International Municipal Lawyers Association
2017 Mid-Year Seminar
Washington, DC

Prayer, Prisons, and Public Fora: Flashpoints at the Intersection of Religion and Municipal Practice, 2:45-3:45 pm session.[1]

Title here*.

By: Elise Bruhl, Senior Attorney, Appeals, City of Philadelphia Law Department

While your friends may say that they understand what your prisoner cases are like because they watched "Orange is the New Black" on Netflix, you know that they don't. Along with deciphering handwritten or typed pleadings and video depositions, a municipal attorney who defends prisoner cases also comes to learn that prisons have become mental health providers and drug treatment centers.

Bruce Herdman, Chief Medical Director of the Philadelphia Prisons, describes the Pennsylvania county jails as "the largest psychiatric hospital in the state of Pennsylvania." *See* http://www.philly.com/philly/news/politics/Can-PA-find-a-way-out-for-thousands-of-mentally-ill-inmates-languishing-in-county-jails.html

For example, in the Philadelphia Prison System, forty percent of inmates are taking psychotropic medications, and seventeen percent have been diagnosed with a serious mental illness, like schizophrenia, bipolar disorder, or major depression. *See id*. Three quarters of the men and women who enter the Philadelphia prisons are on drugs at the time of entry. *See* http://www.philly.com/philly/living/20160905_Leaving_Philly_jail_with_mental_illness__five_days__medication_-_and_now__a_fighting_chance.html

This context adds another layer of complication to prisoner RLUIPA and First Amendment cases. A municipal attorney handling such a case must work with legal principles, the vocabulary of prison administration, as well as *pro se* plaintiffs who may be mentally ill or who may have any number of other problems. This paper will give an overview of RLUIPA and some of the legal questions that arise in these cases, but also will invite the reader to consider how best to communicate the context in which these cases occur to a court.

"Three Strikes" and the Prison Litigation Reform Act (PLRA). Absent a threat of imminent serious physical injury, a court will usually deny a *pro se* prisoner *in forma pauperis* status if that prisoner has filed three or more federal actions or appeals that were dismissed as frivolous, malicious, or failing to state claim. *See* 28 U.S.C. §1915(g). In *Daker v. Commissioner, Georgia Department of Corrections*, 920 F.3d 1278, 1280 (11th Cir. 2016), the Eleventh Circuit ruled that a dismissal for want of prosecution or lack of jurisdiction were not

[1]©2017 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2017 Mid-Year Seminar, held April 21-24, 2017 in Washington, DC. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

"strikes" for purposes of the PLRA "three strike" rule. The telling fact in the case, however, was that Daker had filed over a thousand filings in over "a hundred actions and appeals in at least nine different federal courts." *See id*.

Exhaustion of Administrative Remedies and RLUIPA. The PLRA also requires a prisoner to exhaust all levels of a prison's grievance procedures prior to bringing an action under 42 U.S.C. §1983 or any other federal law, such as RLUIPA, in federal court. *See* 42 U.S.C. §1997e(a). The applicable prison rules "define the boundaries of proper exhaustion." *See Jones v. Bock*, 549 U.S. 199, 218 (2007). The PLRA also "requires a prisoner to exhaust the grievance procedures offered, whether or not the possible responses cover the specific relief the prisoner demands." *See Booth v. Churner*, 432 U.S. 731, 738 (2001). A prisoner's failure to follow prison procedures, including deadlines, can result in dismissal of claims. *See, e.g., Woodford v. Ngo*, 541 U.S. 81, 90-91 (missed grievance deadlines not acceptable, as "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.")

A prisoner's failing to exhaust administrative remedies may bar his RLUIPA suit, or, at least, streamline some of the issues in that case. *See, e.g., Tillman v. Allen*, 187 F. Supp.3d 664 (E.D. Va. 2016) (granting summary judgment on some of Wiccan prisoner's claims on the merits, and requiring other claims relating to Wiccan religious objects and a request for a special "Common Fare" diet to be exhausted through the prison grievance system).

RLUIPA Generally. Under RLUIPA, a prisoner's "religious exercise" is defined broadly to include "any exercise of religious, whether or not compelled by, or central to, a system of religious belief." *See* 42 U.S.C. § 2000cc-5(7)(a).

A prisoner has the initial burden of demonstrating that the challenged regulation or practice "substantially burdens" his exercise of religion. *See* 42 U.S.C. §2000cc-1(a),

If a prisoner makes this showing, prison officials bear the burden of showing that the challenged regulation or practice is the least restrictive means of furthering a compelling government interest. *See id*.

By contrast, a court uses the *Turner* standard to review a prisoner's First Amendment free exercise challenge. Under *Turner*, a prison regulation is valid, even if that regulation impinges on a prisoner's constitutional rights, if the regulation is reasonably related to legitimate penological interests. *See Turner v. Safley*, 482 U.S. 78. 89-91 (1987). Although a *pro se* prisoner will usually bring both kinds of challenges, the Court's focus will likely end up on the RLUIPA claim.

Substantial Burden.

Administrative Segregation or Restricted Housing

Treatment

Less Mainstream Religions