because it served legitimate penological interests) (unpublished table decision).

[59] *See Muhammad v. Lynaugh*, 966 F.2d 901, 902-03 (5th Cir. 1992); *Sutton v. Stewart*, 22 F. Supp. 2d 1097, 1106 (D. Ariz. 1998).

[60] *Wilson v. Moore*, 270 F. Supp. 2d 1328, 1353 (N.D. Fla. 2003) (Native American prisoners allowed to wear religious headgear only during religious services, while other prisoners were permitted to do so at all times).

[61] *See, e.g., Burgin v. Henderson*, 536 F.2d 501, 504 (2nd Cir. 1976).

[62] Nevada Department of Corrections, Administrative Regulation No. 705, Inmate Grooming and Personal Hygiene (2004).

Exhausting remedies for the PLRA requires filing a grievance and pursuing all available administrative appeals.[63] If an inmate brings both claims that have been exhausted and ones that have not, courts can proceed with the exhausted claims and dismiss the ones that have not been exhausted yet.[64] However, if a prisoner does not file a grievance because he or she is unable to obtain grievance forms, no administrative remedy is "available" and the prisoner may file in court.[65]

NDOC stipulates time limits for officials to respond to grievances.[66] Inmates should proceed onto the next appeal level if they do not receive a response within the time limit instead of claiming exhaustion. If an inmate does not receive a response at the final appeal level, and the time for response has passed, the prisoner has exhausted.[67]

An exception to the requirement that all appeals be taken occurs if the prisoner cannot appeal without a decision from the lower level of the grievance system, and the lower level did not respond to the grievance.[68]

Courts have differed on when failure to exhaust might be excused but the safest course is always: with respect to **each claim** and **each defendant** an inmate wants to bring in the eventual lawsuit, he or she should file a grievance and appeal that grievance through all available levels of appeal.

Ultimately, proper exhaustion depends upon the policy requirements of each individual jail or prison. Inmates should get a copy of their prison or jail's grievance policy and follow it as closely as they can.

b. What happens if an inmate doesn't exhaust the grievance process?

The Supreme Court held that failure to exhaust is an affirmative defense that must be raised by the defendants.[69] Then, if the court finds that the prisoner has not exhausted, the case is dismissed without prejudice.[70] This means that the lawsuit may be filed again once the prisoner has exhausted, as long as the statute of limitations has not run. If an inmate has exhausted some claims, but not all, the court will dismiss only the unexhausted claims.[71]

There is not a great deal of case law yet addressing whether a prisoner who misses a deadline in the grievance process forever loses his or her claim. If an inmate is in this situation, he or she should appeal though all the levels of the grievance system and explain in the grievance

[63] *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997).

[64] *Jones v. Bock*, 549 U.S. 199, 221 (2007).

[65] *Miller v. Norris*, 247 f.3d 736, 740 (8th Cir. 2001).

[66] Nevada Department of Corrections, Administrative Regulation 740, Inmate Grievance Procedure (2004).

[67] *Powe v. Ennis*, 177 F.3d 393. 394 (5th Cir. 1999).

[68] *Taylor v. Barrett*, 105 F. Supp. 2d 483, 486 (E.D. Va. 2000); *see also Miller v. Tanner*, 196 F.3d 1190. 1194 (11th Cir. 1999) (prisoner had exhausted when told by staff no appeal was possible).

[69] *Bock*, 549 U.S. at 212 (exhaustion requirement under the PLRA is not a pleading requirement that a prisoner must plead and prove before filing suit, rather it is an affirmative defense a defendant must plead or prove).

[70] *Perez v. Wisconsin Dep't of Correction*, 182 F.3d 532, 534-35 (7th Cir. 1999); *Wright v. Morris*, 111 F.3d 414, 426 (6th Cir. 1997); *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003).

[71] *Bock*, 549 U.S. at 221.

the reasons for the failure to file on time.[72] NDOC provides time limits for grievance procedures. If an inmate fails to submit a grievance within the time limit, the claim is considered abandoned. An exception is if the grievance cannot be filed because of circumstances beyond the inmate's control. In such cases, the time for filing begins from the date in which such circumstances cease to exist.[73]

Finally, the statute of limitations is tolled while a prisoner is in the process of exhausting.[74]

c. What are the exceptions to the exhaustion requirement?

There are very few exceptions to the exhaustion requirement. Prisoners seeking to bring a damages action must exhaust available administrative remedies even if the administrative remedy in question does not provide money damages as a possible remedy.[75]

Other means of notifying prison officials of a complaint, such as speaking to staff or writing to the warden, do **not** constitute exhaustion. Inmates **must** use the grievance system.

The exhaustion requirement does not apply to detainees in INS facilities.[76] Also, the exhaustion requirement does not apply to cases filed before the effective date of PLRA, which is April 26, 1996.[77]

2. Filing fees (28 U.S.C. § 1915(b))

The second key to remember about the PLRA is that all prisoners must pay court filing fees **in full**. If an inmate does not have the money up front, he or she can pay the filing fee over time through monthly installments from a prison commissary account, but the filing fee will not be waived.

A complex statutory formula requires the indigent prisoner to pay an initial fee of 20% of the greater of the prisoner's average balance or the average deposits to the account for the preceding six months. After the initial payment, the prisoner is to pay monthly installments of 20% of the income credited to the account in the previous month until the fee has been paid.

3. Three strikes provision (29 U.S.C. § 1915(g))

The third key to remember about the PLRA is that each lawsuit or appeal an inmate files that is dismissed because a judge decides that it is frivolous, malicious, or does not state a proper claim counts as a "strike." After an inmate gets three strikes, he or she cannot file another lawsuit *in forma pauperis* – that is, he or she cannot file unless the entire court filing fee is paid **up front**. The only exception to this rule is if the inmate is at risk of suffering serious physical injury in the immediate future.

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[72] *Harper v. Jenkins*, 179 F.3d 1311, 1312 (11th Cir. 1999) (holding that prisoner who filed an untimely grievance was obliged to seek a waiver of the time limits in the grievance system; *see also Pozo v. McCaughtry*, 286 F.3d 1022, 1023-24 (7th Cir. 2002) (prisoner who missed deadline on one of the levels of appeals of the grievance system barred from filing lawsuit).

[73] Nevada Department of Corrections, Administrative Regulation 740, Inmate Grievance Procedure (2004).

[74] *Johnson v. Rivera*, 272 F.3d 519, 521 (7th Cir. 2001); *Brown v. Valoff*, 422 F.3d 926, 942-43 (9th Cir. 2005).

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

[76] *Edwards v. Johnson*, 209 F.3d 772, 776 (5th Cir. 2000).

[77] *See, e.g., Bishop v. Lewis*, 155 F.3d 1094, 1095-96 (9th Cir. 1998).

An appeal of a dismissed action that is also dismissed is a separate strike.[78] Even dismissals that occurred prior to the effective date of PLRA count as strikes.[79]

An exception to the "three strikes" rule may be invoked if a prisoner is in imminent danger of serious physical injury.[80] A court will evaluate the "imminent danger" exception at the time the prisoner attempts to file the new lawsuit, not at the time that the incident that gave rise to the lawsuit occurred.[81]

4. Physical injury requirement (42 U.S.C. § 1997e(e))

The fourth key to remember about the PLRA is that an inmate cannot file a lawsuit for mental or emotional injury unless he or she can also show physical injury.

The requirement of physical injury only applies to money damages, it does not apply to claims for injunctive and declaratory relief.[82] Some courts have suggested the possible availability of nominal and punitive damages even when compensatory damages are barred by the requirement of physical injury.[83] Courts are split on whether a claim for violation of constitutional rights is intrinsically a claim for mental or emotional injury in the absence of an allegation of a resulting physical injury (or injury to property).[84] Courts differ in their evaluation of what constitutes sufficient harm to qualify as a physical injury.[85]

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[78] *Jennings v. Natrona Co. Detention Center*, 175 F.3d 775, 780 (10th Cir. 1999).

[79] *See e.g., Ibrahim v. District of Columbia*, 208 F.3d 1032, 1035-36 (D.C. Cir. 2000); *Welch v. Galie*, 207 F.3d 130, 131 (2d Cir. 2000).

[80] *See Gibbs v. Cross*, 160 F.3d 962, 965-66 (3d Cir. 1998) (plaintiff alleged an imminent danger of serious physical injury where dust, lint, and shower odor came from his cell vent, causing him to suffer "severe headaches, changes in voice, mucus that is full of dust and lint, and watery eyes."); *see also Andrews v. Cervantes*, 493 F.3d 1047, 1056-57 (9th Cir. 2007) (prisoner who alleges that prison officials continue with a practice that has injured him or others in the past will satisfy the imminence prong of the three-strikes exception); *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998) (allegations that staff placed plaintiff in proximity to known enemies satisfied imminent danger requirement).

[81] *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 311 (3d Cir. 2001) (en banc); *Cervantes*, 493 F.3d at 1053.

[82] *See Perkins v. Kansas Dep't of Corrections*, 165 F.3d 803, 808 (10th Cir. 1999); *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998).

[83] *See Allah v. Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000) (claims for nominal and punitive damages can go forward); *Oliver v. Keller*, 289 F.3d 623, 629-30 (9th Cir. 2002) (even though detainee not allowed to recover for emotional damages under PLRA, nominal, compensatory, and punitive damages for constitutional violations still allowed).

[84] *See Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999) (First Amendment claim not barred by physical injury requirement); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (claim for violation of First Amendment is not a claim for mental or emotional injury); cases going the other way include: *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002); *Searles v. Van Bebber*, 251 F.3d 869, 875 (10th Cir. 2001).

[85] *See Gomez v. Chandler*, 163 F.3d 921, 924-25 (5th Cir. 1999) (allegations of cuts and abrasions satisfy physical injury requirement); *Liner v. Goord*, 196 F.3d 132, 135-36 (2d Cir. 1999) (intrusive body searches qualify as physical injury); *Compare to Herman v. Holiday*, 238 F.3d 660, 665-66 (5th Cir. 2001) (claim of "physical health problems" by prisoner exposed to asbestos does not specify a physical injury that would permit recovery for emotional or mental damages due to fear caused by increased risk of developing asbestos-related disease); *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999) (confinement in filthy cell where inmate was exposed to mentally ill patients does not count as physical injury).