

**TESTIMONY OF LISA FREEMAN AND DORI LEWIS,
NEW YORK CITY LEGAL AID SOCIETY,
IN SUPPORT OF REFORM OF
THE PRISON LITIGATION REFORM ACT**

**Before the House Judiciary Subcommittee on Crime, Terrorism, and
Homeland Security**

Hearing on H.R. 4109, the “Prison Abuse Remedies Act of 2007”

April 22, 2008

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We are attorneys at the Prisoners' Rights Project of the New York City Legal Aid Society, which represents New York State and City prisoners in class action and test case litigation, advocates for them with prison and jail agencies, and advises them of their legal rights. We are counsel, with the *pro bono* assistance of the law firm of Debevoise & Plimpton, in *Amador, et al., v. Andrews, et al.*, a federal civil rights action challenging a pattern of sexual abuse of women prisoners by male staff in the New York State prisons, and the administrative policies that have in effect granted impunity to the officers preying upon these women and have permitted this conduct to continue without remedy for years. We appreciate this opportunity to testify about the devastating effects of the PLRA on the protection of the civil rights of the most vulnerable in our society.

Although intended to weed out only unmeritorious prisoner litigation, the Prison Litigation Reform Act (PLRA) has created virtually insurmountable barriers to redress for systematic violations of basic human rights, and must be amended accordingly. In particular, the PLRA fails to account for the special circumstances of women who have been the victims of sexual assault in prison, and, as a result, effectively deprives them of access to the courts. The special needs of victims of sexual assault in prison, in general, and of women prisoners, in particular, have been well-recognized and well documented in recent years. *U.S. Prison Rape Elimination Act*, 42 U.S.C. § 15602; AMNESTY INTERNATIONAL, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN 17 (2001); HUMAN RIGHTS

WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 449-452 (1996).

Nonetheless the draconian effect of the PLRA on this population has not been addressed.

In *Amador, et al. v. Andrews, et al.*, sixteen women allege rape and sexual abuse by New York State Department of Correctional Services (DOCS) officers and have sought to challenge DOCS' policies and procedures enabling their abuse, as well as to obtain damages for the assaults they suffered. Rather than being able to present their complaints on the merits, these women have spent four years litigating the issue of exhaustion under the PLRA, and have now been denied the opportunity to present their claims in court.

These women filed a complaint in January 2003, alleging instances of forcible rape, coerced sexual activity, oral and anal sodomy, and pregnancies. They further allege that unless a woman prisoner has physical proof of sexual abuse by an officer, her complaint of abuse will result in *no* action taken against that officer by DOCS, and that DOCS allows a given officer to continue to guard women prisoners, even alone at night in a housing area, despite the fact that DOCS has received multiple credible complaints of sexual abuse by that officer. These women also allege that as a result, women continue to be sexually abused by line officers, and continue to be placed at an unreasonable risk of sexual abuse by known, dangerous line correctional staff.

All of these women reasonably believed they had complained about their assault sufficiently to bring a lawsuit and seek redress. All of them complained about their assault to DOCS Office of the Inspector General's Sex Crimes Unit (IG-SCU), an office established by DOCS for the very purpose of investigating complaints of sexual abuse, presumably because DOCS itself has recognized that complaints of staff sexual misconduct pose a unique set of concerns. These women's complaints to the IG-SCU were made consistently with DOCS'

written instructions telling all women entering the prison system that if they are sexually assaulted they may complain to the IG-SCU or to any staff to whom they feel comfortable speaking. Many of these women additionally complained to the officer's supervisor, to the deputy superintendent for security, or to the superintendent of the facility. Each of these women were told that such complaints, regardless of how they were filed, would be forwarded to the IG-SCU for investigation. Complaints conveyed to the IG-SCU clearly satisfied the purpose of the PLRA in that they gave correction officials notice of the complaint and the opportunity to address it.

The reasonableness of these women's belief that the IG-SCU is the appropriate venue for complaint is underscored by the experience of three of the women who did file grievances. These women—who happened to have timely access to counsel, who advised them to file grievances about their sexual assaults and appeal them to DOCS Central Office—had their grievances denied, or simply not decided, because the matter was the subject of an IG-SCU investigation, consistently with the customary practice of the prison system. That being the case, no reasonable person would appeal these decisions unless told to do so—as these women were—by an attorney schooled in the Byzantine requirements of the PLRA.

In complaining about their assaults, these women had already overcome significant obstacles. Most incarcerated women have a history of sexual or physical trauma prior to their incarceration, in some cases resulting in a diagnosis of post-traumatic stress disorder. *See* Angela Browne, Brenda Miller, & Eugene Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT'L J. LAW & PSYCH. 301-22 (1999). They are then the victims of assault by a staff member, triggering further trauma. This degrading experience is exacerbated by the prison environment in which, unlike their abuser, they lack any

authority and their reports are not credited. They also lack access to support systems available to victims outside of prison and, unless they come forward, they often must confront the abuser day after day. Because the abuser could face criminal penalties, a woman complaining of staff sexual abuse is at a great risk of retaliation for reporting; retaliation by the abuser, other officers, or even other inmates. A woman who is brave enough to complain additionally faces the likelihood that she will not be believed, absent physical proof of the assault, and the likelihood that she may be put into isolation as a result, “for her own protection.” Despite these formidable barriers, all sixteen women who are plaintiffs in *Amador* did complain about their abuse to the IG.

Despite the efforts of these women to exhaust their administrative remedies under the PLRA, the federal District Court has ruled that *none* of these women sufficiently exhausted their administrative remedies to challenge DOCS’ policies and procedures. *Amador v. Andrews*, 2007 WL 4326747 (S.D.N.Y., Dec. 4, 2007). In particular, the District Court disregarded the undisputed evidence that DOCS tells women they can complain to the IG-SCU, that no DOCS staff ever told them to file a grievance about the matter, and that DOCS takes no action on grievances about sexual abuse, except to say they are being investigated by the IG-SCU. Rather, the District Court found that under the PLRA, these women who had complained to the IG-SCU, but had not filed grievances, had not exhausted their available remedies and so could not pursue claims for injunctive relief or for money damages arising from their assault.¹

¹ The court subsequently issued an opinion on plaintiffs’ motion for reconsideration which is not yet published. It reinstates the damages claims of five plaintiffs, three of whom were not subject to the PLRA because they had been released before they filed suit, and two of whom had filed grievances. None of these women, however, were allowed to pursue their injunctive claims, which means that if this court’s ruling stands, there will be no challenge to the continuation of the practices and omissions that made the abuse of these women possible.

There is one plaintiff who is still incarcerated and who filed and appealed a grievance which stated that she was raped by a particular officer who had been the subject of prior similar complaints to the Department, and that her rape should not have been allowed to happen. Nonetheless, the District Court found that this grievance was insufficient under the PLRA to exhaust a claim for injunctive relief. It held that the woman had not named the defendants (apart from the officer) she thought responsible for her assault, or described how they were responsible for her assault, and therefore could not pursue an injunction seeking policy changes to prevent future abuse either of her or of other women in the same situation. Of course prisoners are not privy to the personnel, supervisory, and disciplinary policies and procedures of the prisons in which they are held. Thus, under this decision, the PLRA requires that traumatized, often uneducated and un-counseled victims ignore misleading Departmental practices telling them to complain to the IG-SCU, and that they effectively frame a complex legal claim within the grievance directive's three week time frame, based upon information they have no ability or reason to know, or be denied access to the courts. The PLRA, as applied in this case, has effectively immunized DOCS from any challenge to prison procedures and practices regarding staff sexual abuse.

The PLRA's legislative history reveals it was not intended to bar meritorious lawsuits.² We believe that the *Amador* decision is an extreme application of the statute, and we will seek appellate review as quickly as possible. But success is not assured, and under the "proper exhaustion" standard adopted by the Supreme Court,³ which penalizes prisoners' technical errors

² See, e.g., 141 Cong Rec S 14611, *S14628 (Sen. Thurmond) ("This amendment will allow meritorious claims to be filed, but gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates.") (discussing amendment corresponding to PLRA as enacted; see 141 Cong Rec S 14611, *H14626).

³ See *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 2386-88 (2006).

in the administrative process by requiring dismissal of their claims,⁴ it is likely that in the future other courts will reach decisions as appalling as that reached by this court in *Amador*. In *Amador*, the PLRA has deprived a whole class of the most vulnerable citizens of any meaningful access to the courts and thereby has deprived them of any ability to protect their constitutional rights and their safety against the vilest sort of exploitation. The PLRA must be amended to prevent such results in the future.

Respectfully submitted,

S/

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⁴ Dismissal under the PLRA is usually without prejudice. *See, e.g., Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1213 (10th Cir. 2003), *cert. denied*, 543 U.S. 925 (2004). As a practical matter, however, dismissal will almost always be final, because the deadlines of prison grievance systems are so short that the prisoner will be unable to exhaust to correct technical errors. *See Woodford v. Ngo*, 126 S.Ct. 2378 at 2389 (noting that such deadlines are typically 14 to 30 days); *id.* at 2403 (dissenting opinion) (citing a 48-hour time limit in a juvenile prison).