FEDERAL COURT PRISON LITIGATION PROJECT
REVISED HANDBOOK

December 1, 1998

Introduction

This is a handbook for attorneys appointed by the United States District Court for the Northern District of Illinois to represent prisoners in litigation filed pro se. The Illinois Institute for Community Law, in conjunction with the District Court, has revised this handbook to provide you with information regarding correctional policies and procedures, PART I, and the substantive and procedural rights of incarcerated persons, PART II, including several recent fundamental changes that have occurred since the last revision of the handbook.

The handbook is intended to be of assistance to attorneys unfamiliar with prison procedures and prisoner litigation. However, as with any work of this type, attorneys should determine that all citations, statutes, and other information are correct as of the time the handbook is used.

You may contact the Institute for further information and assistance during the course of your litigation. C all:

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PART I

Under the General Rules of the United States District Court for the Northern District, "every member of the trial bar shall be available for appointment by the court to represent or assist in the representation of those who cannot afford to hire a member of the trial bar." U.S. Dist. Ct. N.D. Ill. Gen. R. 3.31 (emphasis added). In part because the court is aware of the difficulties facing appointed counsel in these cases, it has established this Project. Rule 3.31, Duty of Trial Bar to Accept Appointments, Rule 3.81, Creation of Pro Bono Panel, and Rule 3.83, Duties and Responsibilities of Appointed Counsel, should be carefully reviewed to determine your duties and responsibilities as appointed counsel. The court will permit relief from appointment only for the grounds enumerated in Rule 3.84. Continued representation on appeal is not required. See U.S. Dist. Ct. N.D. Ill. Gen. R. 3.88(b). Remember, the court can sanction trial bar members for refusing to accept appointment by removing their trial bar membership.

CHAPTER 1: FINDING YOUR CLIENT

Section 1. Prisoner Locator Services

If you do not have your client's current institutional address, you may obtain his or her current location by contacting:

(1) Illinois Prisons Inmate Information
(217) 522-2666 ext. 6489
(2) Illinois Department of Corrections
http://www.idoc.state.il.us/
(3) Federal Prisons Inmate Information
(202) 307-3126

You will need your client's name and institution ID number. If you do not have the ID number, then you will need the date of birth and a social security number to obtain information. ID numbers remain the same throughout the State system, but are different from the Cook County Department of Corrections numbers.

Section 2. Assessing the Complaint

Most suits brought by state or county prisoners challenging prison policies, practices, and conditions of confinement are brought under ' 1983. 42 U.S.C.A. ' 1983 (West Supp. 1998). Section 1983 requires the plaintiff to show that someone has deprived him or her of a federally protected right and that the person or persons depriving him or her of that right acted under color of state law. Prisoners often allege either that they have suffered cruel and unusual punishment or a deprivation of liberty or property without due process of law.

Complaints filed by prisoners pro se are held to a less stringent standard than complaints drafted by a lawyer. Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972). However, because counsel is a licensed attorney, all subsequent pleadings will not receive such generous readings from the court. Be sure the claim is properly supported by the law. If you do not do preliminary research to verify the validity of the claim prior to filing pleadings, you could be violating Fed. R. Civ. P. 11. The fact that the court has appointed you does not, in itself, mean that the client has a supportable non-frivolous claim properly grounded in the law. Be sure to review Rule 11 carefully, and read Lewis v. Lane, 816 F.2d 1165 (7th Cir. 1987) for some cautionary words from the Seventh Circuit about your obligations as appointed counsel.

You must determine at the outset whether to file an amended complaint if, for example, the complaint is fatally prolix, issues should be added, the complaint fails to state a claim, or the prisoner has either sued the wrong party or in the right party but in the wrong capacity (individual or official). You should discuss strategy at this initial stage and every other stage of the case with your client. T herefore, before you visit your client, you should research the law underlying the allegations in the complaint and be prepared to discuss the merits of the case.

Check immediately to see if there are statute of limitations issues. There is a two-year statute for all jail and prisoner civil rights cases. If the names of any defendants are unknown, discover them immediately because the court will not allow relation back to the time of filing the complaint. See PART II, Section 3: Statute of Limitations.

Before you file any pleadings, you must attempt to verify the facts alleged in the complaint through discovery of institutional documents, letters, and other sources. For state prisoners, you will need an Illinois Department of Corrections ("IDOC") release form in order to obtain documents in your client's institutional files. See PART I, Section 26: Forms. Ask your client if he or she has already filed a grievance through the institution's grievance procedure.[1] There may be records in his or her file and elsewhere relevant to the allegations in the complaint. You will want copies of them. To obtain documents, make a request for production of documents to opposing counsel.

You should explore the possibility of settlement at this early stage of litigation. L ook at the institution's administrative review process and think about negotiating a settlement with the defendant that is acceptable to your client. Staff of the Correctional Law Project can discuss with you other cases dealing with similar problems arising at the same or other institutions.

Once you have determined the legally cognizable subject matter raised by the complaint (and there will be some cases where you cannot readily decipher this information from the pro se pleadings) and conducted preliminary research, prepare for the client interview at the correctional institution. See PART I, Section 6: Preparing to Visit with Your Client.

Section 3. Decision to Sue Defendants in their Official or Individual Capacity

In prisoner suits, defendants are generally federal, state, or county employees. Different laws of sovereign immunity apply to each group. For discussions of absolute and qualified immunities, see PART II, Section 9: Immunities; PART II, Section 10: Absolute Immunity.

Generally, the following rules apply to each group:

(1) **Federal Officials**: may not be sued for damages in their official capacity except under the Federal Tort Claims Act. 28 U.S.C.A. ' 2680 (West 1994). In all other actions they must be sued for damages in their individual capacity. They must be sued in their official capacity for injunctive relief.

(2) **State Officials**: may be sued only in their individual capacity for damages, and in their official capacity for injunctive relief. See Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (holding that the Eleventh Amendment bars suits for retrospective relief against a state); Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985) (reciting a description of the factors to review in deciding whether to sue state officer in his personal or official capacity).

(3) **City and County Officials**: may be sued in both their official and individual capacities. I n addition, cities may be sued directly for retrospective damages or prospective relief. However, under Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), respondent superior is not a basis for municipal liability. M unicipal liability is based on injury caused by a "policy or custom." These terms are further defined in St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988). See PART II, Section 13: Municipal Liability.

Section 4. Requesting State Prison Records

In order to receive documents from a State prisoner's institutional files, take an Authorization for Release of Information form with you to the client interview for your client to sign. See PART I, Section 26: Forms. Ask the litigation coordinator if there is a special form. Normally she or he will fax it to you. Follow its directions carefully. Find out which department of the prison has the particular files you desire, the name and extension of the person in charge, and try to deal with that person directly. Expect delays. A gentle "nudge" by fax or telephone will often help.

In State prisons, most inmate information is usually kept in each prisoner's Master Record File. However, records are also kept in "Clinical Records" files, "Medical Records" files and other files. Discovery requests should be broad enough to include all inmate records. Samples are available from the Project pleadings bank.

Section 5. Writ of Habeas Corpus Ad Testificandum

If it becomes necessary for your incarcerated client or an incarcerated witness to be brought to court for a hearing, you must prepare a petition for a writ of habeas corpus ad testificandum and the writ itself. See PART I, Section 26: Forms. You must present the petition and writ, plus three copies of the writ to the clerk of the court, well in advance of the hearing at which the prisoner is to be produced. After a hearing on the petition, the judge will ordinarily grant the petition and the clerk will issue the writ ordering the warden to produce the prisoner on the specified date at the specified location. The United States Marshal will serve it on the prison warden. It is your responsibility to follow through with the United States Marshals Office to insure that service is effected. The correctional institution will undertake the cost of transporting the prisoner to federal court. See Pennsylvania Bureau of Correction v. United States Marshals Serv., 474 U.S. 34, 106 S. Ct. 355, 88 L. Ed. 2d 189 (1985) (holding that habeas corpus statutes do not empower a federal court to order the United States Marshals Service to bear the expense of transporting state prisoners to federal court).

Writs will generally be ordered for trial or testimony only, not for consultation with counsel. The court prefers a one day limit to the period covered by the writ. If the trial will be longer the writ should so specify. The number of trial days will determine whether your client remains at the Federal Metropolitan Correctional Center during trial or at a state or county facility. Each facility has different procedures for providing clothes for court. You should specify in the writ whether clothes are to be provided, and check the policy at each institution.

Section 6. Preparing to Visit Your Client

Plan your visit to the correctional institution in advance; otherwise you may have to wait several hours to see your client. To make arrangements for your visit:

(1) Call ahead. Call your client's prison and ask to speak to the person who arranges attorney visits. See PART I, Section 22: Getting to the Institution - Addresses and Telephone Numbers. Plan for your first visit to the prison at least ten days before you intend to visit.

When you make the call, make sure you have the client's prison registration number handy. This is the first information the coordinator will ask of you since often there will be more than one prisoner with the same name.

This first call is critical for a number of reasons:

(a) To make sure your client is still at the same prison. Prisoners are often moved with little or no notice. Your client may not have not had enough time (or did not think) to advise you of the transfer.

(b) Each prison has its own methods for setting up prison visits. Some require written requests, identifying the prisoner and registration number and the date and expected time of the visit. Some will accept telephone requests for a visit. Some require twenty-four hours notice and some, especially the new "Super Max" prison at Tamms, Illinois, require seven days written notice**2**

In some instances, you will coordinate the visit with a "litigation coordinator." In other instances you may be referred to a counselor assigned to the prisoner's unit. Generally, these individuals are helpful and cooperative, but it is wise to be cordial, diplomatic and patient.

(c) You should ask about the best time to arrive at the prison to see your client. Depending on your client's classification and the particular prison, it may take time to arrange the client's movement to the visiting area when you arrive. See PART I, Section 9: Housing Classifications for Correctional Institutions. However, a good rule to follow is to arrive at the prison at the very earliest time you can. **3**

(d) Ask where the visit will be held. Where the prison does not have a lot of visitors, the visit (if permitted) may be more comfortable in the visiting room for all visitors. Privacy can be maintained under these circumstances and the atmosphere is often not as stifling and claustrophobic as many lawyer visiting rooms.

(e) Plan to visit the prison as early as is permissible. Some prisons, such as Stateville, Joliet, and Pontiac (and even Menard in Chester), have many civilian visitors. A lawyer must wait in line to register like other visitors; as a consequence, a visit later in the morning or early afternoon can result in a long wait. Also, prisons have "count" times (often at 7:00 a.m., 11:00 a.m., and later in the afternoon), at which times correctional officers must account for every prisoner. Generally, there is no prisoner movement until the count checks out. If you arrive in the middle of a count, you may have a long wait to see your client.

(f) As indicated earlier, you should know precisely where your client is located in the prison, such as in segregation, protective custody, or the hospital. This knowledge will help facilitate the visit in IDOC prisons and is a necessity in some prisons, e.g., the Cook County Jail, which have many different buildings and numerous visiting areas. If you don't know your client's housing unit, when you make the call to arrange the visit, ask for that information, and directions to the appropriate visiting area. Be aware that as the attorney, you may not have to be on the inmate's visiting list, though this is not true for all

prisons and for all populations at each prison. For example, at Tamms maximum security you must be on the visiting list.

(2) Write your client: Write your client several days ahead of time, telling him or her of the likely date of your visit. Introduce yourself and send a copy of the appointment order so that your client knows for which case you are appointed, e.g., you don't represent him or her on the appeal of a criminal case. This type of communication will give the prisoner adequate time to prepare for your visit, to bring appropriate papers from the cell for use in the visit (the prisoner cannot simply run back and forth to the cell to pick up needed papers), and will inform the prisoner as to your upcoming visit. (Sometimes a prisoner who does not know the visitor will not leave the cell and is under no obligation to do so.)

In your letter, advise the client that you would like to discuss the case and if questions remain after the visit, the client may call you collect as frequently as you, the attorney, deem appropriate. See PART I, Section 17: Reimbursement of Costs and Expenses for Appointed Counsel. Note exactly how envelopes to and from the correctional institution must be marked to insure confidentiality of attorney-client communications. Also be sure to include the inmate ID number in the address. Otherwise the letter will be returned to you. See PART I, Section 24: Sample Envelope Specially Marked. Explain to your client that his or her letters to you must be marked in the same way.

Section 7. Visiting Your Client

(1) Attorney Identification

In order to be admitted to any correctional facility, you must present your:

(a) Current Attorney Registration card; and

(b) Photo identification (e.g., Driver's License).

(2) Money

Most prisons now have cash vending machines for soft drinks, candy bars, sandwiches, etc. N ormally, you cannot bring cash with you into the visit. Rather, a card (like a CTA fare card) is purchased in the gatehouse and money is put on the card. Buy about $5.00 so that you and the client can have refreshments during the visit, which can last more than 2-3 hours in length. Save the card for subsequent visits.

(3) Assistants

If you desire that a student or paralegal accompany you on the visit, clear this request at the same time and in the same manner that you arrange your own visit. If you desire the student or paralegal to visit the client without you on later visits, clear this matter in writing substantially ahead of time because some prisons may not allow such visits. Learn from the litigation coordinator the precise nature of identification the paralegal or student should bring (usually a signed letter of introduction from you, identifying the person as your employee or associate and, in the state prisons, the name of the client to be interviewed).[4]

(4) A Word of Caution

Do not bring you own medication, pills, etc., with you. Often you may forget you have such items and they won't be picked up on a routine search, but may be noticed later. These items can be considered illegal contraband. Under the extremely strict policies now in force, these items could result in your being barred from all prison visits throughout the system or worse.

Review your file before entering the prison. Be sure to bring all that you need and no more. Most prisons will require that you put unnecessary items in a locker, including your wallet, purse and car keys. Be prepared and relaxed for a thorough search, including your shoes and so on. No body cavity search will be required.

Section 8. Telephone Procedures

(1) State Prison Inmate Telephone Use

Encourage your client to communicate with you in writing. It is generally more effective, less time consuming, and certainly less expensive since now almost all calls, whether initiated by you or the client, will be collect to you. Please note that you have no choice but to use the telephone company with which the prison has contracted and the telephone charges are prohibitive - much more than non-prison calls. But be sure to keep in contact with the client and answer his or her letters as promptly as possible.

To initiate a call to a prisoner-client, much the same procedure is followed for an attorney visit. Speak to the litigation coordinator, identify the client, state that you are an attorney and that you wish to make a call. You will be asked if you desire a "secure" line - one on which prison officials cannot listen. Use your judgment; and if there are any doubts, ask for a secure line. But in any event, be careful what you put in writing or say over the telephone. Lines are not always "secure" and cells are subject to sudden searches where attorney-client privileges are not always observed.

Generally speaking, the call cannot be made until at least the day following the call with the litigation coordinator. It will be collect and at a designated time (hopefully). You must be in your office ready to accept the call. If you do not have direct dialing, advise the office operator that the call is coming so that he or she can accept it. Often the call will be mechanical in nature and won't wait for you to be put on the line.[5]

Prisoners may only make collect telephone calls. They are allowed only a very limited number of telephone calls each month. In emergencies, if you need to speak to your client, you may call the prison and ask to speak to his or her counselor (ask your client for the counselor's name at the beginning of your representation). The counselor can usually arrange to have your client call you, depending on the particular prison.

(2) County Jail Inmate Telephone Use

Pre-trial detainees at the Cook County Department of Corrections ("CCDC") are permitted to make only collect calls. In emergencies, it is possible for your client to call you, if you first call the human services department and ask that arrangements be made for the call. Otherwise you and your client can arrange for him or her to call you collect at agreed times as you deem appropriate.

(3) Federal Metropolitan Correctional Center Inmate Telephone Use

Generally, the same rules apply as at the county jail (collect calls only), but some inmates, e.g., those in segregation housing units (due to disciplinary or protective custody status), are allowed out of their cells only for very limited times during which they are permitted to make calls.

Section 9. Housing Classifications For Correctional Institutions

Each correctional institution houses prisoners with different security classifications, usually known as minimum, medium, and maximum. Some institutions also operate an honor system known as the 'farm," the least restrictive classification for prisoners.

Institutions also designate categories of prisoners as follows:

(1) General Population: The prisoner has no special status.

(2) Protective Custody: The prisoner must be protected from other prisoners for any of several reasons, e.g., the prisoner may be particularly vulnerable, may be testifying against a fellow prisoner, etc.

(3) Segregation: The prisoner is in disciplinary confinement, the most restrictive environment.

(4) Circuit Riders: These prisoners are continuously transferred from institution to institution.

(5) Administrative Detention: Depending on the institution, this usually means that the prisoners are awaiting disciplinary procedures or prisoners in protective custody.

It is important to know the housing classification of your client to determine what administrative procedures placed him or her there and what restrictions may have been imposed, such as the inability to make telephone calls to you, restricted use of the law library, limited exercise, etc.

Check the administrative rules of your client's institution for the appropriate sections on classification and, for added assistance, speak with the prison's litigation coordinator.

Section 10. Correctional Facility Entrance Procedures

The prisons and jails of Illinois have certain mandatory entrance procedures for all persons, including attorneys. Although those procedures may vary from institution to institution, the purpose is the same: to prevent any contraband from entering. Generally, the procedures consist of:

(1) Signing in and identifying yourself and your business, use your current valid attorney registration card and photo ID, e.g., Illinois driver's license;

(2) Stamping your hand so that it can be read by a special light as you enter and leave;

(3) Searching your briefcase (but not reading its contents) and sending it through a metal detector; and

(4) Conducting a pat-down body search by an officer of the same sex, and walking through a metal detector.

NOTE: Y ou may not enter any institution with cigarettes, aspirin, cold medication, or gum.

CHAPTER 4: INTERVIEWING YOUR CLIENT

Section 11. The Client Interview

Now you are ready to meet your client. The prisoner may come to the interview handcuffed and shackled (legs chained together). Prisoners on death row, or in disciplinary status (known as segregation) will be restrained in this fashion, other prisoners will not.

You should plan on about one hour for the initial visit. You will be allotted as much time as you need, barring an institutional emergency. Your client may want to tell you about other institutional or family problems regarding which you may not be able to assist him or her.

Let your client tell you in his or her own words what the case is about. Develop a relationship of mutual trust and respect. Let your client know that you will inform him or her promptly about all significant developments in the case and that he or she may call you collect from time-to-time as questions arise. Explain to the client your need to investigate the case pursuant to Fed. R. Civ. P. 11 and ask for his or her ideas about documents and people with information about the case. Find out what other civil actions the client may have filed. Other conditions of confinement troubling the client may be related to this case. You might consider filing an amended complaint to include these issues.

Find out if the client is about to be released and if so, get the address and telephone number. Also be aware that prisoners are frequently transferred to other prisons without notice. Be sure to tell your client to inform you as soon as a transfer occurs. Explain in appropriate terms that you will consult the client's opinion about legal matters, but that you must make the ultimate legal decisions in accord with the requirements of Rule 11. It is vitally important that the client understand your respective roles, particularly because your client is in a closed institution and has limited access to you and to the outside world. Make sure your client understands how you will proceed with the case, with what matters you require consultation with him or her, and how frequently you will send status reports.

Section 12. Relationship with Client During the Litigation

After the initial client interview, appointed counsel should maintain regular contact with the client. Clients in "closed institutions" are uniquely unable to obtain information about their lawsuits. Therefore, you should send regular status reports to your client. By sending copies of pleadings and periodic letters about the case and by allowing the client to telephone periodically if he or she has questions, you can alleviate your client's fear of being "left out," while at the same time maintaining his or her trust.

The importance of maintaining these attorney-client ties cannot be overemphasized. Occasionally, in court appointed cases where such contact has been lost, settlement negotiations have fallen apart because of the client's lack of trust in his or her attorney. To avoid this possibly disastrous consequence, make sure in the initial interview that the client understands your role in the case, and maintain regular client contact throughout the litigation.

CHAPTER 5: ATTACHMENT OF DAMAGE AWARDS

Section 13. Introduction

You and your client should be aware that if your client receives a monetary damage award, either through trial or through settlement, state agencies may seek reimbursement for money the state paid as child support, crime victims' compensation, or other obligations.

Section 14. Governmental Agency Procedures

The applicable law regarding governmental agency procedures controlling deductions for warrants and payments is 15 Ill. Comp. Stat. Ann. 405/10.05 (West Supp. 1998), id. at 10.05a (West 1993), and id. at 10.05b. This statute addresses repayment of such funds as child support owed to the Department of Public Aid, payments of unpaid student loans, as well as other types of unpaid obligations to the state. Although there has been one district court case disallowing set-off by the Department of Corrections after the entry of a settlement agreement, Williams v. Lane, 818 F. Supp. 1212 (N.D. Ill. 1993), if the state follows due process, it could attach a damage award under this statute.

Section 15. Crime Victims Compensation Act

The other statute applicable to a damage award is the Crime Victims Compensation Act, 740 Ill. Comp. Stat. Ann. 45/1 et seq. (West 1993 & Supp. 1998). Pursuant to this law, a timely filing by a victim or a relative of a victim must be within one year of the date of the crime. Crime victims and their relatives are entitled to compensation from the state for uncovered medical expenses (up to $25,000), id. at 45/10.1(f) (West 1993), loss of wages (up to $25,000 for victims made disabled because of the crime), id., and burial expenses (up to $3,000 payable to the families of deceased crime victims). Id. at 45/2(h) (West Supp. 1998). Thereafter the state can seek reimbursement from the convicted person.

You should discuss these issues with your client so that your client understands that if he or she owes money under either of these statutes, then whatever money you obtain from any civil rights claim may later be attached by the state. Your appointment in the civil rights case does not include assistance on any such claims.

Section 16. Statutory Authority for Awarding Attorneys' Costs and Fees

42 U.S.C.A. ' 1988 (West 1994 & Supp. 1998) - To receive an award of attorney's fees under ' 1988, your client must prevail either entirely, or at least on some significant issue, raised by the litigation. Counsel must keep accurate and detailed time sheets if you want to recover fees under ' 1988.

28 U.S.C.A. ' 1920 (West 1994) - Costs are awarded pursuant to ' 1920. These costs include such out-of-pocket expenses as expert fees, depositions, and copying. (See PART II, Section 35: Costs under 28 U.S.C. ' 1920.)

28 U.S.C.A. ' 2412 (West 1994 & Supp. 1998) - If your case involves a federal rather than state defendant, the Equal Access to Justice Act, ' 2412, controls the recovery of attorney's fees. This statute is more narrowly focused than ' 1988 and sets limits on allowable hourly rates.

42 U.S.C.A. ' 1997e(d)(3) (West Supp. 1998) -- Limits the amount of attorneys' fees to an hourly rate of 150% of the rate determined by 18 U.S.C.A. ' 3006A (West Supp. 1998).

Section 17. Reimbursement of Costs and Expenses for Appointed Counsel

Attorneys appointed in civil cases can be reimbursed from the District Court Fund for their expenses up to $2,000 for each party represented in any proceeding, provided that in no proceeding shall the total amount paid exceed $6,000, regardless of the number of parties represented. Reimbursement will be made where your client prevails or accepts a settlement and the amount awarded to or accepted by your client is less than $2,500. Where the amount awarded to or accepted by the party is more than $2,500, the regulations do provide for limited cost reimbursement. To be reimbursed, appointed counsel must enumerate costs on court forms to which vouchers or invoices for each expense must be attached. General office expenses and costs of computer assisted legal research are not reimbursed, but travel and deposition costs are. Except as specified by the Regulations, the amounts and types of expenses covered by the Regulations shall be governed by the guidelines for administering the Criminal Justice Act. 18 U.S.C.A. ' 3006A (West 1985 & Supp. 1998). Instructions for completing the request for prepayment or reimbursement of expenses form appears in the section entitled District Court Fund Regulations. See United States District Court for the Northern District of Illinois General Rules and the Regulations Governing the Pre-payment and Reimbursement of Expenses of Court Appointed Counsel in Pro Bono Cases From the District Court Fund for details. U.S. Dist. Ct. N.D. Ill. Gen. R. 3.82-.90; or call the court Attorney Admissions Coordinator at (312) 435-5771 for additional information.

Appendix to Part I

Section 18. Departments of Corrections Rules and Procedures

Administrative Rules for correctional facilities govern all aspects of prison and jail life. These rules are published as follows:

(1) Illinois State Prisons:
20 Ill. Admin. Code Ch. 1 (1997).[6]

(2) Cook County Department of Corrections Administrative Review Procedure:
Call the Project for a copy of these rules.

(3) Federal Prisons and Jails:
28 C.F.R. Part 500 et seq. (1997).

Section 19. Director of Illinois Department of Corrections

Odie Washington
Director IDOC
Executive Office Building
1301 Concordia Court
Springfield, Illinois 627 94-9277
217/522-2666

Section 20. Cook County and Federal Pre-trial Detention Facilities

(1) Cook County Department of Corrections [7]
Ernesto Velasco, Executive Director
2700 South California Avenue
Chicago, Illinois 606 08

Web Address: http://www.cookcountysheriff.org

(2) Metropolitan Correctional Center
Warden Charles Gilkey
Federal Bureau of Prisons
71 West Van Buren Street
Chicago, Illinois 606 05
(312) 322-0567

Section 21. Descriptions Of Correctional Institutions Involved in Federal Litigation

DWIGHT CORRECTIONAL CENTER is the principal female prison operated by the State of Illinois. Dwight is located on Route 17 just outside Dwight, Illinois. All three female inmate security classifications are housed in the 11 cottages that make up the facility. The visiting area is located in the administration building.

DIXON CORRECTIONAL CENTER is a medium security facility located in Lee County housing approximately 1500 male and female prisoners. The facility includes a Special Treatment Center for male prisoners experiencing moderately severe psychiatric and developmental disabilities. It houses the largest male geriatric population in the state.

JOLIET CORRECTIONAL CENTER is a maximum security male prison for vulnerable offenders. Joliet has a rated capacity of approximately 1,250 inmates of varying classifications.

JOLIET RECEPTION AND CLASSIFICATION (R&C) CENTER. Joliet R&C is located in the East Cellhouse of the Joliet Correctional Center and has a capacity of approximately 515 convicted males, coming directly from county jails. The average stay in R&C is approximately two weeks, during which the inmate is classified and assigned a permanent correctional placement.

MENARD CORRECTIONAL CENTER is a maximum security male prison located near Chester, Illinois on the banks of the Mississippi River. Menard houses approximately 2,620 inmates of varying classifications, with preference given to inmates from southern Illinois. Menard also has an honor farm and a minimum security unit where inmates are allowed greater freedom than those inmates housed inside the walls, as well as a death row.

MENARD PSYCHIATRIC CENTER adjacent to Menard Correctional Center, is a maximum security short-term treatment center for the Department's mentally ill male residents. Menard Psychiatric Center has a rated capacity of approximately 315 inmates of varying classifications who exhibit significant mental disorders.

PONTIAC CORRECTIONAL CENTER is a maximum security male prison located in a residential area of Pontiac, Illinois. Pontiac has a rated capacity of approximately 2,000 inmates of varying security classifications, with a preference to those of maximum security classification from northern Illinois. Pontiac also has a medium security unit and a death row.

STATEVILLE CORRECTIONAL CENTER is a maximum security male prison located near Joliet, Illinois. Stateville has a rated capacity of approximately 2,250 inmates of varying security classifications, mostly maximum security, with a preference to those from northern Illinois. Stateville is the largest correctional facility in the state of Illinois. Stateville also has an honor farm where selected minimum security inmates are allowed greater freedom than those housed inside the walls.

COOK COUNTY DEPARTMENT OF CORRECTIONS ("CCDC") is the county jail complex located at 2700 South California Avenue, covering the area bounded by California on the east, Sacramento on the west, 26th Street on the north and 30th Street on the south. The jail contains many buildings housing different security levels. Most are pre-trial detainees, although there are some convicted misdemeanants, some convicted felons, and some

"parole-hold" cases at the jail awaiting trial, retrial, or shipment to the IDOC. Divisions I (the old Cook County Jail), II, III (Women's Division), and V are easily accessible from the California Street entrance road, just south of the court building. You must check in at the guard station there before proceeding to any of those divisions. Divisions IV and VI are easily accessible from Sacramento Street. Each of these divisions has a separate entrance and guard post where you must check in. Division VIII, the residential treatment unit ("RTU"), houses the drug and mental health units and is reached through Division II. Staff will either bring the RTU resident to Division II or show you how to get to Division VIII. Parking is available either on the street or in a parking garage directly east of the jail complex and across the midway. Parking within the jail perimeter is usually not allowed except for staff.

METROPOLITAN CORRECTIONAL CENTER ("MCC") is the federal pre-trial detention and short-term sentence center located at the south end of the loop. Persons in custody at the MCC are awaiting trial in federal court, serving short sentences, awaiting shipment to a federal penitentiary, or pursuing a federal appeal. There is no parking facility for the building but city garages are nearby. To get into this facility, you must show your attorney ID and state your business while standing outside the front door. Only then will a guard buzz you in. Once inside, you must fill out an information sheet and sign in. It is best to call first to find out when mealtime and count time are scheduled in order to avoid a long wait while your client is eating or locked in his cell for the count.

IDOC now has a Web Page: see **http://www.idoc.state.il.us/**. The cite provides a search engine to help find prisoners.

Section 22. Getting to the Institution - Addresses and Telephone Numbers

(1) IDOC Adult Medium- and Maximum-Security Institutions

CENTRALIA CORR. CENTER
Warden Ronald Haws
P.O. Box 1266, Shattuc Rd.
Centralia, IL 62801
618/533-4111

DANVILLE CORR. CENTER
Warden James Schomig
P.O. Box 4001
Danville, IL 61834-4001
217/446-0441 or 42

DIXON CORR. CENTER
Warden Thomas Roth
2600 North Brinton Avenue
Dixon, IL 61021
815/288-5561 ext. 2126

DWIGHT CORR. CENTER

Warden Donna Klein-Acosta
P.O. Box 5001
Dwight, IL 60420-5001
815/584-2806

EAST MOLINE CORR. CENTER
Warden Sergio Molina
100 Hillcrest Road
East Moline, IL 61244
309/755-4511

GRAHAM CORR. CENTER
Acting-Warden Anthony Suggs
P.O. Box 499
Hillsboro, IL 62049
217/532-6961

HILL CORR. CENTER
Warden Richard Gramley
600 Linwood Road, P.O. Box 1327
Galesburg, IL 61401
309/343-4212

ILLINOIS RIVER CORR. CENTER
Warden Rodney J. Ahitow
P.O. Box 999
Canton, IL 61520
309/647-7030

JACKSONVILLE CORR. CENTER
Warden Stephen L. McEvers
R.R. #4, Box 28C
Jacksonville, IL 62650
217/245-1481

JOLIET CORR. CENTER
Warden Lemont Carter
P.O. Box 515
Joliet, IL 60432
815/727-6141

LOGAN CORR. CENTER
Warden Daniel C. Bosse
R.R. #3, Box 1000
Lincoln, IL 62656
217/735-5581

MENARD CORR. CENTER
Warden Thomas F. Page
P.O. Box 711
Menard, IL 62259
618/826-5071

MENARD PSYCH. CENTER
Warden Thomas F. Page
P.O. Box 56
Menard, IL 62259
618/826-4593

PONTIAC CORR. CENTER
Warden Jerry Gilmore
P.O. Box 99
Pontiac, IL 61764
815/842-2816

ROBINSON CORR. CENTER
Warden Paul Barnett
P.O. Box 1000
Robinson, IL 62456
618/546-5659

SHAWNEE CORR. CENTER
Warden Rodney Tally
P.O. Box 400
Vienna, IL 62995
618/658-8331

SHERIDAN CORR. CENTER
Warden Keith Cooper
P.O. Box 38
Sheridan, IL 60551
815/496-2311

STATEVILLE CORR. CENTER
Warden Dwayne Clark
P.O. Box 112
Joliet, IL 60434
815/727-3607

TAMMS CORRECTIONAL CENTER
Warden George Welborn
200 East Super Max Rd.

Tamms, IL 62988
618/747-2042

VANDALIA CORR. CENTER
Warden Richard McBaker
P.O. Box 500
Vandalia, IL 62471
618/658-8371

VIENNA CORR. CENTER
Warden Richard McVicker
P.O. Box 200
Vienna, IL 62995
618/658-8371

WESTERN ILLINOIS CORR. CENTER
Warden William D. O'Sullivan
P.O. Box 1000
Mt. Sterling, IL 62353
217/773-4441

Section 23. Directions to Illinois Prisons (All Directions Are From Chicago)

TO CENTRALIA CORRECTIONAL CENTER: approximately 240 miles. Interstate 90-94 (Dan Ryan Exp.) east to Interstate 57 south. Interstate 57 south to U.S. Rte. 50 (near Salem, Illinois) west. U.S. Rte. 50 west to Shattuc Rd., south on Shattuc Rd. approximately 2 miles to correctional center.

TO DANVILLE CORRECTIONAL CENTER: approximately 160 miles. Interstate 90-94 (Dan Ryan Exp.) east to Interstate 57 south. Interstate 57 south to Interstate 74 east (Champaign-Urbana). Interstate 74 east to Lynch Rd. (Exit No. 220) north. North on Lynch Rd. 1 2 miles to U.S. Rte. 136 east. U.S. 136 east 1 1/4 miles to correctional center.

TO DIXON CORRECTIONAL CENTER: approximately 100 miles. Interstate 290 (Eisenhower Exp.) west to Ill. Rte. 88 (tollway) west. Ill Rte. 88 west to Ill. Rte. 26 north. Ill Rte. 26 north to Bradshaw Street turn right on Bradshaw Street (east) 2 blocks to Brinton Avenue left on Brinton Avenue (north) 1 1/4 miles to correctional center.

TO DWIGHT CORRECTIONAL CENTER: approximately 85 miles. Interstate 55 (Stevenson Exp.) west/southwest to Ill. Rte. 17 (Exit 217) west. Ill. Rte. 17 west 1 2 miles to correctional center.

TO EAST MOLINE CORRECTIONAL CENTER: approximately 170 miles. Interstate 290 (Eisenhower Exp.) west to Ill. Rte 88 (Tollway) west to Rural Rte. 3 (1 mile west of interstate 80 on Ill. Rte. 5). Right on Rural Rte. 3. 3 miles to correctional center.

TO GRAHAM CORRECTIONAL CENTER: approximately 215 miles. Interstate 55

(Stevenson Exp.) west/southwest to Ill. 48 and 127 east. Approximately 5 miles to Ill. 127 south (Ill. 48 will continue east) Ill. 127 south to Ill. 185. Ill. 185 east 1 mile to correctional center.

TO HILL CORRECTIONAL CENTER: (formerly Galesburg) approximately 170 miles. Interstate 55 (Stevenson Exp.) west (south) to Interstate 80 west. Interstate 80 west to Interstate 74 west. Interstate 74 west to U.S. 34 west. U.S. 34 west 3 miles to Linwood Road. Linwood Road south 1/2 mile to correctional center.

TO ILLINOIS RIVER CORRECTIONAL CENTER: Interstate 55 (Stevenson Exp.) south to Interstate 74 west. Go west on Illinois 116 to Illinois 78 south, west on Route 9.

TO JACKSONVILLE CORRECTIONAL CENTER: approximately 235 miles. Interstate 55 (Stevenson Exp.) west (south) to U.S. 36 west to Illinois Rte. 104. Illinois Rte. 104 north to old U.S. 36. Old U.S. 36 east 1/10 mile to correctional center.

TO JOLIET CORRECTIONAL CENTER: approximately 45 miles. Interstate 55 (Stevenson Exp.) west (south) to interstate 80 east (8 1/2 miles) to Richard Street north 1 2 miles to Collins Street north on Collins Street. 3 miles to correctional center at Woodruff Road.

TO LINCOLN OR LOGAN CORRECTIONAL CENTER: approximately 160 miles. Interstate 55 (Stevenson Exp.) west (south) to Lincoln, Illinois. Exit Business Loop 55 east approximately 1 mile to correctional center cutoff. Take cutoff 1 mile east to correctional centers.

TO MENARD AND MENARD PSYCHIATRIC CENTER: approximately 400 miles. (1) Driving: Not a one day round trip. Interstate 55 (Stevenson Exp.) west (south) to Illinois Rte. 3 south (east) to Ill. Rte. 150 south. Ill. Rte. 150 south 1 mile to Branch Street. South on Branch Street to Front Street. Front Street 1 mile north to correctional centers. (2) Flying: Take flight to St. Louis, obtain rent-a-car, drive to institution. You can do this trip leaving early in morning and returning late the same day.

TO PONTIAC CO RRECTIONAL C ENTER: approximately 90 m iles. Interstate 55 (Stevenson Exp.) west (south) to Illinois 116 east 2 miles to Vermillion Street south 2 blocks to Lincoln Street and correctional center.

TO SHERIDAN CORRECTIONAL CENTER: approximately 60 miles to Rte. 3.Interstate 55 (Stevenson Exp.) west (south) to U.S. Rte. 52 (at Ill.59) west to Rte. 3. Rte. 3 north 2 miles to correctional center.

TO STATEVILLE CORRECTIONAL CENTER: approximately 50 miles. Interstate 55 (Stevenson Exp.) west (south) to Joliet Road exit (only exits south) become 111.53 south to Stateville-approximately 8 miles, and directly past Illinois Stateville State Police Headquarters on right hand side of road.

TO TAMMS CORRECTIONAL CENTER: approximately 365 miles. Dan Ryan Expressway until I-57 South Exit. Take I-57 South for approximately 200 miles; stay on I-57 South towards Memphis for another 140 miles. The take Ullin Road Exit - keep right at the fork in the ramp. Merge onto CR-7 for almost 1.4 miles. Then turn right onto US-51; turn left onto CR-9 for approximately 1 1/4 miles (CR-9 becomes CR-5). Turn left onto SR-127 for slightly more than 3 miles. Turn right onto CR-4. Approximately 8 1/4 hours.

TO VANDALIA CORRECTIONAL CENTER: approximately 240 miles. Interstate 90-94 east (Dan Ryan Exp.) to Interstate 57 south. Interstate 57 south to interstate 70 south (west) to U.S. 51 north. U.S. 51 north to correctional center.

TO VIENNA AND SHAWNEE CORRECTIONAL CENTERS: approximately 350 miles. N ot a one-day round trip. Interstate 90-94 east (Dan Ryan Exp.) to Interstate 57 south. Interstate 57 south to Illinois 146 east (near Vienna, Illinois). Ill. 146 east to correctional center

TO WESTERN ILLINOIS CORRECTIONAL CENTER: Interstate 55 south to Route 136 west (exit #145 McLean), Route 136 west to. Route 124 west, Route 99 south, approximately 1 mile to prison.

See also http://citynet.excite.com:80/maps/view/?mapurl'/countries/united_states/illinois

Section 24 Sample Envelope Specially Marked

YOUR NAME
YOUR ADDRESS

Mr. John Doe
Register Number XXXXX
P.O. Box XXXXXXX
City, State ZIP XXXXX

PRIVILEGED CLIENT/ATTORNEY CORRESPONDENCE
OPEN ONLY IN PRESENCE OF RESIDENT

Section 25. Sample Letter to Client

Mr J ohn Jones
#945722 **8**
Division I, Tier F-1
Cook County Department
of Corrections
P.O. Box 089002
Chicago, Illinois 606 08

RE: Jones v. Smith 87 - 1234

Dear Mr. _____:

I am the attorney who has been appointed by the Federal District Court for the Northern District of Illinois to represent you in the above-titled case. I have enclosed a copy of the order of appointment.

I will be coming to visit you on or about ____ (insert date) probably in the morning, and I look forward to discussing your case with you.

If you have other documents or pleadings in this case, please bring them to our interview or mail them to me. I will copy them and return them to you.

Sincerely,

Type Name
Attorney at Law
(312) 123-4567

Section 26. Forms

(1) Plaintiff's Emergency Motion for Leave to Photograph Gallery And Cell in Prisons Where He Claims He Was Improperly Incarcerated and for Entry of Protective Order

(2) Protective Order

(3) Authorization for Release of Information (State Department of Corrections)

(4) Petition for Writ of Habeas Corpus Ad Testificandum

(5) Writ of Habeas Corpus Ad Testificandum

(6) Project Evaluation Form

Form 1

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

(Plaintiff's Name]

Plaintiff, No. [case no.]

vs. JUDGE [Name]

(Defendant's Name]

Defendants.

PLAINTIFF'S EMERGENCY MOTION FOR LEAVE TO PHOTOGRAPH GALLERY AND CELL IN PRISONS WHERE HE CLAIMS HE WAS IMPROPERLY INCARCERATED AND FOR ENTRY OF PROTECTIVE ORDER.

Plaintiff moves the Court, pursuant to Federal Rules of Civil Procedures 34(b) and 45, to enter upon [Name] Correctional Center, to examine and photograph the cells and the galleries on which the cells are located where the plaintiff was incarcerated, the conditions of which are the subject matter of this law suit. Plaintiff proposes the examination, etc., be accomplished pursuant to a protective order of the type which plaintiff's counsel developed with another Assistant Attorney General, [Name], of the State of Illinois in a case that was recently concluded in this court. A modified copy of that order, ultimately signed by Judge Joe B. McDade, is attached hereto for the Court's execution in the event this motion is granted. In support of this motion, plaintiff states as follows:

1. This is an action by Plaintiff, an indigent plaintiff, currently a prisoner at [Name] Correctional Center. He initially proceeded pro se to recover damages for violation of his Eighth Amendment right against cruel and unusual punishment because of the conditions of incarceration in steel-doored segregation cells when he was incarcerated at [Name] Correctional Center. Pursuant to order of Court, [Name of Counsel] filed his or her appearance as attorney for plaintiff.

2. The critical issue in this case is the nature of the incarceration of plaintiff in these cells. Obviously, it is imperative to be able to explain graphically to the jury the nature of these cells and related environs which were described in plaintiff's detailed affidavit in opposition to defendants' earlier motion for summary judgment. In denying that aspect of defendants' motion, the Court ruled that plaintiff's testimony, if believed by the jury, would in fact constitute cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States.

3. Prior to the final pretrial conference before this Court, [Name], the Assistant Attorney General assigned to represent defendants in this case, had repeatedly stated that he would agree to the relief requested by this motion if photographers engaged by the Illinois Department of Corrections took the photographs at the direction of plaintiff's counsel. Plaintiff's counsel agreed to this condition. The Court at that time was advised of this agreement and the final pre-trial order contemplates such photographs as exhibits.

4. The case is set for trial on [date]. It is essential that plaintiff obtain the subject

photographs as soon as possible so that they can be processed, enlarged and reviewed with his clients that his position can be presented properly to the Court and Jury. It is too late now to rely on the IDOC photographers to provide this cooperation and plaintiff is prepared to proceed immediately with his own photographer, pursuant to the conditions of the attached order or any modification that the Court sees fit to make.

Respectfully submitted,

_____
Attorney for plaintiff.

CERTIFICATION

I hereby certify I caused a copy of the above motion to be served on the attorney for defendants by facsimile and mail, this [date].

_____

Form 2

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

(Plaintiff's Name]

No. [case no.]

Plaintiff,

JUDGE [Name]

vs.

(Defendant's Name]

Defendants.

PROTECTIVE ORDER

Plaintiff, [Name of plaintiff], pursuant to Federal Rules of Civil Procedures 34(b) and 45, has requested entry upon [Name] Correctional Center, operated by the Illinois Department of Corrections (IDOC), to examine and photograph the site where the alleged incident which is the subject to his suit took place. The IDOC does not oppose plaintiff, plaintiff's request provided that certain limitations are imposed.

Plaintiff and the IDOC have reached an agreement concerning those limitations and plaintiff's use of technical equipment and the use and dissemination of information gathered during the entry.

IT IS HEREBY ORDERED upon consent and agreement of the parties that:

1. The plaintiff, plaintiff's team will consist of his counsel, [Name of counsel] and photographer [name of photographer], Social Security #_____, whose office, [Name of business], is at [address].

2. The plaintiff's team may bring with them, use, and remove from [Name] Correctional Center portable photographic equipment consisting of a camera, flash, camera lenses and two rolls of film (12 pictures each).

3. The plaintiff's team may bring with them, use and remove from [Name] Correctional Center a tape measure.

4. The plaintiff's team may bring with them, use and remove from [Name] Correctional Center pads of paper and pens.

5. To avoid possible disruption, the plaintiff's team shall not talk with inmates or employees of the Department of Corrections, other than Legal Counsel and the designated staff escort, about any matter, including the purpose of the photographs or the nature of the litigation.

6. The plaintiff's team shall not photograph any prisoner or employee of the Department of Corrections.

7. The plaintiff's team shall be permitted to inspect and photograph only the following areas of the aforementioned site:

   a. Cell No. [no.] of [Name] Correctional Center; the exteriors of the cells directly adjacent thereto; the tunnel behind the cells limited to the portion directly behind cell no [no.] including one photograph from the doorway of the tunnel looking inward; the "flag" area adjacent to the entrance, looking out of the unit doorway, rather than in towards the

housing areas; the cage unit in the [Name] Correctional Center limited to the area containing the mace canister.

8. The time for making this inspection and photographing shall be conducted on [date and time].

9. Copies of all photographs shall be available to the Department of Corrections at its expense upon request. Copies of all photographs shall also be available to defendants and plaintiff at their own expense upon request on the condition they are bound by this order.

10. Counsel for plaintiff will restrict the dissemination of any and all information and photographs the team gathers to attorneys, paralegals, and support staff who are actively and directly involved in the conduct of this litigation, except that pictures taken at [Name] Correctional Center may be developed by a professional film developer.

11. Any and all information and photographs which are gathered shall not be used or distributed except as provided for by this protective order and for purposes which are directly related to this litigation.

12. Upon final disposition of this litigation, all copies of photographs shall be destroyed and a certification regarding the destruction prepared by the destroying party.

13. While in the facility, all members of plaintiff's team agree to comply with the rules and regulations of [Name] Correctional Center and the IDOC.

14. Nothing in this order shall be construed to mean that the Department stipulates the photographs are true and accurate representations of the areas photographed as those areas existed on [date].

15. The attorney for plaintiff and the defendants will be permitted to participate in this inspection, review documents, etc. only upon execution of this stipulation by the attorney for the defendants [Name of defendant] and the attorney for Plaintiff.

ENTERED:

_____
United States District Court Judge

Dated:_____

AGREED:

_____
Attorney for Plaintiff

_____ _____
Attorney for defendant Attorney for Illinois
[Name of defendant] Department of Corrections

Form 3

STATE OF ILLINOIS
DEPARTMENT OF CORRECTIONS
AUTHORIZATION FOR RELEASE OF INFORMATION

I hereby authorize _____
(facility)

to release

_____
.
(state specific information to be disclosed)

_____

_____
(purpose of disclosure)

for the records of _____ _____
(number) (name)

to:
__ Authorized Attorney __ Self

_____ _____
(name) (name)

_____ _____
(address) (address)

_____ _____

I hereby release and hold harmless, the State of Illinois, the Department of Corrections, and its employees, from any liability which may occur as a result of the disclosure and/or dissemination of the records or information contained therein resulting from the access permitted to the authorized attorney and/or self. This consent is valid for 45 days from the date of signature. I understand that I have the right to revoke this consent in writing at any time during the 45 day period.

_____ _____
(witness) (signature)

_____ _____
(title) (title)

_____ _____
(date) (date)

Form 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Plaintiff's Name]	)	
	)	
Plaintiff,	)	No. [case no.]
	)	
vs.	)	JUDGE [Name]
	)	
(Defendant's Name]	)	
	)	
Defendant.	)	

PETITION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM

TO: Honorable [judge's name), Judge, United States District Court for the Northern District of Illinois

Plaintiff by his counsel comes before the Court and respectfully represents that [witness' name) is currently detained at [name of detention facility). Plaintiff further represents to the Court that the presence of this prisoner is needed to give testimony in the above-entitled case set for hearing before the Court on [date and time of proceeding).

Wherefore, plaintiff petitions for an order directing the Clerk to issue a Writ of Habeas Corpus Ad Testificandum directed to:

[Name and address of custodian)

commanding him to produce the body of the prisoner before the Court at the above-specified date and time and, at the conclusion of the proceedings or upon the Court's direction, to return the prisoner forthwith to the institution from which he was brought.

_____
Attorney for Plaintiff

Form 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Plaintiff's Name]	)	
	)	
Plaintiff,	)	No. [case no.]
	)	
vs.	)	JUDGE [Name]
	)	
(Defendant's Name]	)	
	)	
Defendant.	)	

WRIT OF HABEAS CORPUS AD TESTIFICANDUM

THE PRESIDENT OF THE UNITED STATES

TO: Warden
[Name and address of institution where witness held in custody]

Greetings:

This Court has been advised that [name and prison number of witness] is now confined under your custody at [name of correctional facility] and that his presence is necessary in this Court.

THEREFORE, the Court commands you to bring or cause to be brought the person of [name and prisoner number of witness] before Judge [name], United States District Court for the Northern District of Illinois, Eastern Division, in Courtroom [no.], 219 S. Dearborn Street, Chicago, Illinois on [date and time of proceeding]. [Name of witness] shall remain present in the Court as required and, when his presence is no longer needed, shall, upon the direction of the Court be returned to your custody for safe and secure passage back to the place of confinement from which he was brought.

Writ shall be issued to the United States Marshal to execute.

_____

Michael W. Dobbins, Clerk
U.S. District Court
Northern District of Illinois

_____

Deputy Clerk

DATED:_____

Form 6

FEDERAL COURT PRISON LITIGATION PROJECT
EVALUATION FORM

(Please fill out and return to the Project.)

JUDGE _____, on _____, 19___, in the case _____ v. _____ appointed me to represent the plaintiff. I no longer represent the plaintiff in this case because on _____, 19__,_____ _____

	YES	NO
I read the handbook	___	___
I called the Federal Court Prison Litigation Project for further assistance	---	---
These materials were (helpful) (not helpful).		

COMMENTS:

The Federal Court Prison Litigation Project was (helpful) (not helpful)
COMMENTS:

	YES	NO
I submitted significant pleadings in my case for the Project pleadings bank9	---	---
The materials were submitted on computer disk.	___	___

DATE: _____ SIGNED: ___ _____

NAME (print)_____

PART II

In PART II of the Handbook, you will find brief introductory comments about a variety of issues that may arise during your appointment as counsel. You will also find a sampling of some of the leading cases, primarily focusing on the SPlease, remember to check the status of the cases cited herein, as courts are continually reevaluating civil rights law as applied to prisoner-plaintiffs.eventh Circuit, in order to give you a ready departure point for your research. Obviously, we have not included every case for each issue, though it is our hope that this will help save you time.

As for the structure of PART II, the subjects follow the order established in PART I of the Handbook. First, you will find information and case law about assessing the merits of and limits on the claims made by the prisoner-plaintiff. Please pay careful attention that all parties have been joined and that there is no danger of the statute of limitations running on the prisoner's claim.

The next portion of PART II deals with the mechanics of the case, including choosing nonimmune defendants, discovery of prison records, calculations of and limitations on damages, and general trial strategies. Much of what is true about civil litigation strategies is true of prisoner civil rights litigation; however, remember that you are dealing with a large institution that can often move very slowly.

PART II continues with a look at the process of recovery, either via final judgment or settlement.

PART II concludes by discussing what the appointed counsel must do during the course of the representation to recover costs and expenses. Remember, keep precise records of when and how you spent money in representing the prisoner-plaintiff.

CHAPTER 1: ASSESSING THE CLAIM

Section 1. Pleadings

(1) Appointed Counsel

Introductory Comment

First, review PART I, Section 2: Assessing the Complaint, which discusses appointed counsel's initial duties with regard to the pleadings. As for the obligation of counsel, once the court has made the appointment, only the court can relieve the attorney of his or her fiduciary duties to the prisoner-plaintiff.

Decisions

Mallard v. United States Dist. Court, 490 U.S. 296, 109 S. Ct. 1814, 104 L. Ed. 2d 318 (1989) (Although ' 1915(d) gives federal district courts the power to "request" an attorney to represent an indigent in a civil case, ' 1915(d) does not authorize a court to compel an unwilling attorney to perform such work. But other powers, such as a court's inherent authority, may permit federal court to require an attorney to serve in civil cases.)

Penson v. Ohio, 488 U.S. 75, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988) (The accused's right to counsel under the Fourteenth Amendment was violated where the court did the following: (1) granted counsel's motion for leave to withdraw, where the motion was unaccompanied by a brief drawing attention to anything in the record that might support the appeal; (2) failed to examine the record to determine whether counsel's evaluation of the case was sound before it acted on the motion; and (3) failed to appoint new counsel after determining there were arguable claims of error.)

Di Angelo v. Illinois Dep't of Public Aid, 891 F.2d 1260 (7th Cir. 1989) (Civil appointment of attorney to represent prisoner in district court did not carry over on appeal. Counsel need not file briefs ("Anders" brief) revealing inadequacies of their client's positions in order to be relieved of the appointments on appeal.)

Daniels v. Brennan, 887 F.2d 783 (7th Cir. 1989) (Attorney may not withdraw from case in the district court unless or until given formal leave of court to withdraw.)

Lewis v. Lane, 816 F.2d 1165 (7th Cir. 1987) (The court held that the district court abused its discretion by not granting prisoner-plaintiffs' motion to substitute counsel when appointed counsel failed to take any action on behalf of his clients.)

(2) Duty to Investigate

Introductory Comment

In addition to appointed counsel's duty under Fed. R. Civ. P. 11 to investigate the case from both a factual and legal perspective, a new state statute can impose severe sanctions on the prisoner-plaintiff if a Rule 11 finding of frivolousness is made:

If a lawsuit is filed by a prisoner in an Illinois or federal court against the State, the

Department of Corrections, or the Prisoner Review Board, or against any of their officers or employees, and the court makes a specific finding that a pleading, motion, or other paper filed by the prisoner is frivolous, the Department of Corrections shall conduct a hearing to revoke up to 180 days of good conduct credit by bringing charges against the prisoner sought to be deprived of the good conduct credits before the Prisoner Review Board . . . .

730 Ill. Comp. Stat. Ann. 5/3-6-3(d) (West Supp. 1998)

The section defines "frivolous" in detail, tracking in the main the language and case interpretation of Rule 11. The section specifically applies to Section 1983 actions, that is, the typical prisoner case. See 42 U.S.C.A. ' 1983 (West 1998).

See also 735 Ill. Comp. Stat. Ann. 5/22-105 (West Supp. 1998), which provides that attorney's fees and costs imposed against a prisoner in a Rule 11 sanction proceeding shall be taken from his prison trust fund account.

While appointed attorneys should be cognizant of these provisions, they are no different from the obligations that counsel face in any federal court (or even state court) litigation. Counsel should be wary but not intimidated.

As noted earlier, counsel must not rely on the fact that the district court judge has appointed counsel to represent the prisoner-plaintiff in determining if the prisoner's complaint is valid in law or factually supportable. That is appointed counsel's obligation. As with any client, but particularly with a prisoner who will have one or more felony convictions that will affect his or her credibility, appointed, counsel must always seek corroboration for the plaintiff's version of the facts. This approach is simply good trial strategy. And as with any client, the prisoner may be mistaken in his or her version of the facts. Prisoners are moved often, their records are lost or destroyed, and their recollections may be hazy or incorrect. And, as with any client in the "free world," they may be lying.

Therefore, use all the formal and informal discovery tools available to you to corroborate your client's version of the facts. Push your client for his documents, do an intensive, searching interview, and move on in the normal way. Most prisoners will welcome the opportunity to cooperate, and most, if counsel gives them a legitimate opportunity, will be helpful to counsel.

Decisions

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) (The Court upheld imposition of Rule 11 sanctions even after the attorney voluntarily dismissed his clients' claim because the Rule 11 violation is complete when the signed pleading is filed and cannot be expunged by a voluntary dismissal.)

Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Indus. Corp., 493 U.S. 120, 110 S. Ct. 456, 107 L. Ed. 2d 438 (1989) (Rule 11 does not authorize the imposition of sanctions against the law firm of the individual attorney who violated Rule 11. Sanctions are imposed against the attorney personally.)

Gaiardo v. Ethyl Corp., 835 F.2d 479 (3d Cir. 1987) (Rule 11 sanctions are not appropriate when a case challenging existing law is supported by reasonable" legal research and "adequate" factual investigation.)

(3) Necessary parties

As soon as possible, determine if the proper parties have been named and if parties that generally are never liable (usually the IDOC Director, most often the warden of the prison) have been sued.

Carefully consider the nature of your case. As a rule, officers cannot be liable on the basis of respondeat superior, that is, simply because they have supervisory responsibility over another IDOC employee who has acted wrongfully. See PART II, Section 12: Supervisory Liability. Virtually all types of prisoner actions, under current Supreme Court law, require a party's direct involvement for liability to attach.

Moreover, prisoners, because of lack of knowledge, will often name the wrong officers (wrong names or capacities), fail to name the officers who actually harmed them, or both. Note also, officers and prisoners are often known by their first names only or by nicknames. Prisoners have a difficult time knowing the correct names of others.

There is a two-year statute of limitations! See PART II, Section 3: Statute of Limitations. Move quickly, even if it means making an emergency discovery motion before the trial judge. If you act quickly, most judges will shorten the response time to allow counsel to identify the proper parties if the statute of limitations will run shortly.

After completing your investigation, drop all improperly named parties using an amended pleading.

Section 2. The Complaint

Introductory Comment

Where counsel has been appointed, the rules governing prisoner civil rights cases are essentially the same as for any party represented by counsel. The following decisions represent a variety of situations that appointed counsel may encounter. Otherwise, research the adequacy of your complaint as with any other case.

Decisions

Kimberlin v. Quinlan, 515 U.S. 321, 115 S. Ct. 2552, 132 L. Ed. 2d 252 (1995) (per curiam) (Judgment applying heightened pleading standard to civil rights suit alleging constitutional violation that depends upon defendant official's state of mind or unconstitutional motive is vacated, in light of Johnson v. Jones, 515 U.S. 304 (1995).)

Leatherman v. Tarrant County Narcotics Intel. and Coord. Unit, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993) (The Supreme Court unanimously held that the federal court may not apply a "heightened pleading standard" for claims brought pursuant to 42 U.S.C. ' 1983. The policy behind this holding the Court stated, is that the federal rules establish a liberal system of notice pleading. Municipalities do not have absolute or qualified immunity from ' 1983 suits, and a heightened standard cannot be justified on the ground that a more relaxed pleading standard would subject municipalities to time-consuming discovery.)

Gomez v. Toledo, 446 US. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980) (The Court stated that the only two allegations required to state a cause of action under ' 1983: (1) that some person has deprived plaintiff of a federal right; and (2) that the person who has deprived him of that right acted under color of state or territorial law. Qualified immunity is a defense that must be affirmatively pleaded by defendant.)

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.")

Ruiz-Rivera v. Moyer, 70 F.3d 498 (7th Cir. 1995) (The court held that where the party opposing summary judgment bears the burden of proof on an issue, that party must go beyond pleadings and affirmatively demonstrate a genuine issue of material fact for trial.)

Johnson v. University of Wisconsin-Eau Claire, 70 F.3d 469 (7th Cir. 1995) (Section 1983 claims must specifically allege a violation of the Constitution. Section 1983 provides a remedy for constitutional violations, but does not create substantive rights.)

Ward v. Edgeton, 59 F.3d 652 (7th Cir. 1995) (Prisoner died while civil rights action was pending on appeal. The court held that rather than the action being dismissed, or going directly to the prisoner's next of kin, the action belonged to the estate. Essentially, the court could not grant motion to dismiss for want of substitution without a showing that the next of kin had been notified. The estate representative will be able to decide whether to go ahead with the appeal or drop the action. O ften, courts will appoint the deceased-plaintiff's lawyer as the representative,

but, in this case, the plaintiff was pro se. Therefore, the representative will either be named in his will, if there is one, or the intestate heirs. In addition, any creditors of the plaintiff's estate may go forward with the action.)

Wilson v. City of Chicago, 684 F. Supp. 982 (N.D. Ill. 1988) (Plaintiff should indicate at the outset of his lawsuit the capacity in which he seeks to hold city officer defendants liable in civil rights action, so that defendants and the court can apply the appropriate law.)

Foster v. Unknown Cook County Deputy Sheriff, 914 F. Supp. 221 (N.D. Ill. 1995) (Prisoner-plaintiff's original complaint alleged that he was assaulted by an unknown sheriff thirteen months prior to filing; he named the Cook County Sheriff's Department (an entity not amenable to suit) as the defendant. The court held that the plaintiff was allowed to amend the complaint to correct the date of assault, thereby bringing the assault within the statute of limitations. Plaintiff was also allowed to amend the complaint to name "Cook County Sheriff" as the second defendant. These amendments were held to relate back to the original date of filing.)

Jones v. County of DuPage, 700 F. Supp. 968 (N.D. Ill. 1988) (Mother whose son committed suicide while incarcerated in county jail failed to state a Fourth Amendment claim against the city or city police officers who effected the arrest. However, there was a claim against the county and county jail officials for unreasonable treatment of her son while in the custody of jail officials. To succeed on this claim, plaintiff had to establish that under the totality of the circumstances, the jail officials acted unreasonably in failing to recognize the danger to plaintiff's son, and in failing to prevent the suicide.)

Ross v. United States, 697 F. Supp. 974 (N.D. Ill. 1988) (In any '1983 case involving the Fourteenth Amendment, the plaintiff must plead and prove that the defendant owed the plaintiff a Fourteenth Amendment duty of care and that the defendant breached that duty and caused plaintiff harm.)

Section 3. Statute of Limitations

Introductory Comment

Appointed counsel should act quickly to determine if proper parties have been joined. The statute of limitations is two years, no more![1] See 735 Ill. Comp. Stat. Ann. 5/13-202 (West 1992). And no leniency generally is given either the prisoner-plaintiff or appointed counsel in this regard.

Appointed counsel must act quickly to determine if the proper parties have been joined. See PART I, Section 2: Assessing the Complaint; PART II, Section 1: Pleadings. The prisoner-plaintiff often will fail to join the right officer(s) or other prison personnel who caused the alleged harm or has simply named the wrong defendant(s).

Note that an amended complaint joining the correct parties after the statute of limitations has run will fail, even where the initial complaint named "John Does" or "unknown parties."

In addition, make certain that each named defendant has been properly served with summons. Failure to serve a defendant within 120 days of the filing of the action may result in a dismissal without prejudice. Fed. R. Civ. P. 4(m). Although a new action may be filed against the dismissed defendant, the new pleading must be filed within the two-year statute of limitations.

Decisions

(1) Two-Year Statute of Limitations

Owens v. Okure, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989) (The Court further expounded on Wilson v. Garcia, 471 U.S. 261 (1985), requiring courts to borrow and apply to all ' 1983 claims a state's personal injury statute of limitation. Whereas Wilson did not indicate which statute of limitations applied in states having multiple personal injury statutes, Owens held that in such instances, courts should borrow a state's general or residual personal injury statute of limitations.)

Board of Regents v. Tomanio, 446 U.S. 478, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980) (Plaintiff's attempt to exhaust judicial remedies under state law did not toll state statute of limitations applicable to plaintiff's ' 1983 suit.)

Worthington v. Wilson, 8 F.3d 1253 (7th Cir. 1993) (Arrestee brought ' 1983 action against village and "unknown police officers," alleging violations of his constitutional rights. The court affirmed the district court's dismissal of the plaintiff's amended complaint as time-barred. The court held that Fed. R. Civ. P 15(c)'s "relation back doctrine" was not applicable, because the plaintiff's failure to name specific police officers was not due to a mistake but rather to a lack of knowledge as to their identity. The court also held that plaintiff could not claim fraudulent concealment to toll the statute of limitations. Plaintiff did not set forth affirmative acts or words by defendants which prevented him form discovering their identity; instead, his failure to obtain names was due to his own lack of diligence.)

Pearson v. Gatto, 933 F.2d 521 (7th Cir. 1991) (Pro se inmate's suit was not barred by the statute of limitations; letter plaintiff sent to court seeking permission to file an amended complaint should have been construed as the amended complaint. Late filing of notice of appeal (thirty day requirement under Fed. R. App. P. 4(a)(5)) was properly allowed based on appointed counsel's "overcommitment" to court-appointed cases.)

Booker v. Ward, 888 F. Supp. 869 (N.D. Ill. 1995) (Arrestee could not add two additional defendants to his suit for improper arrest because the statute of limitations had expired. S ection 1983 claims are not prevented from accruing while convictions are pending, even if they relate to the admissibility of evidence issues.)

(2) Amended Complaint Filed After Two Years

Kelly v. City of Chicago, 4 F.3d 509 (7th Cir. 1993) (The court held that a ' 1983 claim was time-barred based on the statute of limitations. The court reiterated that a ' 1983 claim arising in Illinois is governed by a two-year statute of limitations, and that ' 1983 claims "accrue when the plaintiff knows or should know that his or her constitutional rights have been violated." Id. at 511 (citations omitted).)

Wilson v. Giesen, 956 F.2d 738 (7th Cir. 1992) (The court reviewed the applicable statute of limitations in filing a civil rights suit, and ruled against the plaintiff, who filed nine days too late to meet the two-year applicable statute.)

Smith v. City of Chicago Heights, 951 F.2d 834 (7th Cir. 1992) (The Seventh Circuit reviewed the issue of the two-year statute of limitations in a situation where the plaintiff did not know the name of the defendant. The case was remanded back to the district court to determine factual issues related to the equitable tolling of the statute and whether the defendants were equitably estopped from arguing the statute of limitations as a defense.)

Powell v. Starwat, 866 F.2d 964 (7th Cir. 1989) (Fed. R. Civ. P. 4(j) requires courts to dismiss cases without prejudice when service takes more than 120 days unless the delay is attributable to good cause. If a case is dismissed and filed anew, the new suit must satisfy the statute of limitations.)

Matlock v. Hawkes, 874 F. Supp. 219 (N.D. Ill. 1995) (The Illinois statute of limitations on personal injury suits is two years, and this limitation is applicable to ' 1983 suits. See Wilson v. Garcia, 471 U.S. 261, 276 (1985); Kness v. Grimm, 761 F. Supp. 512, 517-19 (N.D. Ill. 1990).)

(3) Failure to Serve Defendant Within 120 Days

Moore v. Indiana, 999 F.2d 1125 (7th Cir. 1993) (Statute of limitations did not allow relation back to time of filing of the complaint because the complaint did not notify corrections officials of action against them. Putative defendants' knowledge of the action against them in their personal capacities cannot be imputed from service of process on the Attorney General in a different type of action, namely habeas corpus action.)

Farrell v. McDonough, 966 F.2d 279 (7th Cir. 1992) (This case reviewed the statute of limitations for prisoner ' 1983 claims and affirmed the application of the Illinois two-year statute. The court further disallowed a "relation-back" approach in a late naming of a defendant.)

Hill v. Shelander, 924 F.2d 1370 (7th Cir. 1991) (A prisoner bringing a ' 1983 complaint against a prison guard changed the complaint from an official capacity claim to an individual capacity claim. The amended complaint related back to the original filing date because it was clear that the guard had notice of the suit within the limitation period under Fed. R. Civ. P. 15(c). The court also discusses the broader purpose of Rule 15(c).) (See also Hill v. Shelander, 992 F.2d 714 (7th Cir. 1993).)

Section 4. Pendent Claims

Introductory Comment

Appointed counsel, in reviewing the pro se complaints filed by prisoner-plaintiffs in assigned cases, will often find state law claims related only in an attenuated way to the primary federal claim. These claims may be "buried" within a verbose version of the federal claim. In many instances, they may concern the destruction or loss of personal property, clearly not a federal claim if state remedies are available. See PART II, Section 5: Effect of Adequate State Remedy on Certain Constitutional Violations (Property Damage or Loss).

These claims may remain in the case only if they are "pendent" to the primary or federal claim which gives the federal court subject matter jurisdiction. The leading case on this issue is United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed 2d 218 (1996) where the Supreme Court held that a federal court in a federal question case has jurisdiction to hear state claims only where the state and the federal claims "derive from a common nucleus of operative fact."

See also the Judicial Improvements Act of 1990 which codified the case law doctrines of "pendent" and "ancillary" jurisdiction under the term "supplemental" jurisdiction:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C.A. ' 1367(a) (West 1993).

See the discussion of this provision in Baer v. First Options of Chicago, Inc., 72 F.3d 1294 (7th Cir. 1995).

Defendants may not file motions to dismiss these claims. Their presence may come to the court's attention only when the typical Northern District pre-trial order is filed. And then, if not earlier, the court, on its own motion, may question the presence of these unrelated or so-called pendent claims in the action. We suggest that counsel deal with such claims soon after their appointment to (1) determine if they should remain in the case; and (2) if so, should the complaint be amended to designate these claims as pendent separate claims.[2]

Section 5. Effect of Adequate State Remedy on Certain Constitutional Violations - (Property Damage or Loss)

Introductory Comment

Often a prisoner's pro se complaint will have a separate claim (or one "buried" in the complaint) for loss or damage to personal property (clothing, legal papers, etc.). The claim may be based on negligent or intentional conduct. Unless another constitutional issue can be raised (e.g., denial of access to the courts or a systemic pattern of destruction), this claim will be subject to dismissal if there is an adequate state remedy, such as an action for conversion or destruction of property. Counsel, in order to limit the issues in the case and when considering an amended complaint, should determine immediately if such a claim has any validity. If not, abandon it.

Decisions

Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) (Parratt v. Taylor applies to intentional as well as to negligent acts so that state employee's intentional unauthorized deprivation of property does not violate due process if state provides a meaningful post-deprivation remedy for the loss.)

Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) (Negligent deprivation of prisoner's property does not violate due process where state has adequate post-deprivation remedy. Nebraska court of claims procedure deemed adequate. Later overruled by Daniels v. Williams, 474 U.S. 327 (1986) to the extent Parratt suggests that a negligent act may ever be sufficient to constitute a deprivation under the Due Process Clause.)

Wilson v. Civil Town of Clayton, 839 F.2d 375 (7th Cir. 1988) (Where deprivations of property are effected through random and unauthorized actions of state employees and the state provides an adequate post-deprivation remedy, the requirements of due process are satisfied and the plaintiff may not maintain a ' 1983 suit in federal court.)

Wolf-Lillie v. Sonquist, 699 F.2d 864 (7th Cir. 1983) (The intentional deprivation of plaintiff's property by state officials does not violate due process if an adequate state law remedy is available. However, violation of substantive constitutional rights, here the Fourth Amendment, is not avoided by the availability of an adequate state remedy.)

Evans v. City of Chicago, 689 F.2d 1286 (7th Cir. 1982) (Parratt rationale does not apply to government's systematic deprivation of protected property interest.)

Marshall v. Fairman, 951 F. Supp. 128 (N.D. Ill. 1997) (The court rejected a pretrial detainee's claim under ' 1983 where prison officials confiscated his property. The court held that state law afforded appropriate remedies. Thus, the plaintiff's claim was dismissed.)

Section 6. Exhaustion of Prison Grievance Procedures

Introductory Comment

The Prison Litigation Reform Act has made substantial changes in the exhaustion requirement. Prior to the PLRA, most cases held that exhaustion of prison administrative grievance procedures was not a condition precedent to the initiation of a ' 1983 action. Although this issue arises most often with prison disciplinary procedures (and will be discussed in detail in PART II, Section 25: Due Process), the PLRA must be considered in light of the particular relief the law suit seeks. The PLRA provides:

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.

42 U.S.C.A. ' 1997e(a) (West Supp. 1998).

Although not yet well-settled, the trend on exhaustion has been to read strictly the PLRA's "availability" requirement. Thus, when a prisoner seeks only monetary redress, no exhaustion is necessary because no grievance procedure would provide the sought for "remedy." For a survey of the current state of the law, see Whitley v. Hunt, 1998 U.S. App. LEXIS 27673 (5th Cir. Oct. 23, 1998); Funches v. Reish, 1998 U.S. Dist. LEXIS 15646 (S.D.N.Y. Oct. 5, 1998).

Questions under this section include: (1) Will it apply retroactively to pending actions? (2) What if the administrative remedy cannot provide the relief the prisoner-plaintiff seeks?

For more on the potential retroactive application of the PLRA, see PART II, Section 17: Damages & the Prison Litigation Reform Act.

Decisions 3

McCarthy v. Madigan, 503 U.S. 140, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992) (A prisoner does not need to exhaust the Bureau of Prisons' administrative procedures prior to initiating a Bivens action for money damages.)

Pratt v. Hurley, 79 F.3d 601 (7th Cir. 1996) (Pro se prisoner brought two Bivens actions. The first action alleged an inadequate prison library and was dismissed by the district court for failure to exhaust administrative remedies. The Seventh Circuit held that prisoners are not required to exhaust administrative remedies when damages are sought for past harms because prison grievance procedures are not capable of compensating prisoners for those harms.)

Johnson v. O'Malley, 1998 U.S. Dist. LEXIS 7955 (N.D. Ill. May 19, 1998) (The court held that a prisoner's action for excessive force is not an action about "prison conditions" and thus the PLRA's exhaustion requirement does not apply. The court went further in dictum and stated that because the prisoner alleged collusion by the prison officials in a scheme to kill him, utilizing the grievance procedure would be so ineffectual as not to provide an "available

remedy.")

Harris v. Mugarrab, 1998 U.S. Dist. LEXIS 7087 (N.D. Ill. May, 1, 1998) (The court held that the prisoner's claim for solely monetary compensation is not barred for failure to follow prison grievance procedures. The court reasoned that because Congress did not intend "to erect meaningless barriers to suit" and because no grievance procedure can award monetary compensation, exhaustion is not required. Id. at *8. In determining the applicability of the PLRA's exhaustion requirement, the court recommending focusing on "the problem complained of, the relief sought, and the nature of the grievance procedure." Id.)

Sanders v. Elyea, 1998 U.S. Dist. LEXIS 1705 (N.D. Ill. Feb. 10, 1998) (The court, in the person of Judge Williams, held that when a prisoner requires expedient medical attention, the PLRA's exhaustion requirement need not be fully satisfied when the warden has rejected the prisoner's appeal of the grievance procedure. There is no "fast track" compelling the Administrative Review Board to hear the prisoner's case and to require exhaustion would present a threat of irreparable harm to the prisoner.)

Hobson v. DeTella, 1997 U.S. Dist. LEXIS 15338 (N.D. Ill. Sept. 30, 1997) (Judge Williams held, without a detailed discussion, that the prisoner's claim was barred by his failure to exhaust the proper administrative remedies as required by the PLRA. For an opinion by Judge Williams denying the need for exhaustion, see Sanders v. Elyea, 1998 U.S. Dist. LEXIS 1705 (N.D. Ill. Feb. 10, 1998).)

Hitchcock v. Nelson, 1997 U.S. Dist. LEXIS 11487 (N.D. Ill. July, 25, 1997) (The court held that the PLRA's exhaustion requirement did not apply retroactively when the acts giving rise to the prisoner's claim occurred before the passage of the applicable amendments to the PLRA, even though the prisoner filed his claim after passage.)

Mitchell v. Shomig, 969 F. Supp. 487 (N.D. Ill. 1997) (The court refused to apply the PLRA's exhaustion requirement when the acts giving rise to the prisoner's claim occurred prior to passage of the amendments to the PLRA requiring exhaustion. In addressing the PLRA's "availability" requirement, the court noted that the prisoner's failure to appeal the institution's grievance procedure should not be held against the prisoner because the "time for pursuing a further appeal had long since passed by the time the defendants filed their appeal." Id. at 492.)

Nunn v. Michigan Dep't of Corrections, 1997 U.S. Dist. LEXIS 22970 (E.D. Mich. Feb. 4, 1997) (The court held that the PLRA's exhaustion requirement is inapplicable to cases filed before passage. The court held that a contrary ruling would run afoul of Landgraf. I n reaching this conclusion, the court relied on decisions declining to apply the PLRA's attorney fee provisions retroactively.)

Section 7. Full Faith and Credit and Res Judicata

Decisions

Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984) (Federal Full Faith and Credit Statute, 28 U.S.C. ' 1738, precludes federal court litigation of claim that could have been, but was not, brought in state court action.)

Thomas v. Gish, 64 F.3d 323 (7th Cir. 1995) (The court affirmed dismissal of prisoner's civil rights suit. Prisoner complained that his wheelchair and crutches were taken away after he was deemed, in a previous suit, to be fabricating his injuries. That earlier finding of "no injury" barred this suit under issue preclusion. The court also held that a theory of injury omitted from the appellate briefs, but raised at oral argument, was waived.)

Rooding v. Peters, 876 F. Supp. 946 (N.D. Ill. 1995) (Plaintiff had won an earlier suit seeking mandamus, and the court found that because the earlier suit was based on the same cause of action, and there was nothing barring plaintiff from presenting his ' 1983 claim or the evidence necessary to establish the claim; plaintiff was not barred from seeking further relief in a new suit.)

Section 8. Communication with Clients

Introductory Comment

In 1997-98, the IDOC put greater restrictions on attorney visits and telephone calls to certain prisons. For example, at Pontiac Correctional Center, a maximum-security prison on permanent lockdown, while attorney-prisoner visits are in an apparently private room, the visits are "no contact," that is, a sheet of glass separates the attorney from the client and conversation is transmitted by an electronic speaker. Papers can be transmitted only through the intercession of a correctional officer, a cumbersome, time-consuming procedure. In addition, subject to the discretion of the warden, visits may be limited to those two days of the week when visits are allowed generally for that prisoner's classification (e.g., prisoners in segregation are permitted visits on Tuesday and Friday and those in Protective Custody on other days.) At Tamms Correctional Center, telephone calls from an attorney are permitted only for a "documented emergency." These limitations have not yet been tested.

In the case discussions that follow, citations from other circuits or districts are cited for illustrative purposes.

(1) Attorney Visiting

Mann v. Reynolds, 46 F.3d 1055 (10th Cir. 1995) (The court affirmed the district court's decision that the Sixth Amendment was violated when prison officials arbitrarily prohibited contact visits between death-row and high-maximum security inmates and their attorneys.)

Casey v. Lewis, 4 F.3d 1516 (9th Cir. 1993) (When prison officials have legitimate security concerns, they can prohibit contact visits between high-security prisoners and their attorneys.)

Crusoe v. DeRobertis, 714 F.2d 752 (7th Cir. 1983) (The warden may prohibit a prisoner from communicating with counsel through a paraprofessional (here, a former prisoner) where the paraprofessional poses a colorable threat to society.)

Dreher v. Sielaff, 636 F.2d 1141 (7th Cir. 1980) (Prisoners have a constitutional right to confer with counsel, which may not be abridged unnecessarily. A reasonable accommodation between the prisoners' right of access to counsel and a prison's need to maintain institutional security is required.)

Mitchell v. Dixon, 862 F. Supp. 95 (E.D.N.C. 1994) (Prisoner was not denied Sixth Amendment right to counsel when she was prohibited from contact visit due to state's interest in maintaining order and security and because there were adequate forms of no-contact visitation.)

Illinois Department of Corrections Rule:

20 Ill. Admin. Code ' 525.40 (1997): Attorney Visitation -- Adult and Community Services Division

(2) Mail

Antonelli v. Sheahan, 81 F.3d 1422 (7th Cir. 1996) (Prisoner stated a claim where he alleged that prison officials violated First Amendment right of access to the court when officials opened his legal mail, delayed its delivery, and sometimes lost it.)

Kindred v. Duckworth, 9 F.3d 638 (7th Cir. 1993) (The court reversed the district court's decision and held that the Indiana Reformatory's newly-implemented policy of requiring inmates to open confidential correspondences in the presence of staff violated the spirit and letter of an earlier consent decree, which gave the Reformatory inmates a substantive right to receive incoming confidential mail without interference unless reasonable grounds existed to believe the mail contained contraband. No evidence indicated that prison officials implemented the new policy in response to some real or perceived crisis or that prison officials should have moved the district court to either vacate or modify the decree.)

Martin v. Brewer, 830 F.2d 76 (7th Cir. 1987) (Federal prison's practice of treating all incoming mail as general correspondence which could be opened and read before delivery unless the envelope was marked "Special Mail - Open only in the presence of the inmate" did not violate prisoner's right of free speech with respect to mail from attorneys, as the requirement that the inmate advise his attorney to place the special legend on envelopes was easy to do.)

Gometz v. Henman, 807 F.2d 113 (7th Cir. 1986) (Jailhouse lawyer could be prohibited from communicating with another inmate, who was represented by counsel, where jailhouse lawyer and inmate had previously conspired to bring about the death of a prison guard.)

Watson v. Cain, 846 F. Supp. 621 (N.D. Ill. 1993) (The court denied defendant's motion for summary judgment on prisoner's claim that there was interference with his "privileged" mail. Purpose for mail was to obtain an attorney. There is no qualified immunity for prison officials because this violated a clearly established constitutional law. However, the court granted defendant's motion for summary judgment on the court access issue because the delay in receipt of the prisoner's mail did not prejudice any pending litigation.)

Sanders v. Dep't of Corrections, 815 F. Supp. 1148 (N.D. Ill. 1993) (The court held that mail sent to an inmate from the Clerk of the District Court concerned non-privileged matters and thus could be opened outside the presence of the inmate. Thus, inmate's in forma pauperis request was denied.)

Hunter v. Quinlan, 815 F. Supp. 273 (N.D. Ill. 1993) (In his pro se request for in forma pauperis status, the federal prisoner brought an action on the issue of opening attorney-client mail. Right of access to the court was not compromised by defendant's actions because nothing legally substantive was in the read letter. Therefore, there was no legal basis for the complaint and denial of the motion to proceed in forma pauperis was proper.)

Willis v. Lane, 738 F. Supp. 1198 (C.D. Ill. 1989) (Pro se plaintiff alleged improper interference when letters were not sent by Danville Correctional Center mail room and returned because they were "privileged" legal mail. The court granted summary judgment for defendants because they complied with statutory and constitutional mandates: the mail in question did not meet the Department of Corrections definition of legal mail. Other mail not meeting regulations was also properly returned unopened.)

Illinois Department of Corrections Rules:

20 Ill. Admin. Code " 525.100-.140 (1997): Mail and Telephone Calls (Mail).

(3) Telephone

Introductory Comment

As indicated earlier (PART I, Section 8: Telephone Procedures), different institutions have different telephone policies: some are far more technical (written requests) and formal than others. The law regarding the more restrictive procedures is not settled. The following is from Michael B. Mushlin, 2 Rights of Prisoners ' 11.06, at 53 (2d ed. 1993):

The law on telephone access to attorneys is not as clearly established as is the right to visits and correspondence [by and from attorneys]. Indeed, some courts have held that restrictions on telephone contacts with attorneys are permissible as long as prisoners are provided other means of access to counsel. However, given the importance of maintaining regular contact between an inmate and his or her legal counsel and the fact that telephone contact is an ordinary and usual method of maintaining that contact in other settings, the better reasoned decisions hold that some regular means of telephone contact should be made available to inmates. As with other forms of attorney communications, telephone calls cannot be monitored routinely by prison officials.

Decisions

Tucker v. Randall, 948 F.2d 388, 391 (7th Cir. 1991) ("[U]nreasonable restrictions on prisoner's telephone access may also violate the First and Fourteenth Amendments;" delay of four days for pretrial detainee to use phones is potentially unconstitutional.)

Martin v. Tyson, 845 F.2d 1451 (7th Cir. 1988) (The court noted that because security is a vital concern in prisons, some monitoring of general phone use is to be expected, though the prison did offer an unmonitored telephone line for calls with attorneys.)

Ishaaq v. Compton, 900 F. Supp. 935 (W.D. Tenn. 1995) (Prison officials did not violate First Amendment right of access to the court where inmate alleged that prison officials denied his request to make a phone call to his attorney. The court noted that inmate had insufficient funds to pay for the call and that right of access does not ensure inmate the most convenient form of access to his attorney.)

Casey v. Lewis, 834 F. Supp. 1553 (D. Ariz. 1992) (Reasonable access to phones is an important component of an inmate's right of access to courts and counsel; protection of confidentiality of attorney-client relationships is essential.)

Illinois Department of Corrections Rule:

20 Ill. Admin. Code ' 525.150 (1997): Telephone Privileges.

CHAPTER 3: FORMULATING A STRATEGY - CHOOSING DEFENDANTS

Section 9. IMMUNITIES - Qualified or Good Faith Immunity

Introductory Comment

Individual correctional officials may be immune from actions for damages if they can establish that defendant's conduct was objectively reasonable - if the conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."

The following decisions illustrate the nature of the principle of qualified immunity, situations where the defense has and has not been established, and the appealability of a trial court's denial of the defense.

The defense is often pleaded inconspicuously in an answer or in a motion to dismiss or for summary judgment or at trial. It is recommended that appointed counsel analyze the legal and factual basis for such a defense at the earliest possible moment, so that it does not arise in a surprise move when counsel is not prepared. While there are certainly cases where the defense is appropriate, often there is no basis for its assertion. In any event, plaintiff's counsel can test the validity of the defense well before trial by a motion to strike or for partial summary judgment.

(1) Qualified or Good Faith Immunity in General

Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (Whether an official is protected by qualified immunity turns on the objective legal reasonableness of the action, in light of legal rules clearly established at the time the action was taken; contours of the right allegedly violated must be sufficiently clear such that a reasonable official would understand that what he or she was doing violated that right.)

Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . Until this threshold immunity question is resolved, discovery should not be allowed. . . . [I]f the official pleading the [immunity] defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.")

Owen v. City of Independence, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980) (Qualified or good faith immunity defense not available to governmental entities in a ' 1983 suit.)

Camp v. Gregory, 67 F.3d 1286 (7th Cir. 1995) (The court held that a public official will be immune from damages, even though that official did violate someone's constitutional right, if the official's actions were objectively reasonable. An action is objectively reasonable if it does not violate ">clearly established statutory or constitutional rights of which a reasonable person would have known.'" Id. at 1298 (quoting Supreme Video, Inc. v. Schauz, 15 F.3d 1435, 1438-39 (7th Cir. 1994)). In other words, officials will not be expected to predict the direction of case law and conform their behavior prospectively.)

Knox v. McGinnis, 998 F.2d 1405 (7th Cir. 1993) (Qualified immunity only shields defendants in their individual capacity from money damages.)

(2) Qualified Immunity Denied

Hayes v. Long, 72 F.3d 70 (8th Cir. 1995) (In this case, the prisoner refused to handle pork (according to his Muslim beliefs) and was disciplined. To mount a free exercise of religion claim, he was required to show a sincerely held religious belief and an infringement on the belief, which he did. The court held that a government official does not receive qualified immunity if (1) the conduct violates clearly established statutory or constitutional rights, and (2) a reasonable person would have known of those rights. The clearly established prong is measured by "objective legal reasonableness." Because a previous case (in the same district) had established Muslim prisoners' right not to handle pork, the court deemed this right to be clearly established and no qualified immunity was available.)

Hill v. Shelander, 992 F.2d 714 (7th Cir. 1993) (The court held that qualified immunity did not apply in case where an officer was alleged to have grabbed plaintiff's hair and shoulder, slammed his head and back against bars, hit him twice in the face and then kicked him in the groin. Clearly established authority prohibited this excessive force. In addition, plaintiff alleged sufficient facts to show that defendant's intent was to punish, thereby meeting the intent requirement necessary to overcome a motion for summary judgment based on qualified immunity. The court further found that defendant's assertions raised an issue of fact regarding intent; thus the court lacked jurisdiction on the summary judgment issue.) (See also Hill v. Shelander, 924 F.2d 1370 (7th Cir. 1991).)

Henderson v. DeRobertis, 940 F.2d 1055 (7th Cir. 1991) (The court denied the defendants qualified immunity in this conditions of confinement suit alleging that there had been no heat during a four-day period in cellhouse B-West at Stateville, when outdoor temperatures fell so low as twenty-two degrees below zero. Defendants' position was that there was no clearly established law regarding the specific fact that the weather was abnormal and that the heating breakdown was unusual. "Contrary to defendants' assertion, constitutional rights don't come and go with the weather," and in 1982 the law was clearly established on this issue. Id. at 1059.)

Jackson v. Elrod, 881 F.2d 441 (7th Cir. 1989) (Plaintiff, a pre-trial detainee at Cook County jail, was prevented from receiving hard-bound books, mostly sent by the publisher and was not notified of such deprivation. Furthermore, the plaintiff had no access to other books on alcohol abuse. The court held the jail's action unconstitutional, as such a ban on books failed to demonstrate a reasonable relationship with any legitimate penological interest. Officials were barred from using the qualified immunity defense because official action cannot be protected merely because the very action in question has not been held unlawful.)

Abel v. Miller, 824 F.2d 1522 (7th Cir. 1987) (Prisoners' rights organization's right to be free from retaliation for the exercise of First Amendment rights was a clearly established right of which a reasonable prison official would have known at the time of the violation, therefore defendants were not entitled to qualified immunity.)

LaRue v. Fairman, 780 F. Supp. 1190 (N.D. Ill. 1991) (Prison officials were not entitled to qualified immunity from an inmate's claim that they purposely delayed access to legal materials after agreeing to provide them when the prisoner's attorney withdrew.)

(3) Qualified Immunity Granted

Anderson v. Romero, 72 F.3d 518 (7th Cir. 1995) (Prisoner (who died during the proceedings) challenged the prison's disclosure of his HIV-positive status and the resulting differential treatment by the institution. Because there was so little law on disclosure of prisoners' HIV status, no right was clearly established, and thus the claim was barred by qualified immunity. Though district cases had held that disclosure of HIV status violated a prisoner's rights, the court made it clear that district court decisions cannot render a right "clearly established" for purposes of determining qualified immunity.

Specifically, the prisoner claimed an Eighth Amendment violation because he was denied yard privileges and a haircut based on his HIV status. The court found no immunity for the decision to deny him a haircut, and expressly did not address the issue of yard privileges, remanding to the district court.)

Kikimura v. Turner, 28 F.3d 592 (7th Cir. 1994) (Because the federal prisoner at Marion penitentiary did not have clearly established right to receive published materials in Japanese, the prison officials had qualified immunity from damage claim. However, on the injunctive claim, the court analyzed whether the regulation was reasonably related to a legitimate penological objective and remanded to the district court.)

Sullivan v. Flannigan, 8 F.3d 591 (7th Cir. 1993) (Prisoner was forced to take mind altering drugs against his will for five years and brought suit arguing that he had a due process right to stop taking the drugs long enough to show that he did not need them. The court held that defendants were entitled to qualified immunity for pre-1990 (before Washington v. Harper, 494 U.S. 210 (1990)) treatment of the prisoner. The court also held that Illinois' post-Harper Rule, 20 Ill. Admin. Code ' 415.70, was proper as it required the same threshold showing to medicate an inmate as Harper, and its review procedure, consisting of a two-person "treatment review committee," afforded the inmate similar protection. The twenty-four hour drug free period in Harper does not apply to inmates like the plaintiff who were already on medication that does not wear off in one day; rather, the drug free period was significant only for inmates challenging forced drugs for the first time, an issue not before the court.)

Knox v. McGinnis, 998 F.2d 1405 (7th Cir. 1993) (In this case, the use of a "black box" to restrain segregation prisoners when leaving the segregation unit was allowed by established case law; thus defendants' qualified immunity was allowed. Further, because plaintiff was returned to the general population where the black box was not used, he did not have standing for injunctive relief.)

Scoby v. Neal, 981 F.2d 286 (7th Cir. 1992) (Supervisory officers entitled to qualified immunity in suit by correctional officers where strip-search procedure of officers did not violate clearly established right.)

Henderson v. Lane, 979 F.2d 466 (7th Cir. 1992) (Inmate in the state's circuit rider program complained of limited shower and exercise time while in the program. The court held that the defendants were entitled to qualified immunity on the issues of shower and exercise time because their decisions did not violate clearly established law on those issues; therefore, there were no violations of due process.)

Felce v. Fiedler, 974 F.2d 1484 (7th Cir. 1992) (A parolee has a constitutionally based

liberty interest in not being subjected to psychotropic drugs as a condition of his parole, except where there is a determination of medical appropriateness. But defendants' procedure, whereby the individual parole agent determined said condition, was violative of due process. However, defendants have qualified immunity because the parolee's procedural rights were not clearly established at the time.)

Lenea v. Lane, 882 F.2d 1171 (7th Cir. 1989) (The court reviewed the "some evidence" rule of Superintendent v. Hill, 472 U.S. 445 (1985), and held (1) that defendants enjoyed qualified immunity for the use of a polygraph test in prison disciplinary hearings, and (2) that polygraph evidence was admissible in prison disciplinary proceeding.)

Lockert v . Faulkner, 843 F.2d 1015 (7th Cir. 1988) (Prisoner alleged that prison officials who prevented the inmate from getting married according to an "Inmate Marriage Policy" violated his constitutional right. The court affirmed the judgment for the defendants based on qualified immunity.)

(4) Private Parties

Williams v. O'Leary, 55 F.3d 320 (7th Cir. 1995) (Inmate suffering from chronic bone infection filed suit claiming that defendants were deliberately indifferent to his medical care. At issue on appeal was whether the defendant-doctors were entitled to qualified immunity even though not state employees. The court noted that private parties may raise the defense of qualified immunity in certain circumstances. Sherman v. Four County Counseling Ctr., 987 F.2d 397, 406 (7th Cir. 1993). A private party acting under a government contract, as was the case here, may be granted qualified immunity. In addition, the court found plaintiff had not established in his pleadings that defendants' actions were sufficiently indifferent to rise to the level of a constitutional violation. Furthermore, whether repeated acts of negligence were enough to establish deliberate indifference was not sufficiently established at the time of treatment to overcome qualified immunity defense.)

Sherman v. Four County Counseling Ctr., 987 F.2d 397 (7th Cir. 1993) (A private party may raise the defense of qualified immunity in certain circumstances: (1) the private party acted under a government contract fulfilling a government function, (2) the party fulfilled statutorily mandated duties under a contract, and (3) a private physician acting under court order.)

(5) Appealability

Behrens v. Pelletier, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996) (Defendant made a motion to dismiss claiming qualified immunity, which was denied. Defendant took the issue up to the circuit court on interlocutory appeal and lost again. At the summary judgment motion, defendant again claimed qualified immunity in his pleadings and lost. When defendant attempted to appeal the summary judgment denial, the Ninth Circuit refused jurisdiction on the grounds that it only had jurisdiction for one interlocutory appeal regarding qualified immunity.

The Supreme Court, in an opinion written by Justice Scalia, reversed, holding that the denial of qualified immunity was immediately appealable pursuant to Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). Scalia wrote that the goal of qualified immunity is to shield government officials from unnecessary litigation, which includes both going to trial and participating in pre-trial proceedings. A litigant should not have to choose between appealing a final dismissal decision

and a final summary judgment decision. Scalia read Mitchell to "clearly establish[ ] that an order rejecting the defense of qualified immunity at either the dismissal stage or the summary judgment stage is a >final' judgment subject to an immediate appeal." Id. at 307. The issues raised in the two interlocutory appeals will be different because a motion to dismiss considers only the pleadings whereas a summary judgment considers all of the evidence available to date.

Therefore, the Ninth Circuit's one-appeal rule was thrown out. Defendants may appeal a denial of qualified immunity after losing both a motion to dismiss and after losing a motion for summary judgment.)

Johnson v. Jones, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) (No immediate appeal may be taken from a federal district court order rejecting the claim, asserted by defendants who were entitled to assert qualified immunity defense to action under ' 1983, that summary judgment was appropriate because the record failed to establish a genuine issue of material fact for trial.)

Swint v. Chambers County Comm'n, 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995) (Pendent appellate jurisdiction could not be used to conduct an interlocutory review of an otherwise unappealable ruling, in this civil rights action against a county sheriff. The district court had denied summary judgment to the sheriff on qualified immunity grounds, from which the sheriff filed interlocutory appeal. The Court ruled that the policy-maker issue did not qualify for treatment under the collateral order doctrine.)

Section 10. Absolute Immunity

Introductory Comment

Whether an official can be sued or has absolute immunity is not an issue that appointed counsel should ordinarily face, except in a pleading where an official of state government has been sued in her or his official capacity. See PART I, Section 3: Decision to Sue Defendants in their Official or Individual Capacity. Remember, state officials (including IDOC personnel) cannot be sued in their official, as opposed to their individual, capacities because of the Eleventh Amendment to the Constitution, which prohibits actions against the State without its consent. I n this context, an action against a state official in his official capacity is an action against the State. There may be exceptions where injunctive relief as opposed to money damages is sought.

This issue ordinarily does not arise in actions against a municipality or county. See PART II, Section 13: Municipal Liability.

Decisions

Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (State officials acting in their official capacities are not "persons" who may be sued under ' 1983 for damages, although they may be so sued for injunctive relief. To sue state officials for damages they must be sued in their individual capacity.)

Westfall v. Erwin, 484 U.S. 292, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988) (The Supreme Court determined that federal officials are not entitled to absolute immunity for all conduct, but only for discretionary conduct within the scope of their employment.)

Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988) (The Supreme Court determined that a state judge was not entitled to absolute immunity in a damage action brought under ' 1983 when his action was "administrative" rather than "judicial" in nature.)

Cleavinger v. Saxner, 474 U.S. 193, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985) (Prison disciplinary committee has qualified, not absolute immunity from inmate suits alleging violation of constitution rights.)

Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978) (The Supreme Court analyzed the criteria for determining whether public officials were absolutely immune from damages.)

Curtis v. Bembenek, 48 F.3d 281 (7th Cir. 1995) (Inmate sued a police officer, alleging that the officer gave perjured testimony during his trial. The court thoroughly discussed absolute immunity for witnesses.)

CHAPTER 3: FORMULATING A STRATEGY - CHOOSING DEFENDANTS

Section 11. Eleventh Amendment Immunity

Introductory Comment

For most appointed cases, this is simply a pleading problem where the prisoner in his or her pro se complaint has named IDOC officials in their official capacity or in their official and individual capacities. See PART I, Section 3: Decision to Sue Defendants in their Official or Individual Capacity. Remember, State officials (including IDOC personnel) cannot be sued in their official capacity, as opposed to their individual, capacities because of the Eleventh Amendment to the Constitution which prohibits actions against the State without its consent. In this context, an action against a state official in his official capacity is an action against the State. There may be exceptions where injunctive relief as opposed to money damages is sought. Counsel should amend the complaint accordingly.

This issue ordinarily does not arise in actions against a municipality or county. See PART II, Section 13: Municipal Liability.

Decisions

Will v. Michigan Dep't of State Police, 491 U.S. 48, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (State officials acting in their official capacities are not "persons" who may be sued under ' 1983 for damages, although they may be so sued for injunctive relief. To sue state officials for damages they must be sued in their individual capacity.)

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (Eleventh Amendment prohibits federal court from ordering state officials to conform their conduct to state law.)

Hutto v. Finney, 437 U.S. 678 98 S. Ct. 2565, 57 L. Ed. 2d 522(1978) (In enacting Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. ' 1988, Congress intended to override Eleventh Amendment immunity of the states and authorized fee awards payable by the states when officials are sued in their official capacities.)

Williams v. Lane, 851 F.2d 867 (7th Cir. 1988) (Eleventh Amendment bars suits against state officials when the state is real party in interest. Absolute immunity afforded state officials when state is real party in interest under Eleventh Amendment doesn't apply if suit challenges the constitutionality of official's actions.)

Campbell v. Illinois Dep't of Corrections, 907 F. Supp. 1173 (N.D. Ill. 1995) (Prisoner was held beyond his proper release date as a result of the institution's improper revocation of his good conduct credits. Though he named IDOC as a defendant, such a suit was barred by the Eleventh Amendment. Because he was a pro se plaintiff, the court accepted the explanation that he had intended to sue the officials named in their individual capacities and denied that motion for summary judgment on Eleventh Amendment grounds. The court held that the deprivation was sufficiently serious and easily enough remedied that there was genuine issue of fact whether the Eighth Amendment had been violated.)

Bounds v. Illinois Prisoner Review Bd., 556 F. Supp. 675 (N.D. Ill. 1983) (Damage claim against the Illinois Prisoner Review Board, a state agency, was barred by the Eleventh Amendment regardless of whether claim was brought under ' 1983 or directly under the

Fourteenth Amendment.)

Section 12. Supervisory Liability

Introductory Comment

Prisoners often name a multitude of defendants in their pro se complaints, including the Directors of the Department of Corrections, the warden and assistant wardens of the prison where the incident in question occurred, and other supervisory personnel usually not directly involved in the incident. As suggested in prior sections on the criteria for personal accountability, a defendant must be "directly" involved in the incident. There is no liability based on respondeat superior or principal-agent.[4] This issue is carefully discussed in Steidl v. Gramley, 151 F.3d 739 (7th Cir. 1998), where the prisoner-plaintiff sued the prison warden for failing to protect him from attack by fellow inmates. The district court dismissed the complaint for failure to state a cause of action. The factual allegations in the complaint stated that no guards were stationed in the towers on the catwalk overlooking the area where plaintiff was attacked. According to the plaintiff, the lack of guards in the towers violated a prison policy requiring the towers to be occupied at all times and that the warden "is the person ultimately in charge of, and responsible for, all day-to-day operations." Id. at 741.

The Court of Appeals stated that the warden (and other supervisory personnel) [5] could be liable under the Eighth Amendment if he was aware of a systemic lapse in enforcement of a policy critical to ensuring inmate safety. "The liability would stem from condoning a constitutional deprivation, and it would be direct, not vicarious. A warden is not liable for an isolated failure of his subordinates to carry out prison policies, however - unless the subordinates are acting (or failing to act) on the warden's instructions." Id. The court affirmed the dismissal because the complaint failed to make these necessary allegations.

Appointed counsel should read this case carefully. It contains an excellent discussion of recent decisions and the analysis the court will make of pro se complaints, as well as the necessity for appointed counsel to amend pleadings to reflect these legal principles if the facts support them.

After investigation, counsel should dismiss supervisory personnel if the requisite facts are not present.

Decisions

Gentry v. Duckworth, 65 F.3d 555 (7th Cir. 1995). (The Seventh Circuit reversed the district court's grant of summary judgment in favor of the defendant. The court began its decision by noting that the defendant, the superintendent of the Indiana State Reformatory, could not generally be held liable unless the plaintiff could demonstrate "some causal connection or affirmative link between the action complained about and the official sued." Id. at 561. (citing Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983)). Although the court admitted that the question was close, the court held that the plaintiff's complaint sufficiently alleged that the defendant affirmatively ordered the deprivation of the plaintiff's constitutional right to access to the courts.)

Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) (Supervisors who are merely negligent in failing to detect and prevent subordinate's misconduct are not liable under ' 1983, because negligence, even gross negligence, is not culpable.)

Rascon v. Hardiman, 803 F.2d 269 (7th Cir. 1986) (To establish a claim against a supervisory official, there must be a showing that the official knowingly, willfully or at least recklessly caused the alleged deprivation by his action or failure to act.)

Chapman v. Pickett, 801 F.2d 912 (7th Cir. 1986), vacated and remanded, 484 U.S. 807 (1987) (remanding for further consideration in light of Anderson v. Creighton, 483 U.S. 635 (1987)), remanded, 840 F.2d 20 (7th Cir. 1988). (Supervisors may be personally liable for failing to act when they have knowledge of a constitutional deprivation. The knowledge required is knowledge that a constitutional deprivation exists, and that the supervisor's personal action is necessary to set it right.)

Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985) (A supervisor may not be held liable for the torts of his subordinates in the Department of Corrections, absent any showing of individual wrongdoing, when sued in his individual rather than official capacity.

Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336 (7th Cir. 1985) (Sheriff was properly dismissed from case where plaintiffs did not allege that the shift sergeant who issued the arrest order was not properly trained by the sheriff; such an allegation would have established the necessary direct participation of the sheriff in the arrest.)

Section 13. Municipal Liability

Introductory Comment

Where a county or a municipality is sued as a named defendant, special pleading and proof requirements apply. As the following cases indicate, liability may attach only if the decision maker was acting pursuant to a policy of the defendant or had the power to establish policy. T hese are questions which should be researched carefully. In most cases, the pro se complaint must be amended and discovery and proof must be adjusted accordingly.

In this respect, a tactical decision must be made as to the importance of keeping the municipal corporation as a defendant as opposed to individual officers, etc. The case may have more jury appeal if the municipal corporation is a named defendant. However, proof may be difficult and the battle may be fought on a tougher field.

Decisions

St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988) (The City may not be liable under ' 1983 for transfer and eventual layoff of municipal employee, allegedly in retaliation for exercise of First Amendment rights by supervisors who did not possess final decision-making authority with respect to challenged employment decisions, but who, at most, possessed only authority to effectuate policy made by their superiors.)

Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (A single improper decision by a municipality may be enough to show liability. On remand, the county was reinstated as defendant. 792 F.2d 57 (6th Cir. 1986). Back at the trial court, the court awarded the doctor damages against the county. 672 F. Supp. 286 (S.D. Ohio 1987).

Monell v. Department of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) (Local governing bodies may be liable under ' 1983 for the unconstitutional execution of a governmental policy or custom, "whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy . . . ." Id. at 2037. Respondeat superior, however, is not a proper basis for municipal liability.) (Overruling Monroe v. Pape, 365 U.S. 167 (1961), insofar as that case held that local governments were wholly immune from suit under ' 1983.)

Jackson v. Marion County, 66 F.3d 151 (7th Cir. 1995) (Plaintiff, in the complaint, need not have alleged all facts which gave rise to his claim on the issue of custom or policy. Leatherman v. Tarrant County Narcotics Intel. and Coord. Unit, 507 U.S. 163 (1993).)

Eversole v. Steele, 59 F.3d 710 (7th Cir. 1995) (Local governments are responsible for the unconstitutional actions of its employees only when the actions are taken pursuant to official policy or custom. Liability can be imposed on a municipality for consequences arising from a single decision under appropriate circumstances. Pembaur v. City of Cincinnati, 475 U.S. 469 (1986). N ot all decision-making by employees, however, will subject the municipality to potential liability. The municipality will be liable only when the person making the decision has the final authority to establish policy with respect to the action ordered.)

Auriemma v. Rice, 957 F.2d 397 (7th Cir. 1992) (This case presents a discussion of the issue from the Monell case, as to who qualifies as a policy maker. To hold the municipality liable, under Monell, the agent's actions must implement rather than frustrate the governmental policy. Here the court found that the defendant, not the municipality, was responsible for his actions. Although this case dealt with the Chicago Police Department, it is instructive on the policy issues raised by the Monell case.)

Wilson v. Civil Town of Clayton, 839 F.2d 375 (7th Cir. 1988) (Because a municipality may be liable only for acts that it has officially sanctioned or ordered under Pembaur, a municipality's liability can never be premised on a random and unauthorized act causing a tortious loss of property.)

Anderson v. Gutschenritter, 836 F.2d 346 (7th Cir. 1988) (Under Pembaur, evidence of county sheriff's and county jail warden's deliberate and callous indifference in failing to protect pretrial detainee from being assaulted by jail inmates could be considered evidence of a county policy, such that the county could be held liable under ' 1983.)

Havey v. County of DuPage, 820 F. Supp. 359 (N.D. Ill. 1993) (Based on Leatherman v. Tarrant County Narcotics Intel. and Coord. Unit, 507 U.S. 163 (1993), there is no heightened pleading standard in a complaint raising a civil rights claim against a municipality. However, plaintiff did not allege that any policy or custom was unconstitutional, but rather that they were not followed by agents and employees. Respondeat superior theory is not applicable in ' 1983 claim.)

Jones v. City of Chicago, 787 F.2d 200 (7th Cir. 1986) (In situations that call for the adoption of new procedures, rules or regulations, a municipality's failure to make such policy may be actionable under ' 1983. Where the City's custom itself did not establish wrongdoing, the plaintiff alleging that the City's inaction resulted in a constitutional violation under ' 1983 must present evidence of the course of events or circumstances that would permit the inference of deliberate indifference or tacit authorization of offensive acts)

Hossman v. Blunk, 784 F.2d 793 (7th Cir. 1986) (Complaint filed against a sheriff and his deputies seeking damages resulting from mistreatment, including beatings administered to the plaintiff while he was incarcerated in county jail and refusal to provide plaintiff with medical care, adequately alleged claims for municipal liability under ' 1983; read liberally, the complaint and affidavits alleged a pattern or policy.)

Strauss v. City of Chicago, 760 F.2d 765 (7th Cir. 1985) (Proximate causation between municipality's policy or custom and plaintiff's injury must be present in order to hold city liable for constitutional violations caused by its official policy or unwritten customs.)

Ross v. United States, 697 F. Supp. 974 (N.D. Ill. 1988) (To establish municipal policy, custom or practice, civil rights plaintiff must allege a specific pattern or series of incidents that support general allegation of custom or policy. Allegation of one incident in which plaintiff suffered deprivation is not enough unless sufficiently high ranking policy-maker's act caused the deprivation.)

O'Leary v. Luongo, 692 F. Supp. 893 (N.D. Ill. 1988) (Punitive damages are not available in ' 1983 action against municipality.)

Mendez v. Rutherford, 687 F. Supp. 412 (N.D. Ill. 1988) (Municipalities and other local

governmental units are considered "persons" for ' 1983 purposes. Cities can be sued for the constitutional torts of their agents but such suits must be brought directly against the city. Respondeat superior is an insufficient theory upon which to base a claim for municipal liability.)

Flores v. City of Chicago, 682 F. Supp. 950 (N.D. Ill. 1988) (Civil rights plaintiff seeking to recover in official capacity suit can look only to entity itself, not the official.)

Section 14. Discovery

Introductory Comment

Although formal discovery may be pursued pursuant to the applicable Federal Rules of Civil Procedure (Rules 26, 30, 33, 34, 36, and 37), as well as the Northern District's local general rules and rules for civil cases, discovery can be difficult and frustrating, given the nature of prisons, the manner in which records are kept, and the fact that the Assistant Attorney General assigned to the case must often work through the office of the General Counsel of the IDOC or with the personnel of a particular prison, usually many miles away. Moreover, for security and other reasons, the prisoner's counsel is not permitted to simply go to the prison records office to "rummage" through records. Often, all you see or know about the prison's records is what is mailed to you. As a consequence, you must be creative to determine that the response given you is an adequate one (as in any litigation). The following suggestions are made:

(1) Study the applicable regulations of the IDOC (and warden's orders and directives where available) to determine what records should be kept;

(2) In depositions of IDOC personnel, interrogate on the same subject;

(3) Push your client to provide you with whatever records he or she has or can find in the prison, as theses records may suggest what other records should exist;

(4) Use the rule of "probabilities" of what records should exist; remember, for many movements of a prisoner from his or her cell to another department, e.g., to or from the segregation units, there should be a document showing that movement;

(5) Demand to see a prisoner's "Master File;" this file follows the prisoner and should contain every document (perhaps not all medical records) that have been created regarding the prisoner;

This request should be on the form supplied by the Prison. See PART I, Section 26: Forms. To save time, call the records office of the prison to see its procedures and if the form you have is correct. This form must have an accurate description of what you want and must be signed by your client and witnessed by a person at the prison (usually a counselor). Sometimes a portion of the medical record (mental health, for instance) will be in a different department than where the regular medical records are kept. The records clerk, if dealt with diplomatically, will ordinarily help you. It helps to catch attention by faxing your request, marking your calendar for about ten days, and then calling the clerk at the prison to check status, if you have not heard. Persistence pays off.

(6) Use Freedom of Information requests to the IDOC in Springfield, Illinois, and to the particular prison where the incident or conduct in issue occurred.

For written requests of documents, consider the following:

Illinois Department of Corrections Rules:

20 Ill. Admin. Code ' 107.310 (1996): Access To Records.
20 Ill. Admin. Code ' 107.330 (1996): Release of Clinical Records to Committed Persons and Authorized

See also PART I, Section 26: Forms.

Section 15. Trial Issues

Introductory Comment

There are many similarities between a prisoner's civil rights trial and the ordinary civil trial. Appointed counsel should approach preparation for trial and the trial itself essentially in the same manner as any other trial. However, there are important differences, some of which will be discussed here and in the decisions cited. 6

The primary difference is that appointed counsel represents a convicted felon who in most instances will still be in a penitentiary. The client's credibility (along with other prisoners who may be supportive witnesses) starts off in a negative posture. The client may have more than one conviction in addition to the sentence being currently served, may be in segregation for prison rules violations, and is appearing in court at a time when many potential jurors will have a decidedly negative bias about criminals and the courts. Read Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996) for some ideas in this regard. Try to limit the defendants' use of the prior convictions of the plaintiff and other prisoner witnesses.

As a consequence, counsel must, if possible, develop proof, either direct or circumstantial, that corroborates the plaintiff and that emanates from the defendants (as adverse witnesses) or from the IDOC itself. This latter proof may take the form of official records (incident reports, medical records) or defendants' failure to file such documents or from other IDOC officials, such as officers from a subsequent shift. Counsel must use their creative resources in their efforts to develop such proof.

Secondly, everything must be done to humanize the plaintiff in the jury's eyes. Do whatever is possible so that the plaintiff's physical appearance is not that of a convict, from the clothes that he or she wears to arguing to the trial judge that IDOC correctional officers (who will accompany the plaintiff to the court) are not permitted to sit around him in court as if he were about to escape. Look to the United States Marshals assigned to the courtroom to help you in this respect.

Decisions

Pennsylvania Bureau of Correction v. United States Marshals Serv., 474 U.S. 34, 106 S. Ct. 355, 88 L. Ed. 2d 189 (1985) (The sending correctional institution is responsible for transporting the prisoner to court; the Marshals Service is responsible for the prisoner during court proceedings.)

Ivey v. Harney, 47 F.3d 181 (7th Cir. 1995) (Prisoner needed expert medical evidence for his case contending that the medical care he received while incarcerated violated his Eighth Amendment rights. The expert physician was in Chicago and the prisoner was incarcerated in Taylorville Correctional Center, more than 200 miles away, in a prison not connected with his lawsuit. The court held that pursuant to 28 U.S.C. ' 2241, a court may not order a custodian to transport a prisoner outside the prison to acquire evidence (to be examined by a doctor) in a suit to which the custodian is not a party. The court would not allow use of 28 U.S.C. ' 1651(a), the all writs provision, to bypass the writ of habeas corpus provision of ' 2241.)

Wilson v. Groaning, 25 F.3d 581 (7th Cir. 1994) (The court held that the evidence of an inmate spitting on corrections officers as well as evidence of prior convictions was properly admitted at trial to determine whether officers had used excessive force to transport the inmate.)

Woods v. Thieret, 5 F.3d 244 (7th Cir. 1993) (The court held that it was not prejudicial to the plaintiff for his inmate-witnesses to appear in leg and arm restraints because restraints were "necessary to maintain the security of the courtroom." Potential prejudice was eliminated when the trial court took steps to reduce the visibility of the restraints and gave a curative instruction advising the jury to disregard the restraints when assessing the testimony. The court held that it was also not prejudicial for the witnesses to appear in prison clothing because, given that the lawsuit dealt with a ' 1983 claim against prison officials, the jury was aware the witnesses were prisoners no matter what they wore.)

Lemons v. Skidmore, 985 F.2d 354 (7th Cir. 1993) (The magistrate judge abused his discretion when he did not hold a hearing to determine what restraints, if any, the inmate had to wear in court. An inmate is entitled to the minimum restraints necessary. The judge's error in relying on an alleged IDOC policy requiring leg shackles was compounded by the fact that IDOC was the defendant and that the shackles conveyed a biased impression to the jury about the inmate's dangerous character, which was an issue in the civil rights case.)

Gora v. Costa, 971 F.2d 1325 (7th Cir. 1992) (For impeachment purposes, evidence of defendant's past crimes is admissible, if relevant, when limited to the crime charged, date and disposition. See Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987); Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989). Evidence of current incarceration cannot be used to impeach, but might be admissible for other purposes if its probative value outweighs unfair prejudice. Here, evidence of current incarceration was admissible, because it was not used to impeach and it was relevant. Objection must be made at trial for improper use of past or present convictions.)

Geitz v. Lindsey, 893 F.2d 148 (7th Cir. 1990) (The trial court properly allowed limited use of the details of plaintiff's pending offenses and prior convictions. This was a ' 1983 case alleging excessive force by police officers and the officers knew of the plaintiff's prior criminal history at the time of arrest; therefore, according to the court, what they knew was relevant when evaluating their conduct. The trial court had protected the prisoner-plaintiff from unfair prejudice by allowing only evidence of the "general nature of the charges and what those charges involved in general terms." Id. at 151 (citations omitted).)

McGill v. Duckworth, 726 F. Supp. 1144 (N.D. Ind. 1989), aff'd in part, rev'd in part, 944 F.2d 344 (7th Cir. 1991) (Evidence that inmate previously engaged in homosexual conduct was properly excluded. Jury instructions, containing objective standard for determining defendant's recklessness, was proper.)

Section 16. Damages - Generally

Decisions

Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986) (Damages based on the abstract "value" or "importance" of constitutional rights are not a permissible element of compensatory damages in ' 1983 cases.)

Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983) (Punitive damages may be awarded in a ' 1983 action when the defendant's conduct involves reckless or callous indifference to plaintiff's rights as well as when defendant acts with evil motive or intent. Policy of qualified immunity is not sufficient to protect defendants against punitive damages for reckless conduct. With such immunity, defendant is only "protected from liability for mere negligence because of the need to protect his use of discretion in his day-to-day decisions in the running of a correctional facility." Id. at 55.)

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981) (Municipalities cannot be held liable for punitive damages under ' 1983.)

Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) (Compensatory damages cannot be awarded for denial of procedural due process without evidence of actual injury.)

Graham v. Satkoski, 51 F.3d 710 (7th Cir. 1995) (Inmate alleged that prison officials had denied him treatment for a scalp condition, had destroyed his mail, had taken away his radio, and had wrongfully disciplined him. He appealed the damage award of $550 received in district court. The appellate court held that federal common law governs ' 1983 damage awards, and agreed with the district court's calculation of damages. Inmate also wanted punitive damages, which are only allowed in ' 1983 cases when the judge finds that defendant's conduct was evilly motivated or motivated by callous indifference. The court found that punitive damages were not warranted in this case.)

Walsh v. Mellas, 837 F.2d 789 (7th Cir. 1988) (The court held prison officials liable for $2,500 compensatory and $5,000 punitive damages to inmate harmed by cellmate who had not been screened for compatibility prior to being placed in "investigative status" area.)

Sahagian v. Dickey, 827 F.2d 90 (7th Cir. 1987) (Prisoner who was denied access to legal materials in violation of due process was entitled to nominal damages of $1 as a recognition of the violation of his rights. Punitive damages in a ' 1983 suit may be available without actual loss to the plaintiff if a showing is made of aggravating circumstances or malicious intent.)

Rascon v. Hardiman, 803 F.2d 269 (7th Cir. 1986) (The court awarded plaintiff $495,000 for injuries from excessive use of force.)

Ustrak v. Fairman, 781 F.2d 573 (7th Cir. 1986) (The court held that the award of $15,000 in punitive damages to white prison inmate whose transfer from maximum- to medium-security portion of prison was delayed for discriminatory reasons was grossly excessive as prisoner suffered only a trivial deprivation of amenities.)

Smith v. Rowe, 761 F.2d 360 (7th Cir. 1985) (Jury verdict for $100,000 was awarded for damages from two years confinement in segregation in violation of due process.)

Saxner v. Benson, 727 F.2d 669 (7th Cir. 1984) (The court upheld $4,500 in damages awarded to compensate for (1) thirty-five days of total segregation, (2) being confined in repulsive conditions, (3) mental distress resulting from procedural unfairness of disciplinary hearing, and (4) the fear that such unfairness would continue in future proceedings.)

Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983) (Jury awards of $25,000, $30,000 and $60,000 in strip-search cases. Seventh Circuit reduced $60,000 award to $35,000.)

Crawford v. Garnier, 719 F.2d 1317 (7th Cir. 1983) (The court reduced $10,000 award for "injury to civil rights" after finding of First Amendment violation to a nominal damage award of $1. The court followed Kincaid v. Rusk, 670 F.2d 737 (7th Cir. 1982), which allowed only nominal damages for violation of prisoner's First Amendment right to access to certain reading materials. The court distinguished Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983) and Owen v. Lash, 682 F.2d 648 (7th Cir. 1982) as only "suggesting" that substantial damages may be awarded for certain constitutional violations without evidence of consequential injuries. See also Corriz v. Naranjo, 667 F.2d 892 (10th Cir. 1981); Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981).)

Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983) ($300,000 jury verdict awarded against police for beating and conspiracy.)

O'Leary v. Luongo, 692 F. Supp. 893 (N.D. Ill. 1988) (Punitive damages are not available in ' 1983 action against municipality.)

Section 17. Damages & the Prison Litigation Reform Act

Introductory Comment

Although the common law of tort damages has generally applied to ' 1983 "constitutional tort" claims (with some exceptions), the Prison Litigation Reform Act makes a profound change to the extent that emotional or mental injuries, in the absence of physical injury, are not compensable:

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.

42 U.S.C.A. ' 1997e(e) (West Supp. 1998) (emphasis added).

The section creates obvious questions which have not been definitely resolved in the Supreme Court of the United States or the United States Court of Appeals for the Seventh Circuit (as of June 1998):

(1) Will this provision (as well as certain other PLRA sections) be applied to actions pending or claims that arose prior to the Act? (Note that the Act states no effective date.)

(2) Will this be applied to all prisoner ' 1983 actions irrespective of the nature of the claim?

(3) What constitutes a "physical injury" within the meaning of the Act?

And more questions will no doubt arise.

In any event, appointed counsel must analyze all damage precedent in light of this section and in doubtful cases, careful analyze the prisoner's medical records (with the advice of an expert witness where possible), to demonstrate a "physical injury."

The following decisions examine (1) the retroactive application of ' 1997e(e), (2) what constitutes a "physical injury," (3) the types of claims to which ' 1997e(e) applies, and (4) prior damage precedent (which, as stated, must be reviewed in light of the PLRA).

Decisions

(1) Retroactivity

Ramirez v. City and County of San Francisco, 1997 WL 33013 (N.D. Cal. Jan 23, 1997) (The court ruled that the "physical injury" provision is inapplicable to a medical care claim filed before the PLRA's passage. The court reasoned that a contrary ruling would constitute an impermissible retroactive application under Landgraf v. USI Film Products, 511 U.S. 244 (1994)

because it would "eliminate plaintiff's once legally cognizable claim for pain and suffering." Id. at *8.)

Nyberg v. Puisis, 1996 WL 754107 (N.D. Ill. Dec. 31, 1996) (Judge Andersen denied the defendants' motion to dismiss the plaintiffs' claim regarding inadequate medical care. The defendant argued that ' 1997e(e) mandated dismissal because the plaintiff failed to allege physical injury. The court stated as follows:

[T]his case was filed two years before the PLRA was passed. The parties have not had an opportunity to brief the issue of whether the PLRA's restriction of a civil action by a prisoner to a showing of a prior physical injury applies to pending cases. More importantly, we cannot say that discovery or expert testimony might not reveal a physical injury has in fact resulted from Nyberg's three days without proper medication. These issues are better resolved at summary judgment or trial rather than on a motion to dismiss.)

Id. at *4.

Markley v. DeBruyn, 1996 WL 476635 (N.D. Ind. Aug. 19, 1996) (The court summarily applied ' 1997e(e) in rejecting a claim that had been filed before the PLRA's passage, without reference to the issues of statutory construction, retroactivity, or constitutionality.)

Taifa v. Bayh, 1996 WL 441809 (N.D. Ind. June 6, 1996), report and recommendation approved sub nom., Isby v. Bayh, 1996 WL 441820 (N.D. Ind. July 24, 1996) (The court summarily applied ' 1997e(e) in rejecting a claim that was filed before the PLRA's passage, without reference to the issues of statutory construction, retroactivity, or constitutionality.)

(2) Physical Injury

Zehner v. Trigg, 952 F. Supp. 1318 (S.D. Ind. 1997) aff'd 133 F.3d 459 (7th Cir. 1997) (The plaintiff class (comprised of current and former prisoners) sought monetary damages against the defendant correction officials for violations of their Eighth Amendment rights caused by deliberate exposure to asbestos. Defendants moved for judgment on the pleadings relying on the physical injury requirement of ' 1997e(e). Judge Hamilton granted the defendants' motion, finding that (1) "physical injury" required a showing of "disease or other adverse physical effects," rather than mere inhalation or ingestion of asbestos, id. at 1323; (2) the provision was applicable to former prisoners, id. at 1327; (3) the provision did not unconstitutionally impair judicial power to effectively vindicate prisoners' constitutional rights because the Constitution does not require a damages remedy for every violation (as demonstrated by the doctrines of qualified and absolute immunity), and injunctive relief remained available, id. at 1331; (4) the provision did not burden prisoners' constitutional right of access to courts because it "does not completely prevent plaintiffs from vindicating their Eighth Amendment rights," it simply limits the relief available to them, id. at 1332; and (5) plaintiffs' equal protection challenge to the provision did not call for strict scrutiny because prisoners are not a suspect class and no fundamental right was burdened, and the provision rationally served the legitimate purpose of discouraging the filing of frivolous suits. Id. at 1333. Plaintiffs did not argue that the provision was inapplicable to actions filed before the PLRA's passage. Id. at 1322 n.1.)

Barnes v. Ramos, 1996 WL 599637 (N.D. Ill. Oct. 11, 1996) (Judge Coar found ' 1997e(e) inapplicable to the plaintiff's due process challenge to a prison disciplinary proceeding:

Barnes has not brought this suit to recover damages for mental or emotional injuries suffered as a consequence of defendants' actions. Rather, he alleges that his constitutional rights were violated because he was denied due process, because false charges were filed against him, and because he was subjected to cruel and unusual punishment. For none of these claims does Barnes assert that he suffered emotional or mental harm, nor do any of these causes of action require such an allegation. For example, a ' 1983 action alleging a procedural due process clause violation requires proof of three elements, none of which include emotional, mental, or physical harm: 1) a deprivation of a constitutionally protected liberty or property interest; 2) state action; and 3) constitutionally inadequate process. Therefore, the PLRA does not require dismissal of Barnes's claims.

Id. at *2 (citation omitted).)

Adams v. Hightower, 1996 U.S. Dist. LEXIS 22180 (N.D. Tex. Sept. 25, 1996) (The plaintiff sought compensation for mental stress caused by an invasion of his privacy. The court dismissed the action after finding that the plaintiff had failed to show physical injury without any discussion about the breadth of the application of the provision or its constitutionality.)

(3) Nature of Claim

Nunn v. Michigan Dep't of Corrections, 1997 U.S. Dist. LEXIS 22970 (E.D. Mich. Feb. 4, 1997) (The court held that the "physical injury" requirement was inapplicable to the plaintiffs' Eighth Amendment claim (for which plaintiffs seek damages) because their emotional distress stemmed from rape and sexual assault - which involved "physical injury" - suffered at the hands of Department of Corrections employees.)

18. Inmate-on-Inmate Assaults - Duty to Protect

Introductory Comment

The key decision on this type of claim is Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). This unanimous opinion by the Court should be carefully studied to learn the standards for this frequently filed suit. As you will learn, this type of claim is very fact oriented. It requires careful investigation and will require, more often than not, reliance on carefully developed circumstantial evidence to support your client's version of the facts.

In Farmer, plaintiff, a biological male, had undergone sex change treatment, including silicone breast implants and unsuccessful surgery to have his testicles removed. In prison he continued to receive hormonal treatment and wore his clothing in a "feminine manner." However, he was transferred to a male high-security prison and placed in general population. Within two weeks, he was beaten and raped by another prisoner. He sued for damages and an injunction, alleging that a transfer under these circumstances violated the Eighth Amendment. The Court reversed the trial court's summary judgment for the defendants (affirmed by the Seventh Circuit), holding that prisoners, in the presence of other prisoners, some of whom are very dangerous, have no real means to protect themselves. Prison officials cannot close their eyes to the inevitable.

The Court held that the test of liability was "deliberate indifference," a standard imposed in different contexts in prison litigation. In this instance, the standard requires something more than mere negligence and less than maliciousness. The standard, while not self-defining, has a subjective (versus an objective) element. The standard may be met if prison officials were aware of a risk sufficiently serious to cover inmates in plaintiff's category, although they did not know that plaintiff in particular might be harmed. Moreover, the standard does not immunize a "hear no evil, see no evil" approach. Stated differently, prison officials may be liable on the basis of circumstantial evidence of an objective nature from which the trier of fact could conclude that prison officials must have had actual knowledge of the risk of harm, but failed to take reasonable steps to abate the risk. Thus, the Court stated that in these circumstances, a prison official cannot escape liability by arguing that "he merely refused to verify underlying factors that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspects to exist . . . ." Id. at 843 n.8. In these circumstances, a prisoner at risk does not have to wait until assaulted. Injunctive relief may be appropriate. In addition, failure of the prisoner to complain is not necessarily fatal if the circumstances indicate that defendants had enough knowledge of the risk but failed to act. The Court reversed the summary judgment and remanded the cause for trial.

The following cases are a sampling subsequent to Farmer. You should do further research as the cases are reported with some frequency.

Decisions

(1) Inmate Stated or Proved Claim

Pope v. Shafer, 86 F.3d 90 (7th Cir. 1996) (Where prison officials were aware of threats made to an inmate's safety and disregarded those threats by failing to immediately transfer the inmate, the evidence was sufficient to support a finding that prison officials were deliberately

indifferent to the inmate's safety. The court affirmed the lower court's award of $75,000 in compensatory damages.)

Miller v. Neathery, 52 F.3d 634 (7th Cir. 1995) (In the district court, the mother of an inmate won a suit against a prison after another inmate, in front of guards, sprayed her son with chemical solvent for several minutes. The inmate later died of unrelated causes. Defendants appealed, claiming that the jury instruction describing the proper standard of deliberate indifference was incorrect. The court, after a thorough discussion on the definition of "reckless indifference," determined that the jury instructions did not adequately define the term "reckless," and remanded the case for a new trial.)

Jones v. Banks, 892 F. Supp. 988 (N.D. Ill. 1995) (The Chief Judge granted reconsideration of this ' 1983 case based on an Eighth Amendment violation. A prison guard gave a prisoner access to the plaintiff's cell so that prisoner could beat-up the plaintiff. The court held that there was a genuine issue of material fact as to whether the guard's behavior amounted to a "brutal and demeaning attack on the psyche." Id. at 989 (quoting Malewski v. O'Leary, 1990 WL 43275, at *3 (N.D. Ill. Apr. 5, 1990)). The clearly established right of protection from other inmates was violated, therefore the guard was not eligible for qualified immunity.)

Rutledge v. Springborn, 836 F. Supp. 531 (N.D. Ill. 1993) (Holding that a factual issue existed as to whether prison officials acted with deliberate indifference when they knew of threats and failed to prevent an inmate attack.)

(2) Inmate Failed to State or Prove Claim

Langston v. Peters, 100 F.3d 1235 (7th Cir. 1996) (The court held that prison officials were not deliberately indifferent to the risk of inmate retaliation after inmate was raped by cellmate. The court found that prison officials were not sufficiently aware the plaintiff would be subject to inmate retaliation and evidence showed he was not retaliated against.)

Davis v. Scott, 94 F.3d 444 (8th Cir. 1996) (The court considered the transfer of a known prison informant from protective custody to the general prison population where he was physically assaulted. The court held that the inmate failed to state an Eighth Amendment violation because he could not provide prison officials with a specific list of potential attackers prior to the transfer. Thus, prison officials could not identify a serious risk to the inmate's safety.)

Jelinek v. Greer, 90 F.3d 242 (7th Cir. 1996) (Inmate was brutally beaten by a fellow inmate after transfer from protective custody. The court held that the inmate failed to state an Eighth Amendment violation. The court reasoned that although he was removed from protective custody, he was not transferred to the general prison population but only to a less protective area than protective custody.)

Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (Plaintiff's allegation that jail officials knowingly subjected her to a substantial risk of danger when they placed her in a segregation cell with a mentally ill cellmate who physically attacked her was enough to state a due process claim. The court affirmed summary dismissal of the denial of medical care claim for failure to allege the necessary mental state. Although the state cannot place pretrial detainee in segregation for no reason, uncontradicted affidavit explaining that the plaintiff was placed in administration segregation for her protection and protection of other inmates following a verbal confrontation supported summary judgment for defendant. Actions under Illinois statute did not require due process before being placed in segregation for non-punitive reason.)

Gibbs v. Franklin, 49 F.3d 1206 (7th Cir. 1995) (Inmate lost a ' 1983 action alleging prison liability for injuries caused when guards failed to stop another prisoner from beating plaintiff. Plaintiff argued that jury instructions on what state of mind the defendants must have had for the plaintiff to recover were improper. The lower court had told the jury that the plaintiff's injury had to be "readily" preventable in order for him to recover. The court, rejecting plaintiffs argument that deliberate indifference can be inferred from guard's failure to act reasonably, held that the plaintiff's reading of Farmer was incorrect and the that jury was properly instructed,.)

Thorton v. Brown, 47 F.3d 194 (7th Cir. 1995) (The court held that the Illinois Department of Corrections, by not protecting the prisoner from attack by other inmates, did not violate his rights under the Eighth and Fourteenth Amendments to be free from cruel and unusual punishment. The factual findings of the magistrate judge were not clearly erroneous and therefore were affirmed.)

Torrence v. Musilek, 899 F. Supp. 380 (N.D. Ill. 1995) (Prisoner claimed that guards violated the Eighth Amendment prohibition against cruel and unusual punishment by showing deliberate indifference to his physical assault by other inmates. However, because the prisoner did not know he was in danger of assault and did not complain to the guards ahead of time, the court held that at worst, the guard's slow response to his assault was negligent, and that without a showing of recklessness or deliberate indifference, there could be no ' 1983 recovery.)

Illinois Department of Corrections Rules:

20 Ill. Admin. Code " 112.10-112.50 (1987): Internal Investigations.
20 Ill. Admin. Code " 501.300-.350 (1987): Protective Custody.
20 Ill. Admin. Code ' 503.20 (1987): Classification of Committed Persons.

Section 19. Guard-on-inmate Assaults - Excessive Use of Force

Introductory Comment

The leading United States Supreme Court case in this category is Hudson v. McMillian, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992), which held, as a general principle, that the use of force by prison guards violates the Eighth Amendment when it is not applied "in a good-faith effort to maintain or restore discipline" but, rather, is administered "maliciously and sadistically to cause harm." Id. at 7. The decision also held that the inmate must demonstrate some injury, although it need not be a significant one. 7

The defenses in this case are twofold, asserted together or singly. First, expect the claim that the assault simply did not happen. The plaintiff's testimony will raise a question of fact. Again, circumstantial support for the plaintiff's position will be critical where other officers do not (and rarely will) support the prisoner. (As stated elsewhere, other prisoner testimony often does not carry weight with the trier of fact because of the witness' status as a prisoner and prior felony conviction.) The second position taken is that even if there was an assault (for example, a gunshot wound), the officer acted to protect the life or limb of himself (or herself), another officer, or even another inmate.

The typical jury instructions in this type of case are harsh, requiring plaintiff to show that harm was inflicted by a correctional officer for malicious purposes, for punishment, and not to maintain security. Read the cases that follow Hudson carefully. Several rulings, particularly from other circuits, are not quite as harsh as the black-letter rule of law. And as always, be creative in your investigation.

Decisions

(1) Inmate Stated or Proved Claim

Yang v. Hardin, 37 F.3d 282 (7th Cir. 1994) (The court held that a sibling could not recover in a ' 1983 case for loss of society and companionship.)

Thomas v. Stalter, 20 F.3d 298 (7th Cir. 1994) (Inmate, under investigation for stabbing of another inmate, refused to give a court-ordered blood sample. While officers restrained him so that a lab technician could draw the blood, one officer allegedly punched the prisoner in the mouth, knocking loose four front teeth which subsequently had to be pulled. The court held that the district court erred in granting defendants' judgment notwithstanding the verdict. Test for excessive force is whether force was applied in good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. The court held that the jury could have reasonably found that the prisoner-plaintiff made out a prima facie case, because nine other people were restraining the prisoner and the punch in face was not necessary to carry out the court order.)

Hill v. Shelander, 992 F.2d 714 (7th Cir. 1993) (The court held that qualified immunity did not apply in case where officer was alleged to have grabbed plaintiff's hair and shoulder, slammed his head and back against bars, hit him twice in the face and then kicked him in the groin. Clearly established authority prohibited this excessive force. In addition, plaintiff alleged

sufficient facts to show that defendant's intent was to punish, thereby meeting the intent requirement necessary to overcome a motion for summary judgment based on qualified immunity. The court found that defendant's assertions raised an issue of fact regarding intent; thus the court lacked jurisdiction on the summary judgment issue. (See also Hill v. Shelander, 924 F.2d 1370 (7th Cir. 1991).)

Stachniak v. Hayes, 989 F.2d 914 (7th Cir. 1993) (Defendants' objections to excessive force jury instruction deemed waived because defense attorney failed to object in a specific and timely fashion. Excessive force instruction to consider whether the force exerted was necessary and reasonable in light of all surrounding facts and circumstances was deemed proper. Exclusion of a "mere inadvertence" jury instruction was proper with regard to officer kicking plaintiff. The court considered it impossible to inadvertently "kick." Testimony from a defense expert was properly excluded because the expert admitted that (1) he could not give expert advice regarding the proper use of force against persons resisting arrest, and (2) he was biased and would weigh his opinion in favor of the police. Record provided reasonable basis for jury's denial of punitive damages.)

Pyka v. Village of Orland Park, 906 F. Supp. 1196 (N.D. Ill. 1995) (Arrestee's sister brought ' 1983 action after arrestee committed suicide while in custody of municipality. T he court held that one officer could be held liable if he or she knowingly did not intervene in another officer's use of excessive force and had a "realistic opportunity to intervene." Id. at 1226.)

Winder v. Leak, 790 F. Supp. 1403 (N.D. Ill. 1992) (In this excessive force case, Judge Aspen held that summary judgment was inappropriate because of the existence of material facts in dispute and inmate did allege excessive force. Inmate did not show violation of due process at the disciplinary hearing on the issue of refusal to allow inmate to call witnesses.)

(2) Inmate Failed to State or Prove Claim

Wilson v. Groaning, 25 F.3d 581 (7th Cir. 1994) (The court held that the evidence of an inmate spitting on corrections officers, as well as evidence of prior convictions, was properly admitted at trial to determine whether officers had used excessive force to transport the inmate.)

Kinney v. Indiana Youth Ctr., 950 F.2d 462 (7th Cir. 1991) (Officer did not violate Eighth Amendment by shooting escaping prisoner where officer acted in good faith. No evidence existed showing officer acted with the intent to inflict unnecessary pain and the prisoner was on notice that the officer would shoot him if he attempted to escape.)

Soto v. Dickey, 744 F.2d 1260 (7th Cir. 1984) (Mace, tear gas, and other chemical agents of like nature are allowed when reasonably necessary to prevent riots, escapes, or to subdue recalcitrant prisoners, even if the inmate is locked in his prison cell or is in handcuffs.)

Section 20. Medical Care

Introductory Comment

In Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 785 (1976), the Supreme Court established that a prisoner could recover under the Eighth Amendment, which prohibits the unnecessary and wanton infliction of pain, if the prisoner established a "deliberate indifference" to the serious medical needs of the prisoner. In the scores of cases that have followed Estelle, no "bright line" has been established as to the meaning of "deliberate indifference" (the same phrase used in the inmate assault cases, PART II, Section 18: Inmate-on-Inmate Assaults - Duty to Protect, but with a different interpretation) or of "serious medical needs." Rather, the Court has simply, from time-to-time stated that Estelle means what it says. For example, in Wilson v. Seiter, 501 U.S. 294 (1991), the Court emphasized that the Estelle standard includes a subjective state-of-mind requirement, as it requires a "wanton infliction of pain." Id. at 297 (citing Estelle, 429 U.S. at 104) (citation omitted).

It is suggested that appointed counsel carefully read Estelle and Seiter and the cases listed below to obtain a "feel" for the approach the Seventh Circuit and Northern District judges have taken in these cases. Estelle itself lists three types of cases which probably cover the types of cases in which counsel is appointed to represent the prisoner: first, where the prison doctor refused to treat the prisoner after inadequate care or no care had been rendered by lower ranking staff, such as a medical technician; second, where prison guards intentionally delayed or denied access to medical care; and third, where guards intentionally interfered with treatment once prescribed.

It is also suggested that counsel approach this type of case like a medical negligence case with the understanding that much more is required in an Eighth Amendment action (that is, a subjective state of mind that indicates deliberate indifference). First, do research in medical textbooks for lawyers at local law schools (John Marshall Law School has the necessary materials) or local medical schools to learn the basic terminology and nature of care for the type of injury and treatment involved. Then have a qualified physician **8** review the medical records, the client and witness statements, depositions, etc., to determine if there has been, at the very least, a deviation from the accepted standard of care required of physicians, hospitals, or other medical providers in the situation in which the client is involved.

If you can meet the "negligence" standard, then move to the deliberate indifference level. Again, your expert and medical treatises may establish that the client's condition was serious and the treatment needed was obvious to any practitioner or even a lay person; hence, the failure to treat the serious medical needs of the client was deliberate.

Decisions

(1) Inmate Stated or Proved Claim

Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996) (Inmates were not required to call a medical expert as witness in ' 1983 action against prison guards arising from beatings and the failure to provide pain medication within first forty-eight hours after the beatings; requiring threshold showing of "objective" injury would confer immunity from claims of deliberate indifference on sadistic guards, as it is possible to inflict substantial and prolonged pain without leaving any "objective" traces on body of victim.)

Kelley v. McGinnis, 899 F.2d 612 (7th Cir. 1990) (The court ruled that the district court's conversion of a motion to dismiss into a motion for summary judgment, without giving the pro se plaintiff notice, was improper under Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982); and further found that plaintiff alleged sufficient facts to prevail on an Eighth Amendment claim, if he could substantiate his claims. Among his allegations were claims that non-medical personnel repeatedly denied him access to a doctor and that long term negligent treatment amounted to deliberate indifference to his serious medical needs. The court stated that relief under this second theory was not foreclosed and cited numerous examples of cases which may support such an Eighth Amendment claim.)

Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987) (Inmate stated a cause of action against prison officials and prison doctor under Eighth Amendment by alleging that she was a pre-operative transsexual, a condition which presented a serious medical need, and that prison officials and doctor were deliberately indifferent to that need by failing to provide any kind of medical treatment.)

Matzker v. Herr, 748 F.2d 1142 (7th Cir. 1984) (A pretrial detainee's due process right to be free from punishment is violated when a jailer fails properly and reasonably to procure competent medical aid for the prisoner when suffering from a serious illness or injury while confined. Pretrial detainee stated a cause of action where he alleged serious injuries to his eye and teeth, told his jailers of his injuries and pain, and sustained permanent injury when jailers failed to procure medical aid for three months.)

Wellman v. Faulkner, 715 F.2d 269 (7th Cir. 1983) (Deliberate indifference to serious medical needs of prisoners may be evidenced by repeated examples of negligent acts which disclose a pattern of conduct by prison medical staff, or by proving there are such systematic and gross deficiencies in staffing, facilities, equipment, or procedures that inmate population is effectively denied access to adequate medical care.)

Walker v. Godinez, 912 F. Supp. 307 (N.D. Ill. 1995) (Motions for summary judgment denied in this prisoner's action alleging deliberate indifference to medical needs. Prisoner claimed that two guards repeatedly blew cigarette smoke in his face, sparking asthmatic attacks requiring medical attention. The court explained that deliberate indifference was "consciously disregarding a substantial risk of serious harm." Id. at 311-12 (quoting Farmer v. Brennan, 511 U.S. 825, 839 (1994) (citation omitted)). The court also recognized that there was a genuine issue of fact as to whether defendant supervisors were aware of the officers' conduct and condoned it.)

Viero v. Bufano, 901 F. Supp. 1387 (N.D. Ill. 1995) (Parent of deceased juvenile in IDOC custody sued under ' 1983 claiming that the department showed deliberate indifference to the juvenile's mental health needs and were responsible for his suicide. In this action, a motion to dismiss was denied because the defendants were aware of the youth's psychological disorders and medication needs. The probation officer defendant was not allowed to claim quasi-judicial immunity for her actions.)

Chaney v. City of Chicago, 901 F. Supp. 266 (N.D. Ill. 1995) (Defendants' motions to dismiss were denied in pre-trial detainee's case alleging refusal of medical treatment in violation of his due process rights under the Fourteenth Amendment. Note that the Eighth Amendment applies only to convicted prisoners.)

Williams v. O'Leary, 805 F. Supp. 634 (N.D. Ill. 1992) (Inmate's allegations of on-going

negligent medical treatment supported inference of deliberate indifference and precluded summary judgment on his ' 1983 action. Mere volume of medical attention is insufficient to defeat Eighth Amendment claim.)

Harris v. O'Grady, 803 F. Supp. 1361 (N.D. Ill. 1992) (A blind pretrial detainee created inference of deliberate indifference in his ' 1983 action when he alleged that the correctional officers refused to respond to his pleas for corrective lenses, handicapped housing and medical attention during the eight months he was in Cook County Jail.)

(2) Inmate Failed to State or Prove Claim

Forbes v. Edgar, 112 F.3d 262 (7th Cir. 1997) (Inmate who contracted tuberculosis claimed that prison officials were deliberately indifferent to her medical needs when they allowed tuberculosis to be spread in prison. The court found that the defendants had implemented tuberculosis control procedures recommended by the Center for Disease Control and the American Thoracic Society. Thus, the court affirmed the lower court's grant of summary judgment for the defendants.)

Gutierrez v. Peters, 111 F.3d 1364 (7th Cir. 1997) (Inmate's infected cyst constituted a "serious medical need." However, the court held prison officials' treatment of the plaintiff's condition did not constitute deliberate indifference. The court noted defendants prescribed antibiotics and sitz baths to treat the plaintiff's condition. Thus, the court affirmed the lower court's judgment for the defendants.)

Snipes v. DeTella, 95 F.3d 586 (7th Cir. 1996) (Physicians' failure to anesthetize an inmate's toe before removing a toenail did not constitute cruel and unusual punishment. According to the court, "What we have here is not deliberate indifference to a serious medical need, but a deliberate decision by a doctor to treat a medical need in a particular manner." Id. at 591. The court held it was a question of tort law, rather than constitutional law.)

Estate of Cole v. Fromm, 94 F.3d 254 (7th Cir. 1996) (The rights of a pretrial detainee who committed suicide were analyzed under the Fourteenth Amendment. In the instant case, the court held prison medical officials were not deliberately indifferent to the serious medical needs of the deceased. The plaintiff failed to show that the defendants were subjectively aware that the detainee would attempt to commit suicide. Thus, the court granted the defendants' motion for summary judgment.)

Oliver v. Deen, 77 F.3d 156 (7th Cir. 1996) (Prisoner sued because he was asthmatic and the prison ignored his medical needs by repeatedly housing him in cells with smoking prisoners. On appeal from summary judgment for defendants, the court affirmed, holding the plaintiff's condition was not sufficiently serious to implicate Eighth Amendment issues.)

Benson v. Godinez, 919 F. Supp. 285 (N.D. Ill. 1996) (Prison officials did not violate the Eighth Amendment where inmate alleged that officials placed him in a cell with inadequate heating and ventilation. The court found that while these conditions could be sufficient to establish an Eighth Amendment violation, they were insufficient in the instant case because the inmate was provided with warm clothes and there was a "chuckhole" in cell door for ventilation. In addition, the court noted that the inmate suffered only from colds and a sore throat.)

Freeman v. Fairman, 916 F. Supp. 786 (N.D. Ill. 1996) (Prison officials did not violate the Eighth Amendment where the estate of deceased inmate alleged that officials misdiagnosed

the inmate upon his entry into prison. The court noted that where officials examined the inmate, found no liver abnormalities, and started the inmate on tuberculosis medication, they were not deliberately indifferent.)

Illinois Department of Corrections Rules:

20 Ill. Admin. Code ' 415.20 (1995):	Definitions (Mental Health Professional).
20 Ill. Admin. Code ' 415.30 (1997):	Medical and Dental Examinations and Treatment.
20 Ill. Admin. Code ' 415.60 (1995):	Review of Placements in a Specialized Mental Health Setting.

Section 21. Access to the Court

Introductory Comment

A prisoner will sometimes charge that he or she does not have adequate help in filing lawsuits, that the prison has failed to provide access to the law library, that the law library is inadequate, that the prisoner could not leave the segregation unit to go to the library, or that no inmate law clerk or civilian paralegal came to the segregation unit to provide help. Under the Supreme Court's initial leading decision in this area, Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), relief could often be obtained - a court would order that the system be improved. However, the Court in Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996), severely limited the Bounds decision. As a consequence, all "access to the court" cases, as well as decisions written prior to Lewis, must be considered in the light of Lewis.

In Lewis, the Court held that the right of access covers no more than the narrow right to present a non-frivolous claim to the Court. Only when a prisoner can demonstrate that such a claim has been frustrated or impeded by prison practices is the right of access violated. Stated differently, to have constitutional standing to bring an action, the prisoner must demonstrate that the inadequacies in the system caused him or her concrete injury, that is, for example, that the prisoner was unable to comply with technical filing requirements or to bring an action at all due to the inadequacies in the system.

Moreover, Lewis limits the application of the "inadequate access to the law theory" to cases that involve either a direct appeal of a criminal conviction, a habeas corpus petition, or a civil rights action challenging conditions of confinement.

As of the date of the publication of the revision of this handbook (Nov. 1998), the law is still very much developing after Lewis. A number of questions are still unanswered: What degree of proof establishes that the claim that the prisoner was prevented from pursuing was a "non-frivolous" claim? Can the requirement be satisfied by a prima facie showing or is there to be a "trial within a trial?" If a system is truly bad, can there never be injunctive corrective relief if no prisoner can show specific harm?

Prior to Lewis, Seventh Circuit law on this issue was not consistent, particularly when injunctive relief was sought. Some of the following Seventh Circuit decisions, although issued prior to Lewis, anticipated Lewis and can still be helpful.

Decisions

Gentry v. Duckworth, 65 F.3d 555 (7th Cir. 1995) (Inmate filed a ' 1983 action, claiming that the prison, by not providing scribe materials for his habeas petition, barred his access to the court. The appellate court held that because not only was it possible for plaintiff to have won his claim on a procedural ground, but also quantum of detriment does not mean that the inmate must show he would have won. Inmate was at least somewhat deterred because he could not even bring his case to be heard.)

Brooks v. Buscher, 62 F.3d 176 (7th Cir. 1995) (Problem inmate placed on circuit rider system challenged constitutional adequacy of system of indirect access to prison law library.

Meaningful access to the courts is denied only when a system of indirect access restricts too greatly a prisoner's ability to do basic research. It is enough to enable him to formulate legal theories and get through the initial stages of a civil suit. Right of access to the court does not require that intermediaries providing access to law libraries be trained in law. Restrictive system of intermediaries, as set up here, was sufficient to give meaningful access because restrictions were based upon legitimate security considerations. The court suggested that where unskilled inmates are

concerned, something more than mere physical access may be required to satisfy Bounds, perhaps "some minimal aid." Id. at 181.)

Smith v. Shawnee Library Sys., 60 F.3d 317 (7th Cir. 1995) (Inmate claimed that he and other inmates in protective custody had been denied meaningful access to the courts. They were given books by non-inmate law librarian and inmate law clerks. Plaintiff failed to establish that the prison failed to "assist in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law," and did not show damage resulting from the lack of meaningful access. Id. at 323 (quoting Jenkins v. Lane, 977 F.2d 266, 268 (7th Cir. 1992) (citation omitted).)

Curry v. Pucinski, 864 F. Supp. 839 (N.D. Ill. 1994) (Summary judgment for defendant clerk was denied. Plaintiff, a Pontiac prisoner, sued the clerk for violating his right of access to courts by failing to provide the records necessary for a meaningful and timely appeal. The concept of meaningful access includes a requirement that inmates be provided access to their underlying records in an appeal of a criminal conviction. Though the clerk provided some of the record, a material factual dispute existed as to whether all of the necessary record was provided.)

Partee v. Cook County Sheriff's Dep't, 863 F. Supp. 778 (N.D. Ill. 1994) (A criminal defendant's access to court was not denied, even though he claimed that on some occasions state denied him access to legal materials; defendant had access to an attorney through most of the proceedings in question. The court stated, "[a]s a general rule, the appointment of counsel is sufficient to discharge the state's obligation to provide an inmate with meaningful access to the courts." Id. at 781. Eighth Amendment rights of prisoner were not violated when he was kept for a "few hours" on several occasions before his court appearances in a holding cell which lacked cold drinking water or toilet paper.)

Eason v. Nicholas, 847 F. Supp. 109 (C.D. Ill. 1994) (In this access to court case, the court granted summary judgment for the defendants based on the plaintiff's undisputed and extensive access to the law library facilities, which, according to the court, made his claim completely groundless. Further, plaintiff did not show the prejudice required under Shango v. Jurich, 965 F.2d 289 (7th Cir. 1992). Plaintiff's foregoing lawsuits and those related to doing without articles of hygiene also failed because defendants provided both basic needs and legal needs.)

Section 22. Transfers

Introductory Comment

Transfers from one prison to another within the Illinois Department of Corrections are within the virtually unchallengeable discretion of the IDOC.9 The Supreme Court has with increasing frequency stated that the Due Process Clause is not applicable to most transfers. For example, see Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976); Montanye v. Haymes, 427 U.S. 236, 96 S. Ct. 2543, 49 L. Ed. 2d 466 (1976).

There are, of course, exceptions: retaliation for the exercise of a vested right, in response to a prisoner's suit alleging a violation of civil rights, and transfers that put the prisoner at risk because of known, identified enemies at the transferee institution (although within limits this issue can be resolved often at the administrative level of the IDOC).

Transfers to out-of-state prisons pursuant to agreement with those states and transfers of mentally ill prisoners raise much more complex issues. The cases cited below touch on these issues and also provide a good sample of the difficulties in attacking transfers.

Decisions

(1) In General

Olim v. Wakinekona, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983) (Transfer of state prisoner from Hawaii to California did not violate due process. A state creates a protected liberty interest by placing substantive limitations on official discretion. Hawaii's prison regulations placed no such limitations on transfer decisions merely by establishing procedures. Process, i.e., procedures, standing alone does not create a substantive interest to which the individual has a legitimate claim of entitlement, but exists only to protect an independent substantive interest.)

Ramirez v. Turner, 991 F.2d 351 (7th Cir. 1993) (Plaintiff's transfer to Marion Penitentiary did not violate due process. Plaintiff did state a prima facie bias case from hearing officer's pre-hearing statements to plaintiff.)

Gee v. Cripe, 853 F.2d 510 (7th Cir. 1988) (The court held that the "transfer rule" in effect in the Southern District of Illinois, which required federal prisoners to remain in Marion so long as they had litigation pending in that district, was invalid. The court determined that dismissal of the plaintiff's suit based on the invalid rule cannot be deemed "voluntary" within the meaning of Fed. R. Civ. P. 41(a).)

Mathews v. Fairman, 779 F.2d 409 (7th Cir. 1985) (The administrative regulation governing prison reassignment did not create a protectable liberty interest, and inmate failed to produce sufficient evidence upon which jury could properly find his reassignment was a disciplinary action entitling him to certain due process protections.)

Harris v. McDonald, 737 F.2d 662 (7th Cir. 1984) (Inmate's intrastate transfer from

medium- to maximum-security institution implicated no constitutionally based or state-created liberty interest entitling him to pre-transfer hearing.)

Armstrong v. Lane, 771 F. Supp. 943 (C.D. Ill. 1991) (The court held that as a matter of law, the circuit-rider program conditions were not violative of the Eighth Amendment.)

Persico v. Gunnell, 560 F. Supp. 1128 (S.D.N.Y. 1983) (Prisoner's complaint challenging a series of interprison transfers failed to state a claim of cruel and unusual punishment.)

(2) Retaliation

Brookins v. Kolb, 990 F.2d 308 (7th Cir. 1993) (The court found no retaliation against prisoner by defendants in transferring him; rather, the transfer was based on prisoner's violation of established prison policy.)

Moore v. Thieret, 862 F.2d 148 (7th Cir. 1988) (Inmate brought suit under ' 1983 against prison officials, charging that he was repeatedly assaulted by inmate gang members who were acting with the approval of prison staff. While plaintiff's appeal from the denial of his motion for preliminary injunction was pending, the state transferred him to another prison. If and when the state tries to return plaintiff to Menard, plaintiff can renew his Motion for Preliminary Injunction and appeal to the Seventh Circuit if the motion is denied. However, if plaintiff can show that he is likely to be retransferred to Menard, then, according to Vitek v. Jones, 445 U.S. 480 (1980), he doesn't have to wait for the retransfer but can ask the district court judge for preliminary injunction upon stating that the injunctive phase of the suit remains alive.)

Murphy v. Lane, 833 F.2d 106 (7th Cir. 1987) (Inmate stated a claim for retaliatory transfer where his complaint set forth a chronology of events demonstrating that his transfer immediately followed his filing of four lawsuits against prison officials, permitting an inference of retaliatory animus.)

Ustrak v. Fairman, 781 F.2d 573 (7th Cir. 1986) (Evidence supported finding that warden's refusal to transfer inmate to medium security was in retaliation for inmate's letters complaining of racial discrimination.)

Shango v. Jurich, 681 F.2d 1091 (7th Cir. 1982) (State officials may not transfer prisoners with or without a hearing to punish them for exercising their constitutional rights. Procedural protections standing alone do not create substantive liberty interests. See also Eason v. Nicholas, 847 F. Supp. 109 (C.D. Ill. 1994).)

Lucien v. Peters, 840 F. Supp. 591 (N.D. Ill. 1994) (Prisoner brought an action against prison officials alleging that he was transferred and otherwise punished in retaliation for having filed an earlier civil rights suit. The court dismissed the plaintiff's equal protection claims, but denied dismissal of the two remaining counts seeking injunctive relief and damages and ordered defendants to answer.)

(3) Out-of-State Transfer

Falcon v. United States Bureau of Prisons, 52 F.3d 137 (7th Cir. 1995) (Pretrial inmate challenged transfer from Miami Metropolitan Correctional Center to the United States

Penitentiary at Marion, Illinois, via habeas corpus. The court held that habeas corpus was inappropriate in this circumstance. Prisoners may use habeas corpus to contest custody or contest a change in the level of confinement. Other actions, however, require a civil suit. Graham v. Broglin, 922 F.2d 379 (7th Cir. 1995). Occasionally, courts will look on improper habeas petitions as civil suits, but usually only when the plaintiff is pro se. Because petitioner in this case had retained a number of experienced attorneys, the court did not regard the case as misfiled. The court noted that the proper method of redress in this case was to seek relief from the Florida trial judge before whom petitioner's case was pending.)

Sayles v. Thompson, 75 Ill. Dec. 446, 457 N.E.2d 440 (Ill. 1983) (Out-of-state transfers of prisoners pursuant to the Interstate Corrections Compact do not violate the transportation clause of the Illinois Constitution, Ill. Const. art. I, ' 11.)

Illinois Department of Corrections Rules:

20 Ill. Admin. Code " 503.100-.160 (1987): Transfers.

Section 23. Visiting

Introductory Comment

Again, as with transfers, visits to prisoners may be strictly curtailed based on the reluctance of courts to interfere with the administration of prisons and the respect given the need for security. Although the Supreme Court has not yet passed on the question of due process and visits, most commentators believe that the Court will not interfere with the discretion of prison administrators on this issue.

The following cases suggest that limitations may be put on visits by particular visitors, and on the time and place of the visits.

However, certain decisions also suggest that state laws and regulations may create a liberty interest that could serve as the basis for legal action where visits are arbitrarily denied or abridged.

Decisions

Block v. Rutherford, 468 U.S. 576, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984) (Due process does not require contact visitation even for low-risk pre-trial detainees.)

Williams v. Schomig, 1997 WL 28073 (N.D. Ill. May 21, 1997). (This case applied a post-Sandin analysis of a prisoner's potential due process rights to visitation privileges. The court began by noting that the Seventh Circuit does not recognize a visitor's liberty interest in access to a prison. Id. at *2 (citing Mayo v. Lane, 867 F.2d 374, 375-76 (7th Cir. 1989)). The court then stated, following the holding in Sandin, that the critical issue is whether the prisoner "has established that the deprivation of . . . visitation imposes an atypical and significant hardship." Id. The court concluded that "the restriction of visitation privileges for one, nonfamily individual is not atypical or significant and does not implicate a liberty interest." Id. at *3. It bears noting that the court acknowledged that "[t]he Seventh Circuit has not decided whether an Illinois prisoner has a liberty interest in receiving visitors generally." Id. at *2. For a step-by-step analysis of due process for visitation rights, see Logan v. Lane, 1989 WL 11276 (N.D. Ill. Sept. 15, 1989).)

Mayo v. Lane, 867 F.2d 374 (7th Cir. 1989) (Plaintiff, who was forbidden to visit a prisoner, alleged she was deprived of liberty and property without due process and in violation of the Fourteenth Amendment. Plaintiff had no standing to assert constitutional right to visit prisoner because there was no allegation that plaintiff was injured by the order barring her visits. This fact situation was analogized to a person locked outside a room.)

Logan v. Lane, 1989 WL 11276 (N.D. Ill. Sept. 15, 1989). (The court denied the defendant's motion for summary judgment and held that a prisoner does have a protected liberty interest in visitation founded on the Illinois visitation statute's substantive and procedural requirements for the denial if visitation privileges. Id. at *2 (relying on Hewitt v. Helms, 459 U.S. 460 (1983)). The court continued by elaborating what process is due and based its conclusions on the necessary balance between the very real governmental interest in prison safety with (1) the inmate's interest in visitation, (2) the potential for other forms of prisoner-visitor communication, and (3) the prisoner's expectations as to visitation rights "must be limited" after a

lawful conviction. Id. at *3. The court then concluded by presenting a catalog of the ways in which due process may be satisfied. Id. at *4. As applied to the case before it, the court then denied the plaintiff's motion for summary judgment as it was a factual question whether the prison had properly adhered to the court's analysis of due process. Id.)

Flournoy v. Fairman, 897 F. Supp. 350 (N.D. Ill. 1995) (Having previously held that under Illinois law pre-trial detainees had a liberty interest in visitation, the court limited that liberty interest to "certain situations." The statutory language created minimum standards, which were not violated by this defendant, thus the ' 1983 claim was dismissed. The court also held that there is no liberty interest in grievance procedures, either constitutional or state-created.)

Gavin v. McGinnis, 866 F. Supp. 1107 (N.D. Ill. 1994) (Denial of visitation is not violative of due process where the prison mailed the prisoner a letter informing him of the reasons for limiting visitation and afforded him an opportunity to contest the decision. Where Illinois statute afforded prisoner liberty interest in visitation, visit from sister could not be denied without due process.)

Gavin v. McGinnis, 788 F. Supp. 1012 (N.D. Ill. 1983) (District court denied defendant's motion to dismiss for failure to state a claim when plaintiff's pro se complaint claimed that he was denied visitation privileges with his family. The court, however, refused to decide at this stage in the litigation whether a prisoner has a protected liberty interest in visitation.)

In re B.A., 283 Ill. App. 3d 930, 671 N.E.2d 69 (Ill. App. 3 Dist. 1996) (Lower court order permitting an inmate to leave the prison facility to visit his daughter was reversed. The court held that the plaintiff did not have a due process right to be periodically transported from the correctional facility for the purpose of visiting his daughter. The court noted that the curtailment of the plaintiff's visitation was reasonably related to the legitimate penological interest in maintaining the security of prisoners and the safety of the public.)

Illinois Department of Corrections Rules:

20 Ill. Admin. Code ' 525.20 (1997): Visiting Privileges.
20 Ill. Admin. Code ' 525.60 (1997): Restriction of Visitors.

Section 24. Freedom of Religion

Introductory Comment

The leading Supreme Court opinion, O'Lone v. Estate of Shabazz, 482 U.S. 342, 107 S. Ct. 1400, 96 L. Ed. 2d 282 (1987), severely limits prisoners' actions for claimed First Amendment violations of their freedom to practice the religion of their choice. The case demonstrates that where actions brought by "free-world" plaintiffs would succeed (such plaintiffs being entitled to strict judicial scrutiny of government action), these same actions are judged differently in a prison setting, where issues of security, as in many other areas, cut across such rights.

In Shabazz, Muslim inmates in a minimum-security classification requested permission to attend services held in another portion of the prison. Plaintiffs claimed that these services were essential to the practice of their religion. The request was denied on the basis of security, and the good faith of plaintiffs was not disputed. The Court upheld the denial, holding that "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Id. at 349 (quoting Turner v. Safley, 482 U.S. 78, 89 n.2 (1987)). To determine whether there was such a relationship, the trial court should consider (1) whether there is a logical connection between the restriction and the governmental interests invoked to justify it; (2) the availability of alternative means to exercise the restricted right; (3) the impact that accommodation of the right might have on other inmates, on prison personnel, and on allocation of prison resources generally; and (4) whether there are "obvious, easy alternatives" to the policy that could be adopted at de minimis cost.

The decisions discussed below demonstrate the heavy burden Shabazz places on a prisoner- plaintiff in these actions and the heavy discovery appointed counsel must undertake to satisfy the Shabazz test.

In 1993, the Religious Freedom Restoration Act in essence would have overruled Shabazz. 4 2 U.S.C.A. ' 2000bb-1 (West 1994). The Act provides in part:

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person - (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.

Id. at " 2000bb-1(a)-(b).

The Act further provides that a person whose rights have been burdened can sue in federal court and, when successful, can obtain appropriate relief, including damages, an injunction, or both. Id. at ' 2000bb-1(c).

While the Act did not remove all obstacles to a prisoner's religious rights claim (security has been constructed as a compelling government interest), it did place the burden on the

government to justify the restriction. In Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996), for example, the Seventh Circuit held that the prison failed to demonstrate that a ban on religious crucifixes could be justified on the basis of security.

However, in City of Boerne v. Flores, 117 S. Ct. 2157, 138 L. Ed. 2d 624, 65 U.S.L.W. 4612 (1997), the Supreme Court held the Act unconstitutional, ruling that the Act was outside of Congress' power granted by Section 5 of the Fourteenth Amendment. It would now appear that for state prisoners, the law on religious freedom reverts to Shabazz, although the Act may still be constitutional and viable for federal prisoners.

The following decisions must be carefully considered in light of the foregoing.

Decisions

Richards v. White, 957 F.2d 471 (7th Cir. 1992) (In this religious freedom case, the court upheld summary judgment for defendants. Plaintiff sought one-half hour per day of silence as required by his religion. The court found that this was unreasonable given the legitimate security and management concerns of the prison. The court reviewed the three-part test for balancing religious freedom with legitimate penological objectives.)

Al-Alamin v. Gramley, 926 F.2d 680 (7th Cir. 1991) (Muslim inmates brought a ' 1983 suit against prison officials alleging deprivation of their religious freedom under the First Amendment. The district court awarded plaintiffs one dollar in damages and ordered the Director of the Illinois Department of Corrections to submit statewide written guidelines concerning the accommodation of Muslim inmates to practice their faith. The appellate court reversed, stating that the prison officials satisfied their constitutional responsibility and made reasonable efforts to afford the plaintiffs an opportunity to practice their religion.)

Young v. Lane, 922 F.2d 370 (7th Cir. 1991) (The Seventh Circuit Court of Appeals, reversing the district court, found that the prison regulation regarding wearing of yarmulkes, and other religious practices, was reasonably related to a legitimate penological interests. In mates also challenged the State's refusal to reimburse travel expenses to rabbis, while other clergy received travel reimbursement. The court stated that the alleged violation was not so "clearly established" at the time of the conduct so as to remove the official's qualified immunity. Further, the court said that the district court did not have jurisdiction to order the state to promulgate statewide regulations regarding religious practices.)

Hunafa v. Murphy, 907 F.2d 46 (7th Cir. 1990) (Summary judgment was reversed and the case remanded on the issue of the free exercise rights of a Muslim inmate in disciplinary segregation who was served meals containing pork. The determination of immunity of prison officials did not have to be made until more facts were presented because plaintiff had a claim for an injunction as well as for damages. The court cited Employment Division v. Smith, 494 U.S. 872 (1990) as possibly minimizing the doctrine that requires government to accommodate minority religious preferences.)

Woods v. O'Leary, 890 F.2d 883 (7th Cir. 1989) (Prison regulation requiring approval of mailings was not unconstitutional as applied to prisoner's mailing on behalf of alleged church.)

Siddiqi v. Leak, 880 F.2d 904 (7th Cir. 1989) (While plaintiff, a Muslim, was at Cook County Jail for four months, he was unable to attend Muslim services even after making written and oral complaints to jail authorities. Although there was a Chaplaincy Council - made up of

representatives of religious organizations - at Cook County Jail at the time of the plaintiff's incarceration, there was a dispute among the members of the Muslim community as to which Muslim group would be given access to the jail. No evidence was shown that reflected any restriction on plaintiff's ability to practice religion, except for the inability to attend services and thus, the district court's denial of plaintiff's judgment n.o.v. was sustained.)

Johnson-Bey v. Lane, 863 F.2d 1308 (7th Cir. 1988) (In this case, the prison had two chaplains - one full-time for Protestant services and one full-time for Catholic services (after the case had gone to trial, the prison hired one part-time for Islamic services, but not one for Moorish Islamic services). The court held that, although prisons may employ chaplains, they need not employ ones of every religion of the prisoners. But prisons may not discriminate against minorities except to the extent required by the particular exigencies of prison administration.)

Reed v. Faulkner, 842 F.2d 960 (7th Cir. 1988) (The issue on remand was whether the prison's hair-length regulation enforced against Rastifarians but not against American Indians was valid in light of the First Amendment and equal protection violations alleged by plaintiff.)

Chaka v. Franzen, 727 F. Supp. 454 (N.D. Ill. 1989) (The court held that granting Muslim prison inmate "Juna" religious service did not moot his claim; state officials were not protected by Eleventh Amendment immunity for individual liability, but the prohibition of the services was warranted based on security considerations. Summary judgment for defendant granted.)

Illinois Department of Corrections Rules:

20 Ill. Admin. Code " 425.10-.120 (1995): Chaplaincy Services and Practices.

Section 25. Due Process

Introductory Comment

The concept of due process, usually procedural due process under the Fourteenth Amendment to the Constitution, arises in several contexts in prison litigation. This section will separate these categories as follows: (1) disciplinary proceedings, (2) mental competency hearings, (3) disparate treatment from other prisoners, and (4) parole, work release and outright release.

(1) Disciplinary Proceedings

Introductory Comment

This area of prison law has changed significantly in the last four years (discussed more fully below). The last word has not yet been heard from the Supreme Court. To illustrate the impact of these decisions on disciplinary proceedings, it may be helpful to briefly review the nature of disciplinary proceedings and the manner in which their results were challenged prior to these recent decisions. In the typical case, a prisoner receives a disciplinary report ("ticket") for violations of IDOC rules, IDOC regulations, warden's orders, or other violations. The ticket could cover conduct ranging from minor violations, such as stealing a piece of bread, to truly serious incidents, such as striking an officer. An adjustment committee within the prison holds a hearing on the ticket. The warden appoints all of the committee members, who can include a high-ranking officer, such as a captain or a lieutenant, a correctional officer, a counselor, and in rare incidents, even a civilian. The hearing, by IDOC rules and case law, should have at least minimal procedural due process. See 20 Ill. Admin. Code " 504.30-.150 (1998).

If the adjustment committee finds the prisoner guilty, it will recommend punishment, which could range from loss of privileges to loss of good time and transfer to the prison's segregation unit for a period of time or even transfer to another facility. The matter then goes to the warden for consideration. The warden may (rarely) exonerate the prisoner, accept the committee's recommendation on guilt and punishment, or modify guilt and punishment. If some form of punishment remains after the warden "signs off," the prisoner can then file a grievance with the IDOC's Administrative Review Board. See 20 Ill. Admin. Code ' 504.810-.870 (1998).

If guilt and punishment remain after the board's decision, the prisoner could file a ' 1983 action, alleging due process violations.[10] These charges could include: an insufficiently specific disciplinary charge, the adjustment committee's failure to call witnesses identified by the prisoner, bias by members of the committee, etc. Typically, any one of these charges might state a cause of action for violation of Fourteenth Amendment procedural due process.

The following are changes which significantly alter the law regarding these procedures. As indicated elsewhere, this is a developing area of the law. Annotations to the PLRA and subsequent decisions to the cases discussed must be updated:

The first question is what due process violations in prison disciplinary proceedings are now actionable. I n Sandin v. Connor, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995), the prisoner-plaintiff was sentenced to thirty days punitive segregation for interfering with a strip

search. He claimed that prison officials refused to let him call witnesses at his disciplinary hearing. He sued under ' 1983, claiming that he had been denied procedural due process. The Supreme Court ultimately affirmed the trial court's dismissal of his complaint. Writing for the Court, Chief Justice Rehnquist initially criticized and abandoned the earlier state law "liberty" interest used to determine if procedural violations were actionable because of the vagaries of state law on a state-by-state basis and because numerous rulings had allowed actions for very insignificant violations. The Court then ruled that henceforth, liberty interests that would justify due process protection would exist only when the deprivation or disciplinary sanction exceeded the prisoner's sentence in an unexpected manner (e.g., loss of "good time" that lengthens the sentence or impacts negatively on the chances for parole) or when the punishment imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id. at 484.

The Court then ruled that the sentence of punitive segregation, as alleged, did not meet this test. Prisoners generally are subject to a wide variety of discipline, given the normal range of misconduct that occurs in prison. The punitive segregation did not present a significant departure from the basic conditions of his indeterminate sentence: the plaintiff was confined to his segregation cell for twenty-three hours a day, while prisoners in general population were confined to their cells for twelve to sixteen hours a day. Moreover, the punishment did not appear certain to affect the prisoner's chance for parole, especially since the warden later expunged the underlying incident from the prisoner's record.

Many cases have followed Sandin. H owever, the burden is not insurmountable. Los s of good time as punishment appears to be actionable. Careful investigation of the conditions of confinement in segregation must be pursued. It is essential that a comparison be made with the conditions in general population to determine if segregation in the particular prison at a particular time imposed an atypical and significant hardship in comparison to life in general population.

However, even when the Sandin test is met, the Supreme Court has imposed other obstacles to such actions. In Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), a prisoner was convicted in an Indiana state court of voluntary manslaughter. He filed a ' 1983 action against two prosecutors and a state investigator, alleging improper conduct with regard to evidence alteration, etc., and that as a result he was convicted. His appeals to the Indiana Supreme Court and collateral attacks on his conviction were denied. The Supreme Court held that the complaint was properly dismissed. A claim for damages for an allegedly unconstitutional conviction, imprisonment, or for other actions whose unlawfulness would render a conviction or sentence suspect, is not cognizable under ' 1983 unless the plaintiff proves that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or questioned by a federal court's issuance of a habeas corpus writ.

In Edwards v. Balisok, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997), the Court applied the Heck principle to prison disciplinary proceedings. The plaintiff prisoner at a state penitentiary received a ticket for several internal prison rules violations. The hearing committee found him guilty and sentenced him to ten days in segregation, ten days in "isolation," and thirty days loss of good time. Plaintiff filed a ' 1983 claim, alleging that he was denied his Fourteenth Amendment procedural due process because the hearing committee was biased in that it denied him the opportunity to present exculpatory witness statements.

The district court dismissed the plaintiff's claim on the grounds that no court or other body prior to the suit's initiation had vacated the finding of guilt by the prison hearing committee. The Supreme Court ruled that the principle of Heck was controlling. Although the plaintiff did not seek restoration of his good time credits, a ruling in plaintiff's favor in the ' 1983 action that the disciplinary proceedings were tainted by bias and deceit would assume that the result of the

hearing (loss of good time credits) was necessarily invalid.[11]

Judge Milton Shadur in Umar v. Johnson, 173 F.R.D. 494 (N.D. Ill. 1997) and in Whitlock v. Johnson, 982 F. Supp. 615 (N.D. Ill. 1997), dismissing sub nom., Umar v. Johnson, 173 F.R.D. 494 (N.D. Ill. 1997) explained the relationship between Sandin and Balisok and attempted to harmonize the apparent conflict in the decisions that follow these cases. These decisions are strongly recommended reading.[12] See also Whitlock v. Johnson, 153 F.3d 380 (7th Cir. 1998),aff'g in part, rev'g in part, 982 F. Supp. 615 (N.D. Ill. 1997) (affirming the district court's grant of summary judgment for plaintiffs, while vacating the district court's order to reopen previous disciplinary decisions revoking inmates' good time credits).

However, the area of the law is still developing. As always, careful research of post-Balisok is critical.

Decisions

Thomas v. Ramos, 130 F.3d 754 (7th Cir. 1997) (The court affirmed summary judgment against a Stateville prisoner challenging the due process of a hearing that resulted in segregation time at Stateville Correctional Center. The prisoner had failed to show conditions of confinement were significantly different from that which a general population prisoner might expect).

Lusz v. Scott, 126 F.3d 1018 (7th Cir. 1997) (Summary judgment affirmed where prisoner's attack on disciplinary hearing implied the invalidity of adjustment committee sentence. However, the court suggested that the claim might have been actionable if prisoner had challenged only procedural due process for denial of his request for written statement of reasons for finding of conviction. See also Stone-Bey v. Barnes, 120 F.3d 718 (7th Cir. 1997)).

Miller v. Indiana Dep't of Corrections, 75 F.3d 330 (7th Cir. 1996). (Dismissal of complaint seeking damages for alleged procedural defects in hearing that denied good time credits was proper where prisoner did not allege that he had successfully challenged denial of credits in a separate proceeding.)

Whitford v. Boglino, 63 F.3d 527 (7th Cir. 1995) (In a case where the prisoner claimed unfair disciplinary hearing that resulted in segregation, the court reversed summary judgment because the record was not sufficiently developed to show whether conditions of confinement came within the Sandin rule. Beware, this decision predates Balisok.)

Jones v. Watkins, 945 F. Supp. 1143 (N.D. Ill. 1996) (Granted motion for judgment on the pleadings because prisoner attacking loss of good time failed to allege that he had successfully attacked the findings in a separate hearing).

(2) Mentally Ill Prisoner Transfers

Introductory Comment

The transfer of prisoners to other institutions, such as a mental hospital, raises due process questions different from the disciplinary proceedings discussed above. The leading Supreme Court decision is Vitek v. Jones, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). I n Vitek, the prisoner was transferred from the prison to a mental hospital pursuant to a Nebraska state statute. Under the statute, prior to any transfer, there must be a finding by a

designated physician or psychologist that the prisoner could not receive the proper level of care in the current prison environment. The prisoner attacked the move on procedural due process grounds. The district court declared the statute unconstitutional as applied to the prisoner. The court cited the lack of adequate notice to the prisoner, the lack of an adversarial hearing, and the lack of appointed counsel as the grounds for its decision.

In affirming the bulk of the district court's decision, the Supreme Court agreed that the transfer implicated the Due Process Clause of the Fourteenth Amendment. The Court also agreed that notice and an adversarial hearing were essential for due process; however, the Court balked, in the person of Justice Powell, as to whether the prisoner was automatically entitled to the appointment of a licensed attorney, and on this point the district court decision was modified.

Decisions

Washington v. Harper, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990) (The Due Process Clause permits the State to treat a prisoner who has a serious mental illness with antipsychotic drugs against his will, if he is dangerous to himself or others and the treatment is in his medical interest. Further, the Due Process Clause requires neither a judicial hearing nor representation by counsel before the State may treat with antipsychotic drugs.)

Zinermon v. Burch, 494 U.S. 113, 100 S. Ct. 975, 108 L. Ed. 2d 100 (1990) (A mental patient stated claims under ' 1983 for violation of his procedural due process rights. Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) did not preclude his claim because (1) pre-deprivation procedural safeguards could have prevented the deprivation of liberty, (2) the deprivation was predictable and foreseeable, and (3) because the State delegated power to deprive mental patients of their liberty and the duty to initiate procedural safeguards against unlawful confinement, the defendant-petitioners' conduct was not random or unauthorized under Parratt and Hudson.)

(3) Parole, Work Release and Outright Release

Decisions

Henderson v. United States Parole Comm'n, 13 F.3d 1073 (7th Cir. 1994) (Federal prisoner's writ of habeas corpus was denied. The court decided that the hearing conducted by the Disciplinary Hearing Officer did not violate the prisoner's due process rights under the Fifth Amendment because the prisoner was given advanced written notice of the charges, the opportunity to call witnesses, and a written statement by the fact-finder of the evidence relied on and the reasons for the disciplinary action.)

Felce v. Fiedler, 974 F.2d 1484 (7th Cir. 1992) (A parolee has a constitutionally based liberty interest in not being subjected to psychotropic drugs as a condition of his parole, except where there is a determination of medical appropriateness. But defendants' procedure, whereby the individual's parole agent determined the existence of the proposed medical condition, was violative of due process. However, defendants had qualified immunity because the parolee's procedural rights were not clearly established at the time.)

DeTomaso v. McGinnis, 970 F.2d 211 (7th Cir. 1992) (The court found frivolous, as a matter of law, plaintiff's claim that he was denied work release while others with more extensive prison records were granted work release. Reviewing Joihner v. McEvers, 898 F.2d 569 (7th

Cir. 1990), the court reiterated that the opportunity to be assigned to a work camp creates neither a liberty nor a property interest.)

Joihner v. McEvers, 898 F.2d 569 (7th Cir. 1990) (The court affirmed Judge Marshall's holding that due process was not violated when the prison refused to transfer the prisoner to a requested work camp because there was no protectable liberty interest. The state statutes and regulations contained no mandatory language and did not limit defendant's discretion in deciding which eligible prisoners will be assigned to work camp.)

United States ex rel. Arnold v. Illinois Prison Review Bd., 803 F. Supp. 222 (N.D. Ill. 1992) (In this habeas action based on United States ex rel. Scott v. Illinois Parole and Pardon Bd., 669 F.2d 1185 (7th Cir. 1982), the district court found that when the Parole Board denied plaintiff's parole, the Board might have violated plaintiff's liberty interest.)

(4) Miscellaneous

Decisions

Baxter v. Palmigiano, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976) (If a prisoner elects to remain silent at his prison disciplinary hearing, that silence may be used against him. A prison disciplinary hearing is civil in nature and therefore the Fifth Amendment does not apply.)

Black v. Lane, 22 F.3d 1395 (7th Cir. 1994) (Prison officials violated inmate's procedural and substantive due process rights when they repeatedly and systematically filed and approved false and unjustified disciplinary charges in retaliation for his successful pursuit of administrative complaints. The court found claims were erroneously dismissed and remanded the case for award on damages.)

Row v. DeBruyn, 17 F.3d 1047 (7th Cir. 1994) (The court held that the prison's policy of denying prisoners the right to raise self-defense as a complete defense in a disciplinary hearing did not violate substantive or procedural due process. The policy purportedly advanced prison security by discouraging all physical violence among inmates.)

Pardo v. Hosier, 946 F.2d 1278 (7th Cir. 1991) (In this due process case, plaintiff did not have state liberty interest in remaining in the general prison population; nor did another plaintiff have a liberty interest in being kept in administrative segregation; nor was there any violation of due process in the disciplinary proceeding. The court's reasoning followed the analysis in Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454 (1989), by first analyzing the liberty or property interest, and then whether the procedures were constitutionally sufficient. Under this review, the regulation in question (A.R. 804 (II) (J) (superseded by 20 Ill. Admin. Code ' 504(D) (1985)) did not contain the mandatory language necessary to compel an outcome; nor did the regulation require release if not followed. This case is distinguishable from Hewitt v. Helms, 459 U.S. 460 (1983), where mandatory regulatory language was used.)

Wallace v. Robinson, 940 F.2d 243 (7th Cir. 1991) (A regulation allowing prison officials discretion to act for any reason except discipline does not establish a liberty or property interest for the purpose of the due process clause. Plaintiff, transferred from a prison job paying $100 per month, to one paying $30 per month, followed the grievance procedure and lost before the Institutional Inquiry Board. He then appealed to the Administrative Review Board and then to Director Lane, who upheld the decision. Because this action was not disciplinary, he had no

liberty or property interest in keeping a better paying job.)

Russ v. Young, 895 F.2d 1149 (7th Cir. 1990) (Absent abuse of discretion by prison authorities, placing inmate in temporary lockup is constitutionally allowed and does not constitute a violation of due process.)

Lenea v. Lane, 882 F.2d 1171 (7th Cir. 1989) (The court reviewed the "some evidence" rule of Superintendent v. Hill, 472 U.S. 445 (1985), and held (1) that defendants enjoyed qualified immunity for the use of a polygraph test in prison disciplinary hearings, and (2) that polygraph evidence was admissible in prison disciplinary proceeding.)

Abdul-Wadood v. Duckworth, 860 F.2d 280 (7th Cir. 1988) (An Indiana prisoner's due process right was not violated by a prison official's denial of a lay advocate at his administrative classification hearing.)

Cain v. Lane, 857 F.2d 1139 (7th Cir. 1988) (Illinois statutes and regulations do not create a liberty interest in remaining in the general prison population. Thus, prison officials are not required to afford prisoners due process protections before placing them in segregation, particularly in light of the fact that 20 Ill. Admin. Code " 504.600-.650 (1985) uses permissive rather than mandatory language in describing that an inmate "may" be confined as a result of a disciplinary hearing. H owever, despite compliance with due process requirements, as set forth in Wolff v. McDonnell, 418 U.S. 539 (1974), disciplinary hearings may be invalidated by evidence that they were retaliatory in nature. (Since this decision, 20 Ill. Admin. Code ' 504.640 and ' 504.650 (1985) have been repealed.))

Wells v. Israel, 854 F.2d 995 (7th Cir. 1988) (The court affirmed the grant of summary judgment in favor of the defendants in an action brought by a prisoner claiming that prison officials violated his rights to procedural due process by relying on undisclosed information in placing him in punitive and administrative segregation. The court held that the confidential information was reliable and adopted the district court's reasoning, but published this opinion to emphasize to district courts the importance of making specific findings in that regard.)

Del Raine v. Carlson, 826 F.2d 698 (7th Cir. 1987) (Prisoner allowed expungement of his record when improperly confined to segregation without a hearing.)

Leslie v. Doyle, 896 F. Supp. 771 (N.D. Ill. 1995) (The court held that although the Fourth Amendment should protect prisoners from segregation imposed without penological purpose, the unavoidable result of Sandin v. Conner, 515 U.S. 472 (1995) is that a prisoner has no liberty interest in an arbitrary segregation which is not an "atypical, significant deprivation." The court granted summary judgment to the defendant, and expressed a fervent hope for appellate review.)

Harms v. Godinez, 829 F. Supp. 259 (N.D. Ill. 1993) (Harms and five other inmates who worked at the commissary were all found guilty based on more than $600 worth of items bagged with the trash which was found by security officers during a "shake down." Harms claimed this was a violation of his due process rights as there was no evidence that he had violated any rules. Defendants satisfied the requirements of Wolff v. McDonnell, 418 U.S. 539 (1974): (1) advance notice of charges, (2) opportunity to call witnesses and produce evidence, and (3) written statement of evidence. The court held that Harms' constructive guilt met the "some evidence" standard of Superintendent v. Hill, 472 U.S. 445 (1985), as interpreted by the Seventh Circuit in Hamilton v. O'Leary, 976 F.2d 341 (7th Cir. 1992).)

Section 26. Searches

Decisions

Block v. Rutherford, 468 U.S. 576, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984) (Due process does not require that prisoners be present during searches of their cells.)

Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) (A prisoner has no expectation of privacy in his cell and thus the Fourth Amendment proscription against unreasonable searches does not apply.)

Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (Prisoners retain some Fourth Amendment rights. However, unannounced cell searches and visual body cavity searches after contact visitation are not unreasonable and therefore not prohibited by the Fourth Amendment.)

Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995) (Female guards keeping watch over naked male prisoners does not violate the Fourth Amendment because it is a reasonable search to prevent smuggling and interprison violence. Such surveillance is justified by legitimate penological interests and equal employment opportunity for female prison guards. In addition, no equal protection violation arose from the fact that some cell blocks were monitored by female guards and some were not.)

Del Raine v. Williford, 32 F.3d 1024 (7th Cir. 1994) (Upholding digital rectal examinations in search for drugs. The court provides an excellent overall discussion of the relevant issues.)

Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994), rev'g 801 F. Supp. 254 (W.D. Wis. 1992) (Although gender is not a barrier to employment in the federal prison system and the occasional or inadvertent sighting of male inmates by female guards is not a violation of the Fourth Amendment, the court found a violation when female guards regularly observed and searched naked male prisoners.)

Scoby v. Neal, 981 F.2d 286 (7th Cir. 1992) (Supervisory officer entitled to qualified immunity in suit by correctional officers where strip search procedure of officers did not violate clearly established right.)

Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987) (Plaintiff stated a claim for denial of medical treatment for transsexualism and for requiring her to be strip searched in front of guards and other inmates. Although Bell v. Wolfish gives prisoners a limited right of privacy, prisoners still have a remedy for "calculated harassment, unrelated to prison needs." Id. at 418 (citing Hudson v. Palmer, 468 U.S. 517, 530 (1981)). In addition, under Rhodes v. Chapman, 452 U.S. 337 (1981), the prisoner is protected against maliciously motivated bodily searches that are unrelated to institutional security.)

Smith v. Fairman, 678 F.2d 52 (7th Cir. 1982) (Allowing female prison guards to conduct pat-down search of male inmates, excluding genital area, was not unconstitutional.)

Burton v. Kuchel, 865 F. Supp. 456 (N.D. Ill. 1994) (Prisoner's Fourth Amendment claim survived summary judgment, as the court held that a finding of harassment may be justified where prisoner was strip searched every day for approximately one month.)

Illinois Department of Corrections Rules:

20 Ill. Admin. Code " 501.200-.220 (1987): Searches for and Disposition of Contraband.

Section 27. Urinalysis Testing

Introductory Comment

The use of urinalysis testing of prisoners to detect drugs has increased substantially in recent years. These tests are now often done on a "sweep" basis where tactical teams of correctional officers (the "orange crush") from other institutions will make unannounced visits to a particular prison and examine prisoners (and even staff) in a particular unit or units at the prison. These teams order prisoners to give urine samples into containers which immediately disclose whether drugs are in the prisoner's system and the type of drug. If the prisoner refuses to take the test or fails it, the sanctions are severe, often immediate transfer to segregation in maximum-security prisons like Stateville and Pontiac. Sometimes tests are administered without warning on a random basis.

Generally speaking, these tests are permissible. The leading case of Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), acknowledged that such examinations are searches subject to Fourth Amendment strictures.

> In each case [the Fourth Amendment] requires a balancing of the need for the particular search against the invasion that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.
>
> Id. at 559.

Forbes v. Trigg, 976 F.2d 308 (7th Cir. 1992) explains why this type of testing in prisons is upheld (security), but also suggests that testing has its limits. The case provides an excellent review of the law for different types of testing and searches of a prisoner's body. The case should be carefully reviewed. Exceptions may occur if the tests are not random, if the inmate has been unfairly singled out, if there are proven inadequacies in the method by which the test was administered, or if the test was administered for retaliatory reasons.

Decisions

Gilbert v. Peters, 55 F.3d 237 (7th Cir. 1995) (An Illinois statute requiring all persons incarcerated for sexual offenses to submit blood specimens to Department of State Police prior to final discharge was not punitive and therefore did not violate ex post facto clause in its application to persons convicted of sexual offenses before its effective date.)

Peranzo v. Coughlin, 675 F. Supp. 102 (S.D.N.Y. 1987) (Summary judgment granted where double "EMIT" urinalysis testing, having accuracy rate of over 98%, was not so unreliable as to render use of its results as evidence in disciplinary hearings and in parole decisions a denial of due process. In addition, pre-disciplinary hearing confinement of prisoners solely on the basis of this test was a permissible administrative confinement.)

Higgs v. Wilson, 616 F. Supp. 226 (W.D. Ky. 1985) (Preliminary injunction enjoining corrections officials from taking disciplinary action against inmates for the use of drugs was granted, where discipline was based solely on unconfirmed results of "EMIT" urinalysis test, and evidence showed that proper procedures for collecting and preserving urine samples were not

consistently followed.)

Wykoff v. Resig, 613 F. Supp. 1504 (N.D. Ind. 1985) (Due process requires that procedures for the handling of inmate urine samples, which will be sufficient to support disciplinary sanctions, be reasonably definite and documented at all stages from the taking of the sample to the use of the evidence at prison disciplinary proceedings.)

Tucker v. Dickey, 613 F. Supp. 1124 (W.D. Wis. 1985) (In a suit brought by an inmate under ' 1983 alleging that he had been awakened at 5:00 a.m., told to give a urine sample as part of a drug testing program and then disciplined after he refused, the defendant's motion for summary judgment was denied because there was insufficient evidence to establish that the testing had a legitimate security purpose and that it was possible that a reasonable person would have known that the manner of taking the sample would violate the plaintiff's rights.)

Stomes v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984) (Inmates were granted a preliminary injunction enjoining prison officials from selecting prisoners for random urinalysis testing by any method which carried with it an unreasonable risk of harassment, including a method of selection whereby the official performing the selection was potentially aware of the names of the inmates he was selecting.)

Section 28. General Conditions

Introductory Comment

Much of the litigation for appointed counsel deals with "conditions of confinement." These cases may range from complaints about the nature of segregation cells and the manner of imprisonment in them to the effects of "second-hand smoking" from other prisoners or staff. Some of the other sections in PART II relate to so-called conditions cases, such as inadequate medical care, but are treated separately because the applicable law may be different from the general "conditions" case. See PART II, Section 20: Medical Care. As a consequence, other portions of PART II should be reviewed as well.

Virtually all conditions cases are based on the Eighth Amendment's admonition against cruel and unusual punishment.[13] The key decision in this section is Wilson v. Seiter, 501 U.S. 294, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991). All conditions decisions prior to 1991 must be read in light of this case which sets up two separate burdens a prisoner-plaintiff must satisfy to prevail. I n Wilson, the prisoner claimed that certain conditions constituted cruel and unusual punishment, including overcrowding, excessive noise, inadequate heating and ventilation, and unsanitary dining facilities. The Supreme Court first held that the conditions must be shown to be objectively cruel; and second, that prison officials had a subjective state of mind that rendered them culpable or liable for the objectively cruel conditions. In contrast to the guard assault cases (PART II, Section 19: Guard-on-Inmate Assaults - Excessive Use of Force) where maliciousness - intent to inflict punishment - must be shown, the Court held that in conditions cases, the subjective standard would be the deliberate indifference standard of inadequate medical care cases. See PART II, Section 20: Medical Care.

Moreover, as indicated by the Court in its subsequent decision of Hudson v. McMillian, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992), in contrast to guard assault cases where an insignificant injury may violate contemporary standards of decency, in a conditions case, the plaintiff must show significant injury, as "routine discomfort" is part of the penalty prisoners pay for their convictions. Plaintiff must show that the conditions caused "extreme deprivations."

Whether a plaintiff in a conditions case can satisfy these two burdens will vary from case to case. The decisions below illustrate the wide variety of conditions claims.

Important: Section 1997e(d) of the Prison Litigation Reform Act - "Exhaustion of Administrative Remedies" - may apply to many so-called conditions cases. See PART II, Section 6: Exhaustion of Prison Grievance Procedures.

(1) Conditions of Cells - Cause of Action Stated or Proved

Del Raine v. Williford, 32 F.3d 1024 (7th Cir. 1994) (The court remanded the case on the claim of failure to provide heat and shelter for the inmate, but affirmed the lower court's decision that a digital search of private areas was not cruel and unusual punishment, that loss of the inmate's personal property was not a violation of a constitutional right, and that dismissing the defendants for failure to effect service within 120 days was correct.)

Jackson v. Duckworth, 955 F.2d 21 (7th Cir. 1992) (In this case, characterized by the court as a "sub-human conditions case," Judge Posner reviewed the different aspects of a

conditions of confinement case: particularly, the objective component - the acts which constitute the alleged constitutional tort - and the subjective component - the intent with which the acts are inflicted. Because there were facts in dispute on both of these issues, the case was not appropriate for summary judgment.)

Johnson v. Pelker, 891 F.2d 136 (7th Cir. 1989) (Neither accidental dumping of water on an inmate nor denial of his request for dry bedding and clothing deprived him of his constitutional rights. His allegation of being in a cell for three days without running water and with smeared feces on the wall, while his request of cleaning supplies and running water were ignored, did state a cause of action for a violation of an inmate's Eighth Amendment rights.)

Jamison-Bey v. Thieret, 867 F.2d 1046 (7th Cir. 1989) (Where plaintiff claimed cruel and unusual punishment when he was put in segregation for 101 consecutive days without hygiene products, ventilation, and exercise, a motion for summary judgment was premature because there was no mention of prison officials' lack of knowledge of plaintiff's claims.)

Bruscino v. Carlson, 854 F.2d 162 (7th Cir. 1988) (In this class action on behalf of Marion Penitentiary inmates, the state prison's provisions for programming and living conditions for protective custody of inmates were unequal in comparison with general population inmates and were not justified by security concerns and violated inmate's equal protection rights.)

Lewis v. Lane, 816, F.2d 1165 (7th Cir. 1987) (An allegation of inadequate heating may state an Eighth Amendment violation; bar banging, if designed to harass prisoners, may also implicate the Eighth Amendment.)

Wilson v. Schomig, 863 F. Supp. 789 (N.D. Ill. 1994) (The court held that prisoners do not have liberty or property interests in their work assignments and due process need not be afforded. However, when cell temperatures fall below freezing and when prison officials refuse to give an inmate materials to clean the feces from his cell, these qualify as violations of the Eighth Amendment. As "clearly established" rights, no qualified immunity exists.)

Matthews v. Peters, 818 F. Supp. 224 (N.D. Ill. 1993) (In this conditions case at Stateville Correctional Center, the plaintiff alleged that he was without hot water in his cell for seven months. The court held that the defendants were not immune because the plaintiff did not make a showing of deliberate indifference.)

Howard v. Wheaton, 668 F. Supp. 1140 (N.D. Ill. 1987) (No working toilet or hot water for thirteen days stated a claim under Eighth Amendment.)

(2) Conditions of Cells - No Cause of Action Stated or Proved

Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (A pre-trial detainees' presumption of innocence has no application to a determination of the rights of pretrial detainees during their confinement. Conditions of confinement imposed on pre-trial detainees implicate only the Fourteenth Amendment and may not amount to punishment, whether cruel or unusual or otherwise.)

Morrissette v. Peters, 45 F.3d 1119 (7th Cir. 1995) (The prisoner's Eighth Amendment claim was denied based on the fact there was no evidence that the defendants were even remotely aware of the conditions in plaintiff's cell, and in any case, the condition complained of did not rise to a constitutional violation. The prisoner failed to show that the defendants were

deliberately indifferent to the electrical hazard in the cell. The court upheld the magistrate's conclusion that the exposed wiring "was a minor hazard that was easily avoided" and "was primarily an unpleasant inconvenience." Id. at 1122.)

Lunsford v. Bennett, 17 F.3d 1574 (7th Cir. 1994) (Prisoners alleged that they were denied basic hygiene items, subjected to loud noises, and served poorly prepared food. In retaliation, they flooded one of the wards and were subsequently shackled to their cells. The court affirmed the district court's grant of summary judgment for the defendants and held that the cumulative effect of the complaints did not add up to a deprivation of a single human need. Restraining prisoners by removing them and shackling them to their cells for three hours, although uncomfortable, was not unreasonable given the circumstances and the need to secure the prisoners while the mess from the flood was cleaned up. Occasional discomfort is part of the penalty of incarceration.)

McNeil v. Lane, 16 F.3d 123 (7th Cir. 1993) (Prisoner-plaintiff's complaint failed to satisfy the subjective prong of the Wilson test. The defendants' failure to remove the asbestos-covered pipes or to transfer the prisoner to a different cell was not enough to establish "deliberate indifference." The court held that the prisoner also failed to satisfy the objective prong of the test because the alleged conditions were not serious enough. Exposure to moderate levels of asbestos is a fact of life and is not considered cruel and unusual punishment.)

Henderson v. Lane, 979 F.2d 466 (7th Cir. 1992) (An inmate in the state's circuit rider program complained of limited shower and exercise time while in the program. The court held that the defendants were entitled to qualified immunity on the issues of shower and exercise time because there was no clearly established law that was violated by their restrictions on these conditions of confinement.)

Harris v. Fleming, 839 F.2d 1232 (7th Cir. 1988) (Where the plaintiff asserted that he was not provided with toilet paper for five days, lacked soap, toothbrush, and toothpaste for ten days, and was kept in a filthy, roach-infested cell, but suffered no physical harm, the defendants' conduct was not unconstitutional because the defendants' temporary neglect of plaintiff was not intentional.)

Diaz v. Edgar, 831 F. Supp. 621 (N.D. Ill. 1993) (Prisoner brought an action against corrections officials based on alleged exposure to asbestos and denial of medical treatment for respiratory disorders. The court dismissed the complaint for failure to state any official policies that caused plaintiff's exposure to asbestos and subsequent denial of treatment. Though he satisfied the objective prong of Wilson test, the prisoner failed to satisfy the subjective prong as he did not show that defendants actually knew that he was required to clean asbestos contaminated dust.)

Section 29. Conditions of Confinement

Introductory Comment

There are several cases that deal with conditions of confinement at the Cook County Jail. These cases are usually considered under the Fourteenth Amendment rather than the Eighth Amendment because many prisoners at the jail are pretrial detainees. (Pretrial detainees have not been sentenced to prison, the basis for application of the Eighth Amendment, and thus, must look for protections elsewhere in the Constitution.) Some recent decisions are Antonelli v. Sheahan, 81 F.3d. 1422 (7th Cir. 1996); Summers v. Sheahan, 883 F. Supp. 1163 (N.D. Ill. 1995); Wilson v. Cook County Bd. of Comm'rs, 878 F. Supp. 1163 (N.D. Ill. 1995); Landfair v. Sheahan, 878 F. Supp. 1106 (N.D. Ill. 1995); Askew v. Fairman, 880 F. Supp. 557 (N.D. Ill. 1995). These cases should be reviewed if counsel is appointed in an action involving the Jail. In the main, the conditions are the same as in actions involving IDOC prisons, except that overcrowding is a significant issue at the Jail.

(1) Cigarette Smoking

Helling v. McKinney, 509 U.S. 25, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993) (Inmate stated an Eight Amendment cause of action by alleging that defendants had with deliberate indifference exposed the plaintiff to environmental tobacco smoke (ETS) at levels that created an unreasonable risk of serious damage to his future health.)

Goffman v. Gross, 59 F.3d 668 (7th Cir.1 995) (An inmate who had survived lung cancer requested to have only non-smoking roommates. The inmate sued the prison under ' 1983 when this request was not met, claiming deliberate indifference. Because the plaintiff did not allege sufficient evidence to state a claim, the dismissal of the plaintiff's complaint was affirmed. In addition, the court held that if the plaintiff was worried about the possible effects of second-hand smoke on his future well-being, rather than his immediate condition, he should have stated so in his complaint.)

Beauchamp v. Sullivan, 21 F.3d 789 (7th Cir. 1994 (The court held that the challenge to the prison's smoking regulations was frivolous, and that the plaintiff, by not alleging that he was a smoker, had no standing to sue.)

Steading v. Thompson, 941 F.2d 498 (7th Cir. 1991) (Exposure to secondary smoke is not punishment under Wilson v. Seiter, 501 U.S. 294 (1991), because it is not intended as punishment.)

(2) Showers and Yard

Davenport v. DeRobertis, 844 F.2d 1310 (7th Cir. 1988) (The court affirmed the portion of the district court's order in which it determined that prisoners be allowed to exercise five hours a week rather than one. The court reversed the district court's order that prisoners be allowed to shower three times a week rather than one.)

(3) Privacy

Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995). (Judge Easterbrook, in writing for the

court, held that neither the Fourth Amendment nor the Eighth Amendment prohibited cross-sex monitoring of prisoners. Id. at 150-51. According to the court, the Fourth Amendment does not protect a prisoner's privacy rights within a prison, and cross-sex monitoring does not constitute the "inhuman" treatment prohibited by the Eight Amendment. But see Chief Judge Posner's pointed dissent, arguing that further fact finding was necessary to determine whether the prison had made sufficient efforts to protect what Judge Posner saw as the prisoner's Eighth Amendment right to be free from "frequent, deliberate, gratuitous exposure" of nudity in front of guards of the other sex. Id. at 155 (Posner, C.J., concurring in part, dissenting in part).)

Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994) (The court, in reversing the lower court's dismissal, held that although prisons must be allowed to employ and fully utilize female guards, this does not mean that inmates are without constitutional protection against invasion of their privacy by members of the opposite sex. Reasonable accommodations to respect inmates' privacy (e.g., the installation of curtains) could have been made here.)

United States v. Whalen, 940 F.2d 1027 (7th Cir. 1991) (Because federal prison requires inmates to leave personal letters unsealed and that plaintiff did so, he had no expectation of privacy and his mail was properly inspected. Proper concern for prison security allows officials to read an inmate's outgoing mail.)

(4) Food

Robinson v. Illinois State Correctional Ctr., 890 F. Supp. 715 (N.D. Ill. 1995) (The restrictions on commissary purchases in segregation did not violate equal protection. In addition, prisons are required to provide nutritionally adequate food that is prepared and served under conditions that do not pose immediate danger to the health and well-being of inmates.)

(5) Access to Work, Programs, and Security Classification

Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992) (Illinois inmates are not entitled to minimum wage under the Fair Labor Standards Act, because there is no constitutional right to compensation for work in prison.)

Black v. Lane, 824 F.2d 561 (7th Cir. 1987) (The court upheld the lower court's finding of racial discrimination in job assignment.)

Parker-Bey v. Roth, 1993 U.S. Dist. LEXIS 13845 (N.D. Ill. Sept. 10, 1993) (Prisoners have no constitutional right to receive "idle pay" and thus "idle pay" can be terminated without due process.)

Jackson v. O'Leary, 689 F. Supp. 846 (N.D. Ill. 1988) (An Illinois administrative regulation governing removal of prison inmates from work assignments did not vest the inmate with protected liberty and property interests in his prison job so as to give rise to ' 1983 action for reassignment to a less desirable job, even though the regulation left the decision to remove the inmate from the job assignment to the unfettered discretion of prison officials.)

Parker v. Lane, 688 F. Supp. 353 (N.D. Ill. 1988) (In order for a prisoner to establish a claim for a ' 1983 deprivation based on his removal from an honor facility to the general population, the prisoner must establish that he had a protected interest in remaining in the honor dormitory rather than in the general population.

(6) Claimed Racial and Other Discriminatory Policies

Williams v. Lane, 851 F.2d 867 (7th Cir. 1988) (Although prisoners do not surrender their rights to equal protection, unequal treatment among inmates is justified if it bears a rational relation to a legitimate penal interest. State prison's provisions for programming and living conditions for protective custody of inmates were unequal in comparison with general population inmates, and were not justified by security concerns and thus violated the inmate's equal protection rights.)

David K. v. Lane, 839 F.2d 1265 (7th Cir. 1988) (A preliminary injunction was denied for prisoner-plaintiffs who alleged that the prison administration's policy of suppressing only gang "violence" and not gang "membership" in effect created a class of white non-gang members that was forced into protective custody. The plaintiffs failed to show that the prison administration harbored a discriminatory motive in implementing those policies.)

Ustrak v. Fairman, 781 F.2d 573 (7th Cir. 1986) (White prisoner failed to make a prima facie case that a black warden's punishing inmate for possessing contraband in his cell, while not punishing inmate's black cellmate, was due to racial discrimination because prison's practice of punishing both cellmates for possessing contraband was merely an unwritten policy, and there was no showing that any inconsistent enforcement of policy was more likely than not based on racial considerations.)

Harris v. Greer, 750 F.2d 617 (7th Cir. 1984) (A complaint that alleged a prison policy of segregating black and white inmates in a protective custody unit according to cell and job assignments stated a ' 1983 cause of action sufficient to withstand a motion to dismiss; however, prison authorities have a right to take into account racial tensions in maintaining security, discipline and order in prison.)

Star v. Gramley, 815 F. Supp. 276 (C.D. Ill. 1993) (The court held that the prohibition against men cross-dressing and wearing female makeup at Pontiac Correctional Center did not violate the First Amendment. The legitimate penological objectives allowing such a prohibition were (1) allowing such behavior would "promote homosexual activity or assault, thereby creating safety and security risks . . ." and (2) "because the potentially drastic >change in his identity' could facilitate an escape . . . ." Id. at 278.)

Siddiqi v. Lane, 763 F. Supp. 284 (N.D. Ill. 1991) (In Illinois, a prisoner has no liberty interest in his particular security classification and therefore cannot bring an action under ' 1983 regarding a change in his classification. The plaintiff's case was dismissed as frivolous under 28 U.S.C. ' 1915(d).)

(7) Application of Disability Statutes

Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 141 L. Ed. 2d 215, 66 U.S.L.W. 4481 (1998) (The Court held that the American with Disabilities Act (ADA) applied to state prison inmates. The Court held that prisons clearly constituted a "public entity" under the ADA and that a prisoner could be a "qualified individual with a disability." Note, however, that the Court did not address whether the application of the ADA to state prison inmates "is a constitutional exercise of Congress's power under either the Commerce Clause, or ' 5 of the Fourteenth Amendment . . . ." Id. at 1956 (citations omitted).)

Grant v. Schuman, 1998 U.S. App. LEXIS 16852 (7th Cir. July 16, 1998) (Although the

court acknowledged the applicability of the ADA to state prison inmates after Yeskey and believed that the plaintiff was "clearly a qualified individual," the court affirmed the lower court's dismissal for the plaintiff's failure to properly join the defendants in their official capacities or to properly join the state institution as a defendant.)

Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997). (The court held that the ADA applied to state prisoners. The court began by stating that "[r]ights against discrimination are among the few rights that prisoners do not park at the prison gates." Id. at 486. The court reasoned further that the silence of the ADA and its legislative history as to the Act's application to prisoner's actually counseled against denying coverage for prisoners. Id. at 487. The court then noted that because Congress passed the ADA using its enforcement power under the Fourteenth Amendment, the Eleventh Amendment "does not insulate states from suits in federal courts." Id.)

Donnell, C. v. Illinois State Bd. of Educ., 829 F. Supp. 1016 (N.D. Ill. 1993) (Plaintiffs, school-aged pretrial detainees, alleged they were either denied complete access to regular and special education services or received services vastly inferior to those provided non-detainees during their detention. The court held that plaintiffs stated claims under the Due Process Clause, the Equal Protection Clause, the Individual with Disabilities Education Act ("IDEA") and the Rehabilitation Act.)

(8) IDOC Regulations

Illinois Department of Corrections Rules:

20 Ill. Admin. Code ' 502.20 (1991):	Menus.
20 Ill. Admin. Code ' 502.30 (1987):	Special Diets.
20 Ill. Admin. Code ' 502.40 (1989):	Sanitation.
20 Ill. Admin. Code " 502.100-.105 (1987):	Cleanliness and Grooming for Committed Persons.
20 Ill. Admin. Code ' 502.110 (1993):	Cleanliness and Grooming for Committed Persons - Procedure.
20 Ill. Admin. Code " 502.200-.230 (1987):	Clothing, Bedding, Linens

Section 30. Enforcement

Introductory Comment

This is an issue that normally should not arise. The only likely causes for delay in the collection of a judgment that has become final and is not appealed (or has been affirmed on appeal), is the availability of funds in the responsible entity's budget (the State, County or City) for the current fiscal year. If the funds are currently unavailable, then the judgment (or settlement) will normally be paid as soon as the next fiscal year budget is funded. This is true even where the action is against State employees (where the State cannot be sued under the Eleventh Amendment), since the State by statute indemnifies its employees.

However, in the rare instance where the State has refused to defend or indemnify its employee (a correctional officer) because his conduct is so outrageous, the following statutes, rules and decisions apply:

Decisions

Balark v. Curtin, 655 F.2d 798 (7th Cir. 1981) (A federal court may order garnishment of the defendant's wages where a successful plaintiff in a ' 1983 action is, as a result, a judgment creditor of defendant police officers, and despite a state indemnification statute, the city fails to pay the claim in a reasonable time.)

Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980) (A federal court's interest in orderly and expeditious proceedings justifies any reasonable action to secure compliance with its orders. Only if the enforcement order is an abuse of judicial discretion will the district court be reversed.)

Gary W. v. Louisiana, 441 F. Supp. 1121 (E.D. La. 1977), aff'd, 622 F.2d 804 (5th Cir. 1980) (Fed. R. Civ. P. 70 may be used as a means of collecting a money judgment, including attorneys fees, rendered in an equitable proceeding. 42 U.S.C. ' 1988, not state procedure, controls Fed. R. Civ. P. 69 because of the significant federal interest in the remedy.)

Rules and Statutes

28 U.S.C.A. ' 2202 (West 1994):	Further Relief.
Fed. R. Civ. P. 69:	Execution.
Fed. R. Civ. P. 70:	Judgment for Specific Acts; Vesting Title.
U.S. Dist. Ct. N.D. Ill. Civ. R. 18:	Contempts.
5 Ill. Comp. Stat. Ann. 350/1-350/2 (West Supp. 1998):	State Employee Indemnification Act
65 Ill. Comp. Stat. Ann. 5/8-1-16 (West 1993):	Tax to Pay Judgment.
745 Ill. Comp. Stat. Ann. 10/2-301-302 (West 1993):	Indemnification of Public Employees

Section 31. Enforcement of Consent Decrees and Other Equitable Remedies

Introductory Comment

This is not an issue that will normally be encountered by appointed counsel.

The new issue involving consent decrees is their termination or modification.

In general, see the Prison Litigation Reform Act of 1995. 42 U.S.C.A. ' 1997e (West Supp. 1998).

Decisions

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992) (The court announced a flexible standard for reviewing consent decrees in institutional reform cases, holding that a clear showing of a grievous wrong evoked by new and unforeseen conditions was not required by Fed. R. Civ. P. 60(b), in order to modify such a decree.)

Money Store, Inc. v. Harriscorp Fin., Inc., 885 F.2d 369 (7th Cir. 1989) (Reviewing United States v. Swift & Co., 286 U.S. 106 (1932) and Rule 60(b)(5), the Seventh Circuit held that the district court did not abuse its discretion in refusing to modify a consent decree. But see Judge Posner's concurrence describing a different approach to prisoner's cases. Id. (Posner, J., concurring) at 374-77.)

Duran v. Elrod, 713 F.2d 292 (7th Cir. 1983) (A consent order is not subject to impeachment if the parties knew of the complained-of conditions when they entered into it. Only to remedy a grievous wrong caused by unforeseen and unexpected conditions occurring after entry of the decree will a consent decree be set aside.)

Madyun v. Thompson, 657 F.2d 868 (7th Cir. 1981) (Illinois prisoners were not collaterally estopped from maintaining a class action challenging the constitutionality of conditions in state prison, despite the contention that the order entered in the pending case amounted to adjudication that conditions did not violate the Constitution, where order did not purport to mandate compliance with Constitution.)

Ruiz v. McCotter, 661 F. Supp. 112 (S.D. Tex. 1986) (This case involved the enforcement of a consent decree and the use of a court's civil contempt power in an action that had been in litigation for more than six years. Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980) aff'd in part and vacated in part, 679 F.2d 1115 (5th Cir. 1982) amended in part, 688 F.2d 266 (5th Cir. 1982). The defendants were found in civil contempt for their unreasonable delay in obeying a court order requiring "single-celling" of inmates, and for not complying with a court order requiring a classification system for prisoners. The defendants were not allowed to modify the consent decree based on their change of philosophy regarding dormitory housing.)

Section 32. Settlement

Introductory Comment

Although settlement is always encouraged and should be explored at an early stage, it is not an easy process with the IDOC - usually nuisance or a very small amount, if anything, will be offered. Although appointed counsel will deal with an Assistant Attorney General, the final decision will be made by internal counsel at the IDOC, often with input from prison officials at the particular prison.[14] In any event, an offer, if any, must be, as with any client, conveyed to the prisoner-plaintiff who must make the final decision.

A significant offer, if the case has merit, will occur only after meaningful discovery has occurred and plaintiff's counsel can bargain from strength, a fact true in most civil litigation generally. Cases, if they are going to settle, will do so often only with the vigorous intercession of the trial judge at pre-trial or on the eve of trial.

The amount of settlement, in most instances, will not equal that which would be obtained in normal tort or personal injury cases because the client will have no special damages (loss of income, medical bills) and because he or she is a felon, normally still in prison. However, in the appropriate cases, settlement should still be representative of the harm inflicted.

There are some caveats:

1. U nder recent legislation, the IDOC can attach prisoner funds for the cost of past incarceration. See 730 Ill. Comp. Stat. Ann. 5/3-7-6 (West Supp. 1998). Make sure that in the settlement documents, the IDOC waives its right to such recovery.

2. Make certain the State otherwise has no pending claims. The settlement can exclude such claims, if any.

3. Try to determine when the funds for the settlement will be received. The administrative process leading to the State Comptroller's issuance of the settlement draft can take time. In addition sometimes, the IDOC's funds for litigation settlements for the fiscal year may have been exhausted and the IDOC will take the position that payment must await the next year's appropriation. Alert your client to the likelihood of delay in payment. Since judges like to dismiss settled cases immediately, have the dismissal order provide that the case may be reinstated if payment is not made within a given time period. Otherwise, enforcement of settlement may require a separate action.

4. Often the State will offer a lump sum, leaving division of the sum between the client's share and attorney's fees to appointed counsel and the client. If you are going to take a fee (which is proper), work this out carefully and fairly in writing with the client (and signed by the client). Use your judgment, remembering that you normally will not be compensated at your usual fee rate. Often two checks will be issued, one for the client's share and one for attorney's fees with both sent to the attorney.

Decisions

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d. 391 (1994) (The Court held that the federal district court lacked jurisdiction over a claim of breach of agreement to settle a dismissed suit, where the parties' obligations to comply with the agreement was not part of the order of dismissal.)

White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982) (A defendant in a civil rights action probably has a right to know his total liability, including both damages and attorney's fees, before he enters into a negotiated settlement. Although ethical issues are thereby raised for plaintiffs, the court refused to hold that "no resolution is ever available to ethical counsel." Id. at 454 n.15.)

Statutes

5 Ill. Comp. Stat. Ann. 350/1-350/2 (West Supp. 1998): State Employee Indemnification Act.

Section 33. Attorneys' Fees under 42 U.S.C. ' 1988

Introductory Comment

The Civil Rights Attorney's Fees Awards Act of 1976 provides in part,

In any action or proceeding to enforce a provision of [42 U.S.C. ' 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs.

42 U.S.C.A. ' 1988(b) (West Supp. 1998):

Appointed counsel should remember that this statute is a "two-way" street, that is, attorneys' fees may be awarded to the plaintiff as a prevailing party, but the court may also award attorneys' fees to the defendant as the prevailing party. However, the standards for the award are different despite the apparently unambiguous language of the statute: a prevailing plaintiff is presumptively entitled to attorneys' fees (despite the discretionary language of the statute); however, a prevailing defendant is entitled to attorneys' fees "only if the suit is adjudged frivolous." Vukadinovich v. McCarthy, 59 F.3d 58, 61 (7th Cir. 1995). This latter standard is very close to the standard employed by Rule 11 of the Federal Rules of Civil Procedure with which every attorney litigating in federal courts should be familiar. See Vukadinovich, 59 F.3d at 60-61, for a good review of the applicable standards.

As plaintiff's counsel, you should continuously review positions that have been asserted prior to appointment (as well as after appointment) to avoid costs imposed according to ' 1988 and sanctions under Fed. R. Civ. P. 11.

For a general review of fee-shifting statutes, see 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure ' 2675.2 (3d ed. 1998).

Keep in mind that a recently passed Illinois Statute, 730 Ill. Comp. Stat. Ann. 5/3-6-3(d) (West Supp. 1998), provides for the Illinois Department of Corrections to take away up to six months of "good time" credits (i.e., increase the plaintiff's sentence) if the court where the action was pending "makes a specific finding that a pleading, motion, or other paper filed by the prisoner is frivolous."

In addition, the recently passed Prison Litigation Reform Act limits the amount of attorneys' fees that the prevailing party may recover, 42 U.S.C.A. ' 1997e(d) (West Supp. 1998), and may alter the applicability and weight of the cases regarding attorneys' fees decided prior to the Act's enactment.

In any event, as with costs expended, you should keep detailed time records regarding work on the case, and maintain the ability to show that the time and costs expended were reasonably necessary to prosecution of the case. FMC Corp. v. Varonos, 892 F.2d 1308 (7th Cir. 1990) (remanding for determination of attorney's fees after the submission of adequate documentation in a RICO fee-shifting case). These records are important even when the case ends in settlement. You may be challenged to support a request for attorney's fees during settlement discussions with the Assistant Attorney General assigned to represent the defendants

or by the trial judge.

Fed. R. Civ. P. 54(d)(2) sets forth the procedures for presenting claims for fees. See also U.S. Dist. Ct. N.D. Ill. Gen. R. 46. Be sure to file the fee petition within ninety (90) days of the entry of judgment as required by the Rules of the United States District Court for the Northern District of Illinois. Id. See also White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982) (holding that Fed. R. Civ. P. 59(e) does not apply to requests for attorneys' fees under ' 1988); Terket v. Lund, 623 F.2d 29 (7th Cir. 1980) (holding that the district court retained jurisdiction to award attorneys' fees under ' 1988 even after notice of appeal has been filed).

The following citations discuss who is a prevailing party (plaintiff or defendant) and the amount of fees awarded.

Decisions

(1) Prevailing Party - Plaintiff

Farrar v. Hobby, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (A civil rights plaintiff who recovered only nominal damages qualified as a prevailing party under the civil rights attorney fee provision; the Court, however, noted that granting such a nominal award to the plaintiff's attorney would be "unreasonable" given the very limited degree of success.)

Texas State Teachers Assoc. v. Garland Indep. Sch. Dist., 489 U.S. 782, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989) (The test for determining when a civil rights litigant is a "prevailing party" and therefor entitled to attorneys' fees under ' 1988 is whether the party prevails on "any significant claim." When making such a showing, the party must show that the resolution of issues resulted in "the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." Id. at 792. In so holding, the Court rejected the "central issue test.")

Rhodes v. Stewart, 488 U.S. 1, 109 S. Ct. 202, 102 L. Ed. 2d 1988 (1988) (Plaintiffs are not entitled to an award of attorneys' fees under ' 1988 where the case was moot before the original judgment was issued and where the judgment could afford the plaintiffs no relief.)

Maher v. Gagne, 448 U.S. 122, 100 S. Ct. 2570, 65 L. Ed. 2d 653 (1980) (Plaintiff entitled to fee even if case is settled before trial.)

Spellan v. Board of Educ. for Dist. 111, 59 F.3d 642 (7th Cir. 1995) (When plaintiffs are only partly successful in prosecuting their claims, they should not receive full attorneys' fees.)

Johnson v. Lafayette Fire Fighters Ass'n Local 472, 51 F.3d 726 (7th Cir. 1995) (Legal services organizations that represent prevailing parties in a ' 1983 action are entitled to attorneys' fees based on local market rates.)

(2) Prevailing Party - Defendant

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978) (Fees may be awarded to the defendant only if the district court finds that the plaintiff's action was "frivolous, unreasonable, or without foundation even though not brought in

subjective bad faith." See also Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983) (stating that fees may be awarded against the plaintiff if his action was found "vexatious, frivolous, or brought to harass or embarrass the defendant"); Hughes v. Rowe, 449 U.S. 5, 14-16 (1980).)

Vukadinovich v. McCarthy, 59 F.3d 58 (7th Cir. 1995) (Defendant of frivolous suit may collect the costs of collecting attorneys' fees if plaintiff refuses to pay them. In addition, less proof as to the amount is required the smaller the amount claimed.)

Billman v. Indiana Dep't of Corrections, 56 F.3d 785 (7th Cir. 1995) (Inmate brought a ' 1983 claim after being raped by an HIV-positive cell-mate who was known for raping prisoners. When the plaintiff filed a request to proceed in forma pauperis, the district court dismissed the suit with prejudice stating that the suit was frivolous. The Seventh Circuit reversed, holding that when a request for in forma pauperis is denied, the plaintiff still has the opportunity to file if he or she can come up with the funds. The court also noted that although a complaint might not be legally sufficient, that does not mean that its underlying claim is frivolous.)

Leffler v. Meer, 936 F.2d 981 (7th Cir. 1991) (The court refused to impose Rule 11 sanctions against the plaintiff's attorneys because the frivolous nature of claim against certain defendants was not apparent until well into the case, and defendants should have attempted to mitigate their own legal fees through summary procedures.)

(3) Amount of Fees

City of Riverside v. Rivera, 477 U.S. 561, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986) (The court upheld a fee award of $245,000, when the plaintiff recovered only $33,000 in damages.)

Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (To determine fees, calculate the number of hours reasonably expended multiplied by a reasonable hourly rate. No fees allowed for work on unsuccessful claims that are "distinct in all respects" from successful claims; fees should not be reduced, however, when claims are related simply because court did not adopt each contention raised; but, "where the plaintiff achieved only limited success the district court should award only that amount of fees that is reasonable in relation to the results obtained." Id. at 440.)

Wallace v. Mulholland, 957 F.2d 333 (7th Cir. 1992) (The appellants were police officers appealing, inter alia, an award of attorneys fees to the plaintiffs, granted by Judge Shadur pursuant to 42 U.S.C. ' 1988. The plaintiffs had sought payment for 400 hours at $150 per hour. The appellate court reduced the fees to 288 hours at $150 per hour and awarded $43,200. The Seventh Circuit upheld the award as based on customary rates for similar legal work, and further, that the fee award was not required to be proportionately related to the damage award. Id. at 339 (citing Hensley v. Eckerhart, 461 U.S. 424, 440 (1983)).)

Ustrak v. Fairman, 851 F.2d 983 (7th Cir. 1988) (Attorneys' fees award reduced to those fees related only to the meritorious issue and reductions allowed for excessive time for oral argument preparation and law student time.)

Lightfoot v. Walker, 826 F.2d 516 (7th Cir. 1987) (Use of current market rates, as opposed to historic rates, was warranted to compensate attorneys for delay in payment.)

Gregory v. Wiegler, 873 F. Supp. 1189 (C.D. Ill. 1995) (The court held that the plaintiff's

attorney's fees should be assessed at his own lawyer's rate, rather than local market rates. The court also allowed paralegal fees and fees for computerized research.)

Shakman v. Democratic Org. of Cook County, 677 F. Supp. 933 (N.D. Ill. 1988) (Given the substantial period of delay experienced in civil rights cases, simply adjusting attorneys' fees lodestar for inflation did not produce fee sufficient to induce competent attorneys to accept cases of similar nature in the future; thus, adjustment for delay in payment should be based on inflation and time value of money.)

Section 34. Attorneys' Fees under Equal Access to Justice Act: 28 U.S.C. ' 2412

Introductory Comment

The Equal Access to Justice Act ("EAJA") provides for attorneys' fees in actions against the United States, not employees of the Illinois Department of Corrections. The relevant section provides in part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C.A. ' 2412(d)(1)(A) (West Supp. 1998) (emphasis added).

For the most part, all of the issues and conditions discussed in the preceding section apply.

Decisions

Pierce v. Underwood, 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) (The Court vacated and remanded a court of appeals judgment affirming a district court's award of attorneys' fees of more than the generally applicable cap rate of $75 per hour under EAJA, because the district court abused its discretion by noting as "special factors" the novelty and difficulty of the issues, the undesirability of the case, the work and ability of counsel, and customary fees and awards in other cases.)

EEOC v. O & G Spring and Wire Forms Specialty Co., 38 F.3d 872 (7th Cir. 1994) (The court refused to award fees, even though the defendant's expert's testimony was totally flawed, as "a position can be justified, even though it is not correct . . . if a reasonable person could think it correct, that is, if it has a reasonable basis in law and in fact." Id. at 884 (citing Pierce v. Underwood, 487 U.S. 552, 565-66 & n.2 (1988).)

Continental Web Press, Inc. v. NLRB, 767 F.2d 321 (7th Cir. 1985) (The statutory maximum of $125 per hour can be increased to reflect a cost of living increase. See 28 U.S.C.A. ' 2412(d)(2)(A) (West Supp. 1998).)

McDonald v. Schweiker, 726 F.2d 311 (7th Cir. 1983) (An application for fees filed more than thirty days after the district court's "final judgment" but within thirty days of the dismissal of the government's appeal was timely, as "final judgment" meant at the conclusion of the appellate process. See 28 U.S.C.A. ' 2412(d)(2)(G) (West Supp. 1998).)

Illinois Migrant Council v. Pilliod, 672 F. Supp. 1072 (N.D. Ill. 1987) (Under the EAJA, fees are awarded to the party who prevails against the United States, unless the United States' position was substantially justified or special circumstances make such an award unjust.)

Section 35. Costs under 28 U.S.C. ' 1920

Introductory Comment

28 U.S.C. ' 1920 provides:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensations of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C.A. ' 1920 (West 1994) (emphasis added).

Note that the imposition of costs is subject to the discretion of the trial court. The statute is narrowly construed as to allowable items. These costs differ from reimbursable costs to appointed counsel. See PART I, Section 16: Statutory Authority for Awarding Attorneys' Costs and Fees.

Again, keep careful track (receipts, bills, etc.) of costs.

See also Fed. R. Civ. P. 54 (regarding attorneys' fees); 28 U.S.C.A. ' 1921 (West 1994) (regarding United States marshal's fees); 28 U.S.C.A. ' 1821(b) (West 1994) (regarding the payment of witnesses); 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure ' 2678 (3d ed. 1998) (regarding witness fees and expenses).

Decisions

Demarest v. Manspeaker, 498 U.S. 184, 111 S. Ct. 599, 112 L. Ed. 2d 608 (1991) (A convicted state prisoner testifying at a federal trial pursuant to a writ of habeas corpus ad testificandum is entitled to the payment of witness fees under 28 U.S.C. ' 1821.)

Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 85 S. Ct. 411, 13 L. Ed. 2d 248 (1964) (A district court can tax as costs the travel expenses of a witness coming to court from beyond subpoena range.)

Sampley v. Duckworth, 72 F.3d 528 (7th Cir. 1995) (The Illinois Department of Corrections cannot seek reimbursement of costs associated with complying with a writ of habeas corpus ad testificandum where IDOC was not a party.)

McGill v. Faulkner, 18 F.3d 456 (7th Cir. 1994) (The court held that the district court did not abuse its discretion by imposing costs against the inmate following the decision in McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991), which overturned a jury award in the inmate's favor. The court held that the prisoner failed to file an objection to the bill of costs, thus waiving his right to challenge the defendants' order for payment of costs. In addition, the prisoner failed to establish that he was incapable of paying the court-imposed costs. The mere allegation of indigence without documentary support is unpersuasive, and the inmate's status as prisoner does not per se establish that he is without funds. The court held, however, that even had the prisoner timely demonstrated that he was indigent, the district court still would not have abused its discretion. Thus, indigents are not immune from supposition of costs.)

Chicago College of Osteopathic Med. v. George A. Fuller Co., 801 F.2d 908 (7th Cir. 1986) (Fees and disbursements for witnesses' attendance fee, travel and subsistence are taxable as costs, but the fee of an expert witness, other than one appointed by the court, cannot be taxed under ' 1920 as a cost of suit to the winning party over the statutorily allowed amounts, even if that witness was necessary to the winner's case.)

Hudson v. Nabisco Brands, Inc., 758 F.2d 1237 (7th Cir. 1985) (Costs related to depositions may fall within ' 1920(2) even if the depositions were never introduced at trial, so long as they were believed necessary in light of the facts known at the time of their taking. Even costs related to discovery depositions may be assessed, provided those depositions are not merely for the convenience of the attorney or purely investigative in nature.)

Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983) (In a successful civil rights action, the plaintiff was entitled to an award of costs for charges by the official court reporter and for the depositions of five defendants. For an example of fee calculation, see this case on remand, Tikalsky v. City of Chicago, 585 F. Supp. 813 (N.D. Ill. 1984).

Illinois v. Sangamo Constr. Co., 657 F.2d 855 (7th Cir. 1981) (Expense of copying materials reasonably necessary for use in case are recoverable.)

Marcus v. National Life Ins. Co., 422 F.2d 626 (7th Cir. 1970) (The taxing of costs is a matter within the trial judge's discretion.)

Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1968) (Attorneys' travel expenses for taking depositions are not taxable as costs.)

Abbott Lab. v. Granite State Ins. Co., 104 F.R.D. 42 (N.D. Ill. 1984) ("Costs" are not to be equated with trial expenses; rather they are a term of art defined by statute.)

APPENDIX

Prison Litigation Reform Act

42 U.S.C.A. ' 1997e (West Supp. 1998):

(a) APPLICABILITY OF ADMINISTRATIVE REMEDIES

No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), 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.

(b) FAILURE OF STATE TO ADOPT OR ADHERE TO ADMINISTRATIVE GRIEVANCE PROCEDURE-

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 3 or 5 of this Act.

(c) DISMISSAL

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) ATTORNEY'S FEES

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that --

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B) (i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

(e) 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.

(f) HEARINGS

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) WAIVER OF REPLY

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.
(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) DEFINITION

As used in this section, the term `prisoner' means 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."

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Footnotes

Part I - Footnote 1

For the impact of the Prison Litigation Reform Act (the "PLRA") on lawsuits filed prior to the exhaustion of administrative remedies, see PART II, SECTION 6: EXHAUSTION OF PRISON GRIEVANCE PROVISIONS.

Part I - Footnote 2

The advent of Super-Maximum security prisons, such as Tamms, has created new problems for lawyers for both telephones and visits. It is critical to review IDOC regulations and prison orders in such instances.

Part I - Footnote 3

If the prison is more than 125 miles away, it may be best to leave the afternoon or night before the visit. This way you can arrive early and leave early.

Part I - Footnote 4

It is advisable, even when not expressly required, to fax a letter with appropriate details the to litigation coordinator about your visit. Show this letter at the gatehouse upon arrival with other appropriate identification. However, be sure to call the prison before faxing to alert them to the correspondence.

Part I - Footnote 5

As indicated earlier, some maximum-security prisons have a much more complicated procedure of which you will learn from the litigation coordinator.

Part I - Footnote 6

In addition, each state facility has its own more detailed rules implementing the general rules. These rules are known currently as "institutional directives" and "administrative directives" and should be sought through discovery.

Part I - Footnote 7

See PART I, SECTION 25 : SAMPLE LETTER TO CLIENT.

Part I - Footnote 8

Mail will not be delivered without the client section number on the envelope. Be sure to mark the envelope "PRIVILEGED & CLIENT/ATTORNEY CORRESPONDENCE - OPEN ONLY IN PRESENCE OF RESIDENT," so that the envelope will be opened only in the presence of the prisoner.

Part I - Footnote 9

If you haven't yet submitted pleadings in your case, please do so.

Part II - Footnote 1

As the decisions in this section indicate, the Supreme Court has held that federal courts must apply the state statute of limitations for personal injury in a § 1983 proceedings. The Illinois statute tolling the limitations period while a person is incarcerated has eliminated this exception. 735 ILL. COMP. STAT. ANN. 5/13-211 (West 1992). See Dixon v. Chrans, 986 F.2d 201 (7th Cir. 1993).

Part II - Footnote 2

An issue of “pendent parties○ can also arise, although rarely. That is, the designation as a defendant of a person or entity that is not part of the federal claim. Obviously, the Illinois Department of Corrections, an agency of the State of Illinois, and the State itself cannot be sued in federal court and should be dismissed if named. There is also a serious question whether a party, not involved in the federal claim but named in the pendent claim, can remain in the case. See Aldinger v. Howard, 427 U.S. 1, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976) (holding that there is no federal jurisdiction over a party against whom a claim cannot be brought under 28 U.S.C. §§ 1343(3) or 1983, the sections upon which federal civil rights claims are normally based).

Part II - Footnote 3
Decisions prior to the PLRA must be reviewed in light of this section.

Part II - Footnote 4
Distinguish the principles involved here from the liability of a city or county based on policy, etc. See PART II, SECTION 13: MUNICIPAL LIABILITY.

Part II - Footnote 5
This principle may also apply to officers of equal rank to the direct perpetrator.

Part II - Footnote 6
At the frequent Period Meetings, mostly informal in nature, appointed counsel are encouraged to attend to discuss problems peculiar to their cases. In addition the consultant, James P. Chapman and his associates are always available for telephone and in-person discussions.

Part II - Footnote 7
Review this issue in light of the Prison Litigation Reform Act which denies recovery for emotional injury in the absence of physical harm. See PART II, SECTION 17: DAMAGES & THE PRISON LITIGATION REFORM ACT.

Part II - Footnote 8
See PART I, SECTION 16: STATUTORY AUTHORITY FOR AWARDING ATTORNEYS' COSTS AND FEES.

Part II - Footnote 9
Internal prison transfers, for example from general population to segregation for disciplinary reasons, are treated separately herein. See PART II, SECTION 25: DUE PROCESS.

Part II - Footnote 10
However, prior to recent changes in the law (the PLRA) the prisoner was not required to exhaust administrative remedies as a condition of the §1983 action. Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982). That rule may now be different. See PART II, SECTION 6: EXHAUSTION OF PRISON GRIEVANCE PROCEDURES.

Part II - Footnote 11
For state proceedings by prisoners to vacate disciplinary hearing findings, see People ex rel. Yoder v. Hardy, 116 Ill. App. 3d 489, 451 N.E.2d 965 (Ill. App. 5 Dist. 1983) and Thompson v. Lane, 194 Ill. App. 3d 855, 551 N.E.2d 731 (Ill. App. 4 Dist. 1990).

Part II - Footnote 12
Judge Shadur in these decisions finds that the Balisok and Sandin rules may not apply when only injunctive relief is sought and that there is a discreet cause of action when damages are sought only for the due process violation, not the subsequent segregation or loss of good time. However, the damages recoverable in these instances would seem nominal at best in most cases. Consider also Wright v. Miller, 973 F. Supp. 390 (S.D.N.Y. 1997) for another good discussion.

Part II - Footnote 13
Cases against county jail personnel by pretrial detainees are based on the Fourteenth Amendment. See PART II, SECTION 29: THE COOK COUNTY JAIL.

Part II - Footnote 14
Note that the IDOC is not the defendant, but that the State is the real party in interest in virtually all cases because of its statutory obligation to represent and indemnify state employees. See 5 ill. comp. stat. ann. 350/2 (West Supp. 1998). In rare cases, the State will not represent correctional officers if their conduct is truly outrageous, that is, allegedly outside of the scope of employment. In this instance, union lawyers will represent the officer(s). However, case law does not favor the State in most instances.