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 Seventh 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. Please, remember to check the status of the cases cited herein, as courts are continually reevaluating civil rights law as applied to prisoner-plaintiffs.

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

1. PLEADINGS

(1) Appointed Counsel

Introductory Comment

Once the court has made the appointment, only the court can relieve the attorney of his or her fiduciary duties to the prisoner-plaintiff. Appointed counsel must represent prisoner-client with the same skill and care as he/she would use for a paying client.

Decisions

Mallard v. United States Dist. Court, 490 U.S. 296, 109 S. Ct. 1814, 104 L. Ed. 2d 318 (1989) (Although § 1915(e)(1) gives federal district courts the power to "request" an attorney to represent an indigent in a civil case, it 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.)

Stanciel v. Gramley, 267 F.3d 575 (7th Cir. 2001) (Prisoner who filed civil suit was not entitled to retrial on basis that his attorney's performance was so inadequate as to deprive him of fair opportunity to present his case; although performance of prisoner's attorney was deficient in several respects, there is no Sixth Amendment right to effective assistance of counsel in a civil case. Proper remedy for inadequate representation was malpractice action.)

Dunphy v. McKee, 134 F.3d 1297, 1301 (7th Cir. 1998) (Court must bear in mind, when counsel has been appointed or recruited for § 1983 action, that usual assumptions about agency relationship between lawyer and client must be relaxed; thus, in considering dismissal for want of prosecution, court should satisfy itself that appointed counsel is on the job and should consider appointing substitute counsel in cases in which fault seems to lie primarily with lawyer.)

Forbes v. Edgar, 112 F.3d 262 (7th Cir. 1997) (Denial of prisoner's request for counsel was not an abuse of discretion where prisoner was an "able litigant" who submitted comprehensible and literate documents to district court.)

Jackson v. County of McLean, 953 F.2d 1070, 1071 (7th Cir. 1992) (Indigent civil litigants have no constitutional or statutory right to be represented by counsel in federal court. The district court, however, may in its discretion request counsel to represent indigent civil litigants in certain circumstances under 28 U.S.C. § 1915(d). In determining whether to appoint counsel, the district court should consider: (1) the merits of the indigent's claim for relief; (2) the ability of the indigent

plaintiff to investigate crucial facts unaided by counsel; (3) whether the nature of the evidence indicates that the truth will more likely be exposed where both sides are represented by counsel; (4) the capability of the indigent to present the case; and (5) the complexity of the legal issues raised by the complaint.)

Pearson v. Gatto, 933 F.2d 521 (7th Cir. 1991) (District court did not abuse its discretion in permitting late filing of notice of appeal by appointed counsel whose involvement in numerous court-appointed cases caused him to miss the filing deadline, particularly as over-commitment was due to an excess of public service and altruism, rather than mismanaged ambition or desire for financial gain.)

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.)

(2) Duty to Investigate and to Eliminate Frivolous Claims

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 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. 2001).

The section defines "frivolous" in detail, tracking 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 Supp. 2001). See also 735 ILL. COMP. STAT. ANN. 5/22-105 (West Supp. 2001), 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.

You should also be aware that under the PLRA, a prisoner who accumulates three "strikes" for filing complaints (or appeals) that are deemed "frivolous" or "malicious" is barred (with certain exceptions) from filing future suits *in forma pauperis*. See 28 U.S.C. § 1915(g).

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.

(3) Necessary Parties

As soon as possible, determine if the proper parties have been named and if parties that generally are not liable (the IDOC Director or 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 on Bivens suits or federal claims under § 1983! See PART II, SECTION 4: STATUTE OF LIMITATIONS. (Other federal claims, such as Federal Tort Claims Act claims, have different limitations periods, as do potential pendant state claims.) 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.

2. FILING FEES: THE PLRA'S AMENDMENT TO THE IN FORMA PAUPERIS STATUTE

The Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915 amended the *in forma pauperis* statute to require prisoners who file a civil action to pay – over time, if necessary – the full amount of the court filing fee. A prisoner who is totally indigent may not be prevented from filing suit. A prisoner who has funds when he files suit, however, must pay an initial partial filing fee. After payment of the initial fee, the prisoner is required to make monthly payments until the fee is paid. See § 1915(b)(1)-(3). The PLRA sets forth three grounds for denying *in forma pauperis* status to a prisoner plaintiff: the prisoner has not established indigence; the appeal is in bad faith; or the prisoner has three strikes. See 28 U.S.C. § 1915(a)(2)-(3), (g). If the prisoner has three strikes against him, § 1915(g) requires prepayment of the entire fee in future cases, unless the prisoner "is under imminent danger of serious physical injury."

Decisions

Hall v. Stone, 170 F.3d 706 (7th Cir. 1999) ("Section 1915 does not give prisoners a veto power over collection–and at all events, once the district court enters an order under the PLRA, a warden must comply . . . Custodians must remit as ordered under § 1915 without regard to the prisoner's wishes. A prisoner's complaint or notice of appeal is all the authorization needed to debit his trust account; wardens must follow the statute (and judicial orders) rather than contrary directions from their charges.")

Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1999) (Prison Litigation Reform Act provision barring inmates with three or more prior frivolous cases from proceeding *in forma pauperis* did not apply to action filed by inmate before PLRA's effective date.)

Newlin v. Helman, 123 F.3d 429 (7th Cir. 1997), overruled in part by Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000) and Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000) (Much of Newlin remains good law and provides guidance for many PLRA procedures employed in this circuit. Waiver of the initial filing fee for a prisoner allowed to proceed IFP is allowed under § 1915(b)(4) only when the prisoner has "no assets and no means." A prisoner with periodic income has "means" even when he lacks "assets." In cases where the prisoner has been allowed to proceed IFP, the case will not proceed to decision until the initial partial filing fee has been collected.)

3. THE COMPLAINT

Introductory Comment

When 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

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 federal rules establish a liberal system of notice pleading. See also McCormick v. City of Chicago, 230 F.3d 319, 323 (7th Cir. 2000)(reversing district court's dismissal of plaintiff's municipal liability claim as premature given § 1983's liberal pleading standard.)).

Gomez v. Toledo, 446 US. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980) (Two allegations are 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.")

Davis v. Ruby Foods, Inc., 269 F.3d 818 (7th Cir. 2001) (The dismissal of a complaint on the ground that it is unintelligible is permitted. "But when the complaint adequately performs the notice function prescribed for complaints by the civil rules, the presence of extraneous matter does not warrant dismissal.")

Stanley v. Litscher, 213 F.3d 340, 343 (7th Cir. 2000) (A pro se plaintiff can plead himself out of court by pleading facts that undermine the allegations set forth in his complaint.)

Johnson v. Univ. 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.)

4. STATUTE OF LIMITATIONS & "RELATION BACK"

Introductory Comment

The prisoner-plaintiff often will fail to join the right officer(s) or other prison personnel who caused the alleged harm. Appointed counsel should act quickly to determine if proper parties have been joined. The statute of limitations is two years, no more! See 735 ILL. COMP. STAT. ANN. 5/13-202 (West 2001). And no leniency generally is given either the prisoner-plaintiff or appointed counsel in this regard.

Note that an amended complaint joining the correct parties after the statute of limitations has run will usually fail, even where the initial complaint named "John Does" or "unknown parties." See King v. One Unknown Federal Correctional Officer, 201 F.3d 910 (7th Cir. 2000).

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

Owens v. Okure, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989) (The Court 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.)

Johnson v. Rivera, 272 F.3d 519 (7th Cir. 2001) (exhaustion of prison's administrative remedies, as mandated by the PLRA, tolls the statute of limitations.)

Bd. 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.)

Heard v. Sheahan, 253 F.3d 316 (7th Cir. 2001) (This case examined the date of accrual for a § 1983 action alleging inadequate medical care. A prisoner with an untreated hernia sued officers at Cook County Jail. If the suit was for medical malpractice, the date of accrual would be when plaintiff discovered he had medical problem. But this was a suit charging that defendants inflicted cruel and unusual punishment. The refusal to provide medical care continued for as long as defendants had the power to do something about his condition. "Every day that they prolonged his agony by not treating his painful condition marked a fresh infliction of punishment that caused the statute of limitations to start running anew.")

Owens v. Boyd, 235 F.3d 356 (7th Cir. 2001) (In habeas corpus action, statute of limitations begins to run when the prisoner knows (or through reasonable diligence could discover) the important facts, not when the prisoner recognizes their significance.)

Henderson v. Bolanda, 253 F.3d 928, 931 (7th Cir. 2001) ("The correct statute of limitations for § 1983 actions filed in Illinois is two years as set forth in 735 ILCS § 5/13-202.")

King v. One Unknown Federal Correctional Officer, 201 F.3d 910 (7th Cir. 2000) (An amendment to a complaint for purposes of naming the proper party relates back to the original complaint only when (1) there has been an error made concerning the identity of the proper party and (2) that party is chargeable with knowledge of the mistake. See Fed. R. Civ. P. 15(c)(3). Here, plaintiff could not amend the complaint to identify a correctional officer defendant after the limitations period ran.)

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.)

5. 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 6: 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 (1966), 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."

Note that the case law doctrines of "pendent" and "ancillary" jurisdiction have been codified at 28 U.S.C. § 1367 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 2001).

Often, defendants will 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 determine (1) if they should remain in the case; and (2) if so, whether the complaint should be amended to designate these claims as separate pendent claims.

6. 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 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.)

Wynn v. Southward, 251 F.3d 588, 592 (7th Cir. 2001) (Defendant officers who confiscated prisoner's dentures did not deprive prisoner of life, liberty or property protected by the Fourteenth Amendment. Intentional deprivation of property does not violate due process so long as adequate state post-deprivation remedies are available. Wynn had an adequate post- deprivation remedy in the Indiana Tort Claims Act, and no more process was due.)

Murdock v. Washington, 193 F.3d 510 (7th Cir. 1999) (Prisoner claimed that confiscation of his property – jeans, carbon paper – violated his due process rights. His § 1983 action was properly dismissed for failure to state claim, in light of availability of adequate post-deprivation remedy.)

7. EXHAUSTION OF PRISON GRIEVANCE PROCEDURES

Introductory Comment

Prior to enactment of the Prison Litigation Reform Act ("PLRA"), most courts allowed prisoners to file § 1983 actions in federal court before they had exhausted the institution's administrative grievance procedure. This area of the law has changed dramatically in recent years. 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. § 1997(e)(a)(West. Supp. 2001).[1/]

One of the first steps you should take as appointed counsel is to determine whether the PLRA's exhaustion requirement applies to your case, and if so, whether your client has exhausted all available administrative remedies. The PLRA's exhaustion requirement applies to every case brought by a prisoner "with respect to prison conditions." (Prison conditions include excessive force cases and failure to protect cases in addition to traditional conditions cases.) It applies even if the prisoner thinks that the grievance procedure at his or her particular institution is a meaningless formality. It applies to all prisoners: state prisoners, federal prisoners, county jail inmates, and juveniles. And it may apply retroactively to incidents that occurred before the enactment of the PLRA, if the lawsuit was filed after the enactment of the PLRA.

1/ Elsewhere in the statute, "prison conditions" are defined as "conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2).

Note also that a prisoner must pursue internal appeals all the way to the IDOC's Administrative Review Board. Letters to prison officials do not satisfy the exhaustion requirement. If your client is a state prisoner, you should familiarize yourself with the IDOC's administrative grievance system, which is set forth in the Illinois Administrative Code. See 20 Ill. Admin. Code 504.810-850 (West Supp. 2001). In Illinois, a grievance must be filed within 60 days after the discovery of the incident, occurrence, or problem which gives rise to the grievance. A grievance may still be considered after the expiration of 60 days, but only if the prisoner can demonstrate that a grievance was not timely filed for good cause.

The Supreme Court recently discussed the scope of the PLRA's exhaustion requirement in Booth v. Churner, 121 S. Ct. 1819 (2001). Prisoner Timothy Booth sought money damages for an alleged beating by prison guards. He argued that the PLRA's exhaustion requirement was inapplicable to him because the prison's administrative grievance mechanism had no provision for recovery of money damages. The Supreme Court disagreed. After Booth, even if an inmate's injury lies wholly in the past and no relief other than money is conceivable, the inmate must first exhaust administrative remedies before bringing suit in federal court.[2/]

Just what is an action brought "with respect to prison conditions" within the meaning of the PLRA? The circuits are split. The latest word from the Seventh Circuit comes from three cases in which inmates complained of excessive force and harassment by prison guards. In Larkin v. Galloway, 266 F.3d 718 (7th Cir. 2001) and Smith v. Zachary, 255 F.3d 446 (7th Cir. 2001), the court held that isolated incidents assault by prison officials are "prison conditions" triggering the exhaustion requirement. Similarly, in Johnson v. Litscher, 260 F.3d 826 (7th Cir. 2001), the court found that repeated instances of retaliatory harassment by individual officers were subject to the exhaustion requirement. The Second Circuit has taken a contrary view. See Nussle v. Willette, 224 F.3d 95 (2d Cir. 2000) (the PLRA's exhaustion requirement does not apply to allegations of particular instances of excessive force or assault by prison employees). The Supreme Court has granted certiorari to resolve the split in authority. See Porter v. Nussle, 121 S. Ct. 2213 (2001).

Decisions

Booth v. Churner, 121 S. Ct. 1819 (2001) (see above)

McCarthy v. Bronson, 500 U.S. 136 (1991) (Complaints about medical treatment in prison are complaints about "prison conditions" for purposes of the § 1997e exhaustion requirement.)

2/ Note that Booth leaves open a very small loophole. If the administrative procedure in question "lacks authority to provide any relief or to take any action whatsoever in response to a complaint," then exhaustion would not be required. *Id.* at 1822.

McCoy v. Gilbert, 270 F.3d 503 (7th Cir. 2001) (Prisoner alleged that in October 1995 a gang of guards severely beat him, forced him to strip, and left him naked in a cell overnight. Plaintiff filed his complaint against the officers who beat him in 1999 – without first attempting to exhaust administrative remedies. He argued that since the PLRA became effective in April 1996, the exhaustion requirement did not apply to his case. The Court of Appeals disagreed, holding that the PLRA's exhaustion requirement may apply retroactively to incidents that occurred before the enactment of the PLRA. Although plaintiff missed the opportunity to submit a formal grievance within twenty-days of the event, BOP regulations provided a hardship exception for prisoners who can demonstrate a valid reason for not meeting the deadline. Since plaintiff could not show that he "substantially complied with the institution's grievance policy," the case was properly dismissed for failure to exhaust.)

Larkin v. Galloway, 266 F.3d 718 (7th Cir. 2001) (Lawsuit brought by prisoner who was severely beaten by guards was dismissed for failure to exhaust administrative remedies. Prisoner appealed, claiming that he did not file an administrative grievance because he feared retaliatory action by prison officials. The Court of Appeals affirmed, holding that under § 1997(e), prisoner-plaintiff must exhaust any administrative process that "(1) was empowered to consider his complaint and (2) could take *some* action in response to it.")

Johnson v. Litscher, 260 F.3d 826 (7th Cir. 2001) (Prisoner brought § 1983 action alleging that he was repeatedly harassed by prison officials in retaliation for winning prior lawsuit. The court affirmed district court's dismissal for failure to exhaust. Allegations of harassment by state prison officials towards inmate were allegations of "prison conditions" requiring exhaustion.)

Smith v. Zachary, 255 F.3d 446 (7th Cir. 2001) (An excessive force lawsuit is a lawsuit "with respect to prison conditions," under § 1997 such that a prisoner must first exhaust administrative remedies before bringing an action alleging excessive force. The court held that requiring exhaustion in this context will develop the factual record; give prison officials an opportunity to address the situation internally; and may serve to narrow the scope of litigation.)

Massey v. Wheeler, 221 F.3d 1030 (7th Cir. 2000) (Prisoner cannot avoid exhaustion requirement by arguing that administrative remedies are a "sham." There is no "futility exception" to the PLRA exhaustion requirement.)

Massey v. Helman, 196 F.3d 727 (7th Cir. 1999) (PLRA does not condition the applicability of its exhaustion requirement on the effectiveness of the administrative remedy available in a given case.)

Perez v. Wisconsin Dep't of Corrections, 182 F.3d 532 (7th Cir. 1999) (Plaintiff brought a § 1983 action seeking damages for inadequate medical treatment. The court held that a prisoner cannot avoid § 1997e(a) by limiting his demand to money damages. The PLRA requires exhaustion when a

prisoner seeks financial relief for a continuing violation and the prison's internal grievance system does not award money damages. NOTE: To the extent that the court hinted at an exception to this rule, the exception was foreclosed by Booth v. Churner.)

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 a 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 security.)

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.)

Illinois Department of Corrections Rule:

20 Ill. Admin. Code § 525.40 (West Supp. 2001): Attorney Visitation -- Adult and Community Services Division

(2) Mail

Massey v. Wheeler, 221 F.3d 1030, 1037 (7th Cir. 2000) (Affirming that attorney-client mail may only be opened in presence of inmate.)

Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999) ("Merely alleging an isolated delay or some other relatively short-term, non content-based disruption in the delivery of inmate reading materials will not support, even as against a motion to dismiss, a cause of action grounded upon the First Amendment." In this case, the delays in receiving mail were relatively short-term and sporadic. Moreover, plaintiff failed to allege that the delays resulted from a content-based prison regulation or practice.)

Antonelli v. Sheahan, 81 F.3d 1422 (7th Cir. 1996) (Prisoner stated a claim when 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. Note: This case pre-dates Lewis v. Casey, 518 U.S. 343, 355 (1996.))

Illinois Department of Corrections Rules:

20 Ill. Admin. Code §§ 525.100-.150 (West Supp. 2001): Mail and Telephone Calls

(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.

Decisions

Massey v. Wheeler, 221 F.3d 1030 (7th Cir. 2000) (Prisoner and his attorney brought lawsuit alleging that actions of prison staff in restricting inmate's communications with attorney, including limit on unmonitored telephone calls by inmate, resulted in violation of constitutional rights. Prisoner's case was dismissed for failure to exhaust. Attorney lacked third-party standing to allege a violation of the prisoner's constitutional rights.)

Pope v. Hightower, 101 F.3d 1382, 1385 (11th Cir. 1996) (Prison telephone policy limiting number of persons inmate may call to 10 justified by legitimate penological interest in reduction of criminal activity and harassment.)

Hansen v. Rimel, 104 F.3d 189, 190 (8th Cir. 1997) (No equal protection violation where prison officials failed to provide hearing-impaired inmate with specially modified telephone.)

Tucker v. Randall, 948 F.2d 388, 391 (7th Cir. 1991) (Unreasonable restrictions on a detainee's telephone access may violate the First and Fourteenth Amendments. A delay of four days, for example, before a detainee is allowed access to telephone is potentially unconstitutional.)

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

Illinois Department of Corrections Rule:

20 Ill. Admin. Code § 525.150 (West Supp. 2001): Telephone Privileges.

CHAPTER 3: FORMULATING A STRATEGY — CHOOSING DEFENDANTS

9. IMMUNITIES — QUALIFIED OR GOOD FAITH IMMUNITY

Introductory Comment

Qualified immunity from a civil rights action is an entitlement not to stand trial or face the other burdens of litigation.

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

The qualified immunity 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.

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.

(1) Qualified or Good Faith Immunity in General

Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151 (2001) (A qualified immunity defense must be considered in proper sequence. The initial inquiry is whether a constitutional right would have been violated on the facts alleged, for if no right would have been violated, there is no need for further inquiry. If a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is whether the right was clearly established. The relevant inquiry is whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted. In excessive force cases, the second prong of the qualified immunity analysis must be separate and distinct from the excessive force analysis.)

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. See also Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982.))

Campbell v. Peters, 256 F.3d 695 (7th Cir. 2001) (Inmate articulated a constitutional right in not being detained for longer than his sentence required, but officials did not violate clearly established law and therefore were entitled to qualified immunity.)

Jacobs v. City of Chicago, 215 F.3d 758, 765 n.3 (7th Cir. 2000) (A complaint is generally not dismissed under Rule 12(b)(6) on qualified immunity grounds because an immunity defense usually depends upon the facts of the case. "[T]he plaintiff is not required initially to plead factual allegations that anticipate and overcome a defense of qualified immunity." Qualified immunity is an issue better addressed at summary judgment.)

Walker v. Snyder, 213 F.3d 344, 346 (7th Cir. 2000) (Qualified immunity is a personal defense, which does not apply to institutional defendants in suits under federal statutes. See also Owen v. Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980.))

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 Defense Denied

Delaney v. DeTella, 256 F.3d 679 (7th Cir. 2001) (Officials could not have reasonably believed that complete withholding of out-of-cell exercise from inmate for six months did not violate Eighth Amendment. Qualified immunity defense denied.)

Alvarado v. Litscher, 267 F.3d 648 (7th Cir. 2001) (Prisoner with severe chronic asthma brought an Eighth Amendment claim alleging that he was being exposed to harmful levels of second hand smoke. Given the Supreme Court's holding in Helling v. McKinney, 509 U.S. 25 (1993), the right of a prisoner not to be subjected to a serious risk of his future health resulting from second hand smoke was clearly established at the time of the incident.)

Sanville v. McCaughtry, 266 F.3d 724 (7th Cir. 2001) (Prison officers were not immune from individual liability where mentally ill detainee committed suicide, when officers did not check on prisoner for five hours despite bizarre behavior, a last-will-and-testament note, a warning call from his mother, and extreme weight loss. "There can be little debate that it was clearly established, long before 1998, that prison officials will be liable under § 1983 for a pretrial detainee's suicide if they were deliberately indifferent to a substantial suicide risk.")

Burgess v. Lowery, 201 F.3d 942 (7th Cir. 2000) (Prison visitors' Fourth Amendment right not to be strip searched in absence of reasonable suspicion that he or she was carrying contraband was

clearly established at time state prison officials searched persons visiting death row inmates, and thus officials, sued under § 1983, were not entitled to qualified immunity.)

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.)

Henderson v. DeRobertis, 940 F.2d 1055 (7th Cir. 1991) (The court denied the defendants qualified immunity in case in which prisoner complained of absence of heat in cellblock. Defendants argued that there was no clearly established law since the weather was abnormally cold and the heating breakdown was unusual. The court held that "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.)

(3) Qualified Immunity Defense Prevailed

Pearson v. Ramos, 237 F.3d 881 (7th Cir. 2001) (Superintendent of state prison's disciplinary-segregation unit, who imposed four, consecutive, 90-day denials of prison yard privileges upon prisoner for violation of prison disciplinary rules, was entitled to qualified immunity in § 1983 action alleging cruel and unusual punishment; there was no case law when official acted indicating that such "stacking" of sanctions was cruel and unusual punishment and no tenable argument that stacking so clearly violated the Eighth Amendment that official in superintendent's position would have had to know that it did.)

Campbell v. Peters, 256 F.3d 695 (7th Cir. 2001) (Former prison inmate failed to show that clearly established law prohibited prison officials from revoking his good conduct credits after re-commitment, and thus officials were entitled to qualified immunity in inmate's §1983 action.)

Fuller v. Dillon, 236 F.3d 876 (7th Cir. 2001) (Prison inmate who had been given psychotropic medication against his will brought § 1983 action against prison officials and medical personnel, alleging a violation of his due process rights. Given prisoner's serious mental illness and in light of the Supreme Court's decision in Washington v. Harper, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990), defendants could reasonably have believed that involuntary administration of medication did not violate inmate's due process rights. See also Sullivan v. Flannigan, 8 F.3d 591 (7th Cir. 1993.))

Arsberry v. Illinois, 244 F.3d 558 (7th Cir. 2001) (Illinois prisoners brought action under § 1983, Sherman Act, and state law challenging the practice by which prisons grant one telephone company the exclusive right to provide inmate telephone services in exchange for a portion of the revenue generated. Individual defendants were entitled to qualified immunity given the novelty of the suit.)

Anderson v. Romero, 72 F.3d 518 (7th Cir. 1995) (Prisoner 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.)

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 did not violate clearly established right.)

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. Defendants' procedure, whereby the individual parole agent determined said condition, was violative of due process. However, defendants were entitled qualified immunity because the parolee's procedural rights were not clearly established at the time.)

(4) Qualified Immunity & Private Parties

Richardson v. McKnight, 521 U.S. 399, 117 S. Ct. 2100 (1997) (Prison guards employed by a private prison management firm were not entitled to qualified immunity from suit by prisoners charging a violation of § 1983. History did not reveal a tradition of immunity for private prison guards. Neither did the immunity doctrine's traditional purposes warrant immunity for private prison guards. Mere performance of a government function does not support immunity for a private person. This is especially true where the private person performs a job without government supervision or direction. See also Malinowski v. DeLuca, 177 F.3d 623 (7th Cir. 1999); Payton v. Rush Presbyterian St. Luke's Med. Ctr., 184 F.3d 623 (7th Cir. 1999.))

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 they were not state employees. The court noted that private parties may raise the defense of qualified immunity in certain circumstances. A private party acting under a government contract, as was the case here, may be granted qualified immunity.)

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 acted under court order.)

(5) Appealability of Qualified Immunity Decision

Behrens v. Pelletier, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996) (Defendant filed a motion to dismiss on qualified immunity grounds, which was denied. Defendant took the issue up to the circuit court on interlocutory appeal and lost again. At summary judgment, 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 reversed, holding that the denial of qualified immunity was immediately appealable pursuant to Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). 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. 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. 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.)

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 denied the sheriff summary judgment 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.)

Mitchell v. Randolph, 215 F.3d 753, 755 (7th Cir. 2000) (If resolution of a claim of qualified immunity depends on disputed issues of material fact, not only must it await a full trial, but it is also not a proper subject for an interlocutory appeal. See Johnson v. Jones, 515 U.S. 304, 307, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995); Omdahl v. Lindholm, 170 F.3d 730, 732 (7th Cir. 1999) (same.))

Burgess v. Lowery, 201 F.3d 942 (7th Cir. 2000) (Denial of prison officials' motion to dismiss prison visitors' tort claims on ground of qualified immunity was immediately appealable insofar as undisputed facts subjected officials to threat of damages liability, even though suit also sought injunctive relief, from which there was no immunity.)

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. Remember, state officials (including IDOC personnel) cannot be sued for damages 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. In this context, an action against a state official in his official capacity is an action against the State.

Official capacity actions for prospective or injunctive relief are not treated as actions against the State. Such claims are not barred by the Eleventh Amendment. See, e.g., Power v. Summers, 226 F.3d 815 (7th Cir. 2000).

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.)

Mireles v. Waco, 502 U.S. 9 (1991) (Discusses judicial immunity.)

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.)

Anderson v. Simon, 217 F.3d 472 (7th Cir. 2000) (Widow of detainee who committed suicide could not sue assistant state's attorney in his individual capacity under § 1983. Absolute prosecutorial immunity barred the suit.)

Biblia Abierta v. Banks, 129 F.3d 899 (7th Cir. 1997) (Discusses absolute legislative immunity.)

Wilson v. Kelkhoff, 86 F.3d 1438 (7th Cir. 1996) (Defendant could not sue members of prisoner review board for alleged due process violations in revoking his supervised release. Prisoner review board members were entitled to absolute immunity for activities that are analogous to those performed by judges, such as decision to grant, deny, or revoke parole, as well as activities that are inexorably connected with execution of parole revocation procedures and are analogous to judicial action.)

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.)

Kincaid v. Vail, 969 F.2d 594 (7th Cir. 1992) (Court clerks were entitled to absolute immunity against § 1983 action brought by two inmates, who alleged that clerks had deprived them of their constitutional right to access to courts by refusing to file inmates' civil suit in Indiana Superior Court; clerks' acts were done at judicial direction, and were nonmechanical functions integral to judicial process.)

11. ELEVENTH AMENDMENT IMMUNITY

Introductory Comment

In most 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 for damages 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

Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 120 S. Ct. 1858, 1865 (2000) (Courts should first determine whether the statute in question permits the cause of action it

creates to be asserted against States before reaching the Eleventh Amendment immunity issue). See, e.g., Johnson v. Doe, 2000 WL 1529788 (7th Cir. 2000)("[B]ecause the IDOC cannot be sued under § 1983, we need not reach the constitutional issue.")

Coll. Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. , 527 U.S. 666, 670, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (A bank sued the state of Florida for false advertising under the Lanham Act. The Supreme Court held that the suit was barred under the Eleventh Amendment. As a general rule, Congress may subject non-consenting States to suit in federal court pursuant to a valid exercise of its power to enforce the Fourteenth Amendment. In this case, however, the Court held that Congress could not use § 5 of the Due Process Clause to abrogate state sovereign immunity on the ground that statutory rights are "property" under the Fourteenth Amendment.)

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. But see PLRA's limitation on attorney's fees, 42 U.S.C. § 1997e(d).)

Wynn v. Southward, 251 F.3d 588, 592 (7th Cir. 2001) (Prisoner alleging deliberate indifference to medical condition may not sue Indiana State Prison; nor may he sue prison officials in their official capacity. These claims are barred by Eleventh Amendment. Pro se prisoner's omission of the phrase "individual capacity," however, does not necessarily render this solely an official capacity suit.)

Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000) (Under Eleventh Amendment, inmate's claim, seeking accommodation of his visual disability under ADA, could not be brought against State in federal court.)

Higgins v. Mississippi, 217 F.3d 951, 953 (7th Cir. 2000) (Eleventh Amendment, which precludes a citizen from suing a state for money damages in federal court without the state's consent,

barred plaintiff's claims against the Indiana State Prison and the Indiana Department of Corrections, both state agencies.)

DeGenova v. Sheriff of DuPage County, 209 F.3d 973 (7th Cir. 2000) (For Eleventh Amendment purposes, Illinois sheriffs are county officers – not state officers – when they manage jails.)

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 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 personally responsible for the deprivation of a constitutional right or he will not be liable. There is no liability based on respondeat superior or principal-agent.[3/]

This issue is carefully discussed in Steidl v. Gramley, 151 F.3d 739 (7th Cir. 1998), where the prisoner-plaintiff sued the warden for failing to protect him from attack by fellow inmates. The complaint stated that no guards were stationed in the towers on the catwalk overlooking the area where plaintiff was attacked. Plaintiff claimed that the absence of guards in the towers violated prison policy and that the warden was liable for this violation since he "[was] the person ultimately in charge of, and responsible for, all day-to-day operations." Id. at 741. The Court of Appeals determined that the warden (and other supervisory personnel)[4/] could be liable under the Eighth Amendment only 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 district court's dismissal because the complaint failed to make these necessary allegations.

Appointed counsel should read Steidl 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

---

3/ Distinguish the principles involved here from the liability of a city or county based on policy, etc. See PART II, SECTION 13: MUNICIPAL LIABILITY.

4/ This principle may also apply to officers of equal rank to the direct perpetrator.

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

Sanville v. McCaughtry, 266 F.3d 724 (7th Cir. 2001) (A defendant "will be deemed to have sufficient personal responsibility if he directed the conduct causing the constitutional violation, or if it occurred with his knowledge or consent." See Chavez v. Illinois State Police, 251 F.3d 651 (7th Cir. 2001). The individual does not have to have participated directly in the deprivation. A supervisor may be liable for "deliberate, reckless indifference" to the misconduct of subordinates.)

Chavez v. Illinois State Police, 251 F.3d 612, 651 (7th Cir. 2001) ("[S]upervisors who are merely negligent in failing to detect and prevent subordinates' misconduct are not liable.... The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference." (quoting Jones v. City of Chicago, 856 F.2d 985, 992-93 (7th Cir. 1988.))

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 of access to the courts.)

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.)

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. These 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.

Note that a § 1983 action against an official in his official capacity is treated as a suit against the governmental entity that employs the defendant. See Monell v. Department of Soc. Servs., 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In other words, if an inmate sues the director of the Cook County Jail in his official capacity, it will be treated as a suit against Cook County.

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.)

Monell v. Dept. of Soc. Services, 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.)

Sanville v. McCaughtry, 266 F.3d 724 (7th Cir. 2001) (In the Eighth Amendment context, "failure to train" claims may be maintained only against a municipality – not against individuals. See also Farmer v. Brennan, 511 U.S. at 841, 114 S.Ct. 1970.)

McCormick v. City of Chicago, 230 F.3d 319, 323 (7th Cir. 2000) ("The Supreme Court has made it very clear that federal courts must not apply a heightened pleading standard in civil rights cases alleging § 1983 municipal liability. See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)." See also Jackson v. Marion County, 66 F.3d 151 (7th Cir. 1995.))

DeGenova v. Sheriff of DuPage County, 209 F.3d 973 (7th Cir. 2000) (Illinois sheriffs have final policy making authority over jail operations.)

Eversole v. Steele, 59 F.3d 710 (7th Cir. 1995) (A local government is 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). Not 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.)

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.)

CHAPTER 4: PREPARATION FOR TRIAL

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 these 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 find out 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:	Access To Records.
20 Ill. Admin. Code § 107.330:	Release of Clinical Records to Committed Persons and Authorized Attorneys (Adult Division) — Court Agreement.

See also PART I, SECTION 26: FORMS.

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.

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 Marshal's Service is responsible for the prisoner during court proceedings.)

Haley v. Gross, 86 F.3d 630, 644 (7th Cir. 1997) (Expert testimony from a former prison warden about the appropriate response to certain prison situations was properly admitted.)

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, 151 (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, 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.")

CHAPTER 5: DAMAGES

16. DAMAGES — GENERALLY

Decisions

Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983) (Inmate in a Missouri reformatory for youthful offenders brought suit under § 1983 against reformatory guards alleging that his Eighth Amendment rights had been violated. After a jury verdict in plaintiff's favor, the Supreme Court held that 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.)

Jutzi-Johnson v. United States, 263 F.3d 753 (7th Cir. 2001) (The Court of Appeals discussed the difficulty of calculating appropriate pain and suffering awards. The Court suggested in dictum that "[t]o minimize the arbitrary variance in awards bound to result from ... a throw-up-the-hands approach, the trier of facts should ... be informed of the amounts of pain and suffering damages awarded in similar cases.")

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.)

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.)

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.)

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. 2001) (emphasis added).

Section 1997e(e) does not require a showing of physical injury in all prisoner civil rights cases – just those in which mental or emotional injury is claimed. The Seventh Circuit has offered the following guidance for when the physical injury requirement comes into play:

> "[I]f the only form of injury claimed in a prisoner's suit is mental or emotional (for example, if the prisoner claimed that the small size of his cell was driving him crazy), the suit is barred in its entirety. If the suit claims a palpable, current physical injury that is inflicting mental and emotional harm, the suit is unaffected by the statute. If the suit contains separate claims, neither involving physical injury, and in one the prisoner claims damages for mental or emotional suffering and in the other damages for some other type of injury, the first claim is barred by the statute but the second is unaffected."

Robinson v. Page, 170 F.3d 747 (7th Cir. 1999).

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

The following decisions examine what constitutes a "physical injury" and the types of claims to which § 1997e(e) applies.

Decisions

Cassidy v. Indiana DOC, 199 F.3d 374 (7th Cir. 2000) (Blind prisoner who sued under the Americans with Disabilities Act was barred by § 1997e(e) from recovering for mental/emotional injury in the absence of any claimed physical injury.)

Rowe v. Shake, 196 F.3d 778, 781 (7th Cir. 1999) (A prior showing of physical injury is not required to bring a First Amendment claim, so long as prisoner does not seek recovery for mental or emotional injuries.)

Robinson v. Page, 170 F.3d 747, 749 (7th Cir. 1999) (Prisoner's claim for mental or emotional injury not barred by § 1997(e) where it was not yet established if prisoner could establish a physical injury.)

Kerr v. Puckett, 138 F.3d 321 (7th Cir. 1998) (The physical injury requirement does not apply to suits filed by ex-prisoner after he is released.)

Zehner v. Trigg, 133 F.3d 459, 462 (7th Cir. 1997) (Rational basis test was appropriate standard for equal protection challenge to § 1997(e) in civil rights action by prisoners who alleged that they suffered mental and emotional injuries as a result of exposure to asbestos. The provision passed the rational basis test. Prisoners could not recover damages for emotional injuries. They may, however, sue for injunctive relief.)

CHAPTER 6: SUBSTANTIVE PRISON LAW

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. In prison he continued to receive hormonal treatment and wore his clothing in a "feminine manner." He was, nonetheless, 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 and 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.

Note that challenges to the effectiveness of a prison's classification system have fared poorly in this circuit. In order to prevail against the sheriff for failure to implement a proper classification system, plaintiff would have to prove that defendants deliberately failed to implement a classification system with

the motive of allowing or helping prisoners to injure one another. See Weiss v. Cooley, 230 F.3d 1027, 1032 (7th Cir. 2000).

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

Mayoral v. Sheahan, 245 F.3d 934 (7th Cir. 2001) (Upon arrival at Cook County Jail, plaintiff told receiving officer that he had been a gang member, that his crime involved a rival gang member, and that he feared for his life. He was placed in general population where he was seriously injured by other inmates. The court reversed district court's grant of summary judgment on claims against individual officers. Summary judgment should not have issued where officers knew about plaintiff's request for protective custody but nonetheless placed him in general custody where they saw that other inmates were acting "rowdy" and "seemed to be intoxicated" on prison alcohol.)

Weiss v. Cooley, 230 F.3d 1027 (7th Cir. 2000) (Suspect in highly-publicized rape case was assaulted by inmates while in county jail. Court reversed district court's grant of summary judgment. While a deliberate indifference claim "cannot be predicated merely on knowledge of general risks of violence in prison," a plaintiff need not show that defendant had "advance knowledge of every detail of a future assault.")

Haley v. Gross, 86 F.3d 630 (7th Cir. 1997) (Prisoner was severely burned in fire set by cellmate. The court found that the evidence sustained jury determination that prison officials were deliberately indifferent to safety and welfare of prisoner when cellmate, who had been acting strangely, set their cell on fire after prisoner's pleas to be moved were ignored and after cellmate was placed on "deadlock status" which made it more difficult to remove prisoner from cell in emergency.)

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.)

(2) Inmate Failed to State or Prove Claim

Steidl v. Gramley, 151 F.3d 739 (7th Cir. 1998) (Warden could not be held liable for an Eighth Amendment violation based on allegation that he knew or should have known that chances of inmate-on-inmate violence were greatly enhanced after disappearance of razor blade. Alleged absence

of guards in towers and catwalk overlooking prisoner's unit at the time of attack did not give rise to liability on warden's part.)

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.)

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.)

Illinois Department of Corrections Rules:

20 Ill. Admin. Code §§ 112.10-112.50:	Internal Investigations.
20 Ill. Admin. Code §§ 501.300-.350:	Protective Custody.
20 Ill. Admin. Code § 503.20:	Classification of Committed Persons.

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. In evaluating an excessive force claim, Hudson directed trial courts to consider factors such as: the need for an application of force, the relationship between that need and the force applied, the threat reasonably perceived by the responsible officers, the efforts made to temper the severity of the force employed, and the extent of the injury suffered by the prisoner. See id. at 7, 112 S.Ct. 995; see also DeWalt v. Carter, 224 F.3d 607, 619 (7th Cir. 2000).

Hudson also held that the prisoner must demonstrate some injury, although it need not be a significant one.[5/] See also Outlaw v. Newkirk, 259 F.3d 833, 839 (7th Cir. 2001) (discussing *de*

5/ 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.

minimis injuries in excessive force cases); DeWalt v. Carter, 224 F.3d 607, 619-20 (7th Cir. 2000) (same).

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's 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

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) (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.)

(2) Inmate Failed to State or Prove Claim

Outlaw v. Newkirk, 259 F.3d 833, 839 (7th Cir. 2001) (Court granted summary judgment against prisoner who alleged that guard slammed his hand in cellport door. Eighth Amendment claims

based upon *de minimis* uses of physical force by prison guards are not cognizable unless they involve "force that is repugnant to the conscience of mankind." Hudson, 503 U.S. at 9-10. Here, there could be no Eighth Amendment claim because either (1) the injury was an accident; or (2) defendant deliberately and perhaps unnecessarily applied a relatively minor amount of force to achieve a legitimate security objective, resulting in only superficial injuries. Neither scenario involved a use of force "repugnant to the conscience of mankind.")

DeWalt v. Carter, 224 F.3d 607, 620 (7th Cir. 2000) (Defendant's simple act of shoving DeWalt was the kind of *de minimis* use of force that does not constitute cruel and unusual punishment. The shove was a single and isolated act, unaccompanied by further uses of force. Moreover, the bruising DeWalt allegedly suffered was not particularly serious.)

Lunsford v. Bennett, 17 F.3d 1574, 1582 (7th Cir. 1994) (Defendant's act of pouring a bucket of water on prisoner and causing the bucket to hit him in the head characterized as *de minimis*.)

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.)

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." One thing is clear, however. The prison administration does not violate the Constitution every time a prison doctor or other official makes a

mistake in diagnosing or treating a prisoner. A prison official is deliberately indifferent when he knows about but disregards an excessive risk to a prisoner's health. Plaintiff must show that defendant acted with reckless disregard toward the prisoner's serious need by inaction or woefully inadequate action.

It is suggested that appointed counsel carefully read Estelle, Wilson v. Seiter, 501 U.S. 294, 111 S. Ct. 2321 (1991) 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 [6/] 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

Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001) (Allegations that inmate had suffered bleeding, headaches, and disfigurement as a result of not having his dentures demonstrated that inmate had serious medical need, supporting §1983 claims alleging that corrections officials violated his Eighth Amendment rights through actions depriving him of his dentures.)

Sherrod v. Lingle, 223 F.3d 605 (7th Cir. 2000) (Grant of summary judgment for defendants reversed where inmate suffered ruptured appendix after prison medical staff repeatedly refused to take

---

6/ See PART I, SECTION 16: STATUTORY AUTHORITY FOR AWARDING ATTORNEYS' COSTS AND FEES.

him to a hospital. An inmate is not required to show that he was "literally ignored" by the staff, but rather that the official knew of and disregarded an excessive risk to the inmate's health. "If knowing that a patient faces a serious risk of appendicitis, the prison official gives the patient an aspirin and an enema and sends him back to his cell, a jury could find deliberate indifference although the prisoner was not simply ignored.")

Chavez v. Cady, 207 F.3d 901 (7th Cir. 2000) (Despite defense expert's testimony that nurse complied with applicable standard of care, there was an issue of material fact as to whether the treatment provided for appendicitis was a substantial departure from accepted professional practice where plaintiff was not taken to a hospital until several days after he suffered ruptured appendix.)

Ralston v. McGovern, 167 F.3d 1160 (7th Cir. 1999) (It "bordered on the barbarous" to withhold doctor-prescribed pain-alleviating medication from a patient suffering from cancer where the illness caused blistering which made it difficult for the prisoner to swallow food.)

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.)

(2) Inmate Failed to State or Prove Claim

Sentmyer v. Kendall County, 220 F.3d 805 (7th Cir. 2000) (Guards' failure to dispense detainee's medication for ear infection consistently on schedule did not amount to deliberate indifference.)

Walker v. Peters, 233 F.3d 494 (7th Cir. 2000) (HIV positive prisoner who exhibited HIV-related symptoms did not state a deliberate indifference claim against doctors who allegedly refused to treat him. Prisoner's refusal to undergo HIV test was fatal to his deliberate indifference 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 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.)

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.)

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.

21. MENTAL HEALTH CARE/ SUICIDE

To state a claim, plaintiffs must prove that officials were deliberately indifferent to the prisoner's risk of suicide. Plaintiff must also prove that the suicide was a foreseeable and an actual consequence of officials' deliberate indifference. As the cases below demonstrate, this is a very high burden to meet.

(1) Inmate Stated or Proved Claim

Sanville v. McCaughtry, 266 F.3d 724 (7th Cir. 2001) (Allegations that mentally ill inmate who had a history of mental illness and suicide attempts, had recently lost nearly one-third of his body weight, written letters to his mother contemplating his death, written a last will and testament, told guards that he planned to commit suicide, and covered his cell openings with toilet paper so that it was difficult to see inside, stated claim that guards were aware of a substantial risk that inmate would commit suicide, as required for Eighth Amendment claim by inmate's mother after he committed suicide.)

(2) Inmate Failed to State or Prove Claim

Jutzi-Johnson v. U.S.A., 263 F.3d 753 (7th Cir. 2001) (The estate of Robert Johnson, a federal prisoner who hanged himself in his cell, brought suit for damages under Federal Tort Claims Act for negligence in failing to identify him as suicide risk. Before his death, fellow prisoners repeatedly reported Johnson's symptoms – poor hygiene, self-mutilation, excessive sleep, extreme nervousness – to prison personnel. To satisfy its burden, the estate had to prove that Johnson would not have committed suicide had the staff acted responsibly and that his suicide was a foreseeable as well as an actual consequence of the staff's negligence. In this case, the court held, causation was not established. Even if jail staff had sent Johnson to a psychologist, it was "sheer conjecture" that interview with psychologist would have produced information to have enabled officials to infer that prisoner was a suicide risk.)

Estate of Novack v. County of Wood, 226 F.3d 525 (7th Cir. 2000) (Prison officials must take reasonable preventative steps when they are aware that there is a substantial risk that an inmate may attempt suicide. Here, jail personnel were not substantially aware that deceased inmate posed a high risk of suicide and there was no pattern of suicides to suggest that the City was aware that its policies for treating mentally ill inmates were inadequate. Judge Williams dissented.)

Frake v. City of Chicago, 210 F.3d 779 (7th Cir. 2000) (City was not deliberately indifferent to the needs of mentally ill pretrial detainees (even though city continued to place detainees in cells containing horizontal bars) where there was no evidence that anyone had knowledge that detainee was suicidal, detention facility used thorough screening process, and cells were checked regularly.)

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.)

22. 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 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.

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

Shaw v. Murphy, 121 S. Ct. 1475 (2001) (Inmate law clerk brought § 1983 action for injunctive and declaratory relief against state prison employees, alleging that his First Amendment rights, right of access to the courts, and due process rights were violated when he was punished for sending a letter containing legal advice to another inmate. Justice Thomas held that inmates do not possess a First Amendment right to provide legal assistance to fellow inmates.)

U.S. v. Boyd, 208 F.3d 592, 593 (7th Cir. 2000) (Prisoner's right of access to court was not violated when defendant-prisoner was offered appointed counsel for appeal but chose self-representation; because inmate chose to forgo access to counsel, right of access to law library was lost as well. Cf. Bribiesca v. Galaza, 215 F.3d 1015, 1020 (9th Cir. 2000) (incarcerated criminal defendant who chooses to represent self has constitutional right to access law books or other tools to assist in preparing defense.))

May v. Sheahan, 226 F.3d 876 (7th Cir. 2000) (Pretrial detainee sued county sheriff alleging that prisoners at county hospital were not taken to court on assigned court dates and did not have access to lawyers, legal materials, and visitors. Plaintiff's allegation that he was detained longer than he would have been if he had not missed a court date sufficiently alleged an injury under Lewis v. Casey.)

Zimmerman v. Tribble, 226 F.3d 568, 572 (7th Cir. 2000) (Inmate who was banned from the law library after he repeatedly filed grievances about inadequate library access stated a claim for retaliation.)

Hoard v. Reddy, 175 F.3d 531 (7th Cir. 1999) (Inmate could not recover money damages against prison officials who hindered his efforts to litigate a state court collateral attack on his conviction. Under Heck v. Humphrey, 512 U.S. 477 (1994), a convicted person may not seek damages on any theory that implies that his conviction was invalid without first getting the conviction set aside. The inmate also could not obtain an injunction ordering the state court to re-open his post-conviction proceeding.)

Walters v. Edgar, 163 F.3d 430 (7th Cir. 1999) (To establish standing, plaintiff asserting that he was denied access to the courts must show that "the blockage prevented him from litigating a nonfrivolous case." Prisoner need not prove that he would have won his case had it not been for his being denied access to court.)

Brooks v. Buscher, 62 F.3d 176, 182 (7th Cir. 1995) (Meaningful access was provided to violent inmate restricted from law library because inmate was given access to library materials through intermediaries.)

23. TRANSFERS

Introductory Comment

Transfers from one prison to another within the Illinois Department of Corrections are within the virtually unchallengeable discretion of the IDOC.[7/] 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: transfers that retaliate for the exercise of a vested right, transfers in response to a prisoner's suit alleging a violation of civil rights, and transfers that put the

---

7/ Internal prison transfers, for example, from general population to segregation for disciplinary reasons, are treated separately herein. See PART II, SECTION 25: DUE PROCESS.

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. Procedures standing alone do not create a substantive interest to which the individual has a legitimate claim of entitlement.)

Meachum v. Fano, 437 U.S. 215, 225 (1976) (There is no constitutional right to remain in or be transferred to a correctional institution of the inmate's choosing.)

United States v. Ross, 243 F.3d 375 (7th Cir. 2001) (Brief interruptions in state prison confinement for the purpose of attending proceedings in federal court do not violate the Interstate Agreement on Detainers, 18 U.S.C. § 922(g). The IAD was meant to protect prisoners against the endless interruption of rehabilitation programs because of criminal proceedings in other jurisdictions. Brief transfers do not hinder rehabilitation efforts.)

Zimmerman v. Tribble, 226 F.3d 568 (7th Cir. 2000) (Inmate who was transferred from prison which had vocational training and substance abuse programs to one which did not have such programs did not state a claim of deprivation of a liberty interest in violation of due process on ground that if he successfully completed such programs, he would earn good time credits under Indiana law, since even if given the opportunity, it was not inevitable that inmate would earn good time credits.)

Whitford v. Boglino, 63 F.3d 527 (7th Cir. 1995) (Prisoners argued that their transfer to a more restrictive prison regime constituted an atypical or significant hardship. But it takes more than limited movement within the prison system to constitute a deprivation of liberty under Sandin.)

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.)

(2) Retaliation

Stanley v. Litscher, 213 F.3d 340, 343 (7th Cir. 2000) (While transfer by itself does not implicate constitutional rights, retaliatory transfer could give rise to a claim. Here, however, prisoner pled himself out of court – the transfers took place prior to grievances.)

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.)

Shango v. Jurich, 681 F.2d 1091, 1098 (7th Cir. 1988) (Prison officials have discretion to transfer prisoners for any reason except in retaliation for the exercise of a constitutionally protected right.)

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.)

(3) Out-of-State Transfer

Moran v. Sondalle, 218 F.3d 647 (7th Cir. 2000) (State prisoners who wish to challenge transfers to out-of-state prisons must sue under 28 U.S.C. § 1983 rather than bringing a § 2255 action. Habeas corpus generally cannot be used to challenge transfer between prisons. See also Falcon v. United States Bureau of Prisons, 52 F.3d 137 (7th Cir. 1995.))

Pischke v. Litscher, 178 F.3d 497 (7th Cir. 1999) (Thirteenth Amendment challenge to Wisconsin statute authorizing prison authorities to enter into contracts with private prisons in other states was deemed "thoroughly frivolous." No provision of the Constitution is violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by government.)

Froehlich v. State Dep't of Corrections, 196 F.3d 800 (7th Cir. 1999) (Transfer of minor children's incarcerated mother to out-of-state prison did not violate due process rights of minor children; children had no constitutional right to insist that their mother be imprisoned at a convenient location.)

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: Transfers.

24. VISITING

Introductory Comment

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 Seventh Circuit has held that visiting privileges do not implicate a constitutionally protected liberty interest. Even if a state law creates a liberty interest in visits from family or friends, it will be protected only so far as the deprivation of visits imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." See Sandin v. Connor, 515 U.S. 472, 115 S. Ct. 2293 (1995). Because denial of visiting privileges is well within the terms of confinement ordinarily contemplated by a prison sentence, most restrictions on visits do not inflict a significant or atypical hardship. Consequently, a prison official can revoke visiting privileges without a due process hearing. See Billups v. Galassi, 202 F.3d 272 (7th Cir. 2000).

The following cases suggest that prison authorities may place significant limitations on visitors. 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.)

Burgess v. Lowery, 201 F.3d 942 (7th Cir. 2000) (Family of death row inmates brought suit for damages and injunctive relief against prison officials who required them to submit to a strip search as a condition of visitation. Illinois prison regulations authorize strip searches only if the visitor consents *and* there is reasonable suspicion that he is carrying contraband. See 20 Ill. Admin. Code § 501.220(a)(3). Defendants were not immune from suit; the right of prisoners' family members to be

free from strip searches in the absence of reasonable suspicion that they carry contraband was clearly established at the time the conduct occurred.)

Abu-Jamal v. Price, 154 F.3d 128, 136 (3d Cir. 1998) (Prison official justified in limiting visitation because prison had legitimate reason to suspect that visitation privileges were being abused so that inmate could receive more than the permitted number of social visits.)

Bazzetta v. McGinnis, 124 F.3d 774 (6th Cir. 1997) (Prison officials justified in limiting "contact visits" to family and limited list of nonfamily individuals because of concerns regarding security.)

Illinois Department of Corrections Rules:

20 Ill. Admin. Code § 525.20: Visiting Privileges.
20 Ill. Admin. Code § 525.60: Restriction of Visitors.

10. 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. As a general rule, a prison is required to make "only reasonable efforts" to provide "some opportunity" for religious practice.

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 good faith of plaintiffs was not disputed, but the request was denied on the basis of security. 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. See 42 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 provided 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 1997, however, the Supreme Court held the Act unconstitutional, ruling that the Act was outside of Congress' power granted by Section 5 of the Fourteenth Amendment. See City of Boerne v. Flores, 117 S. Ct. 2157, 138 L. Ed. 2d 624, 65 U.S.L.W. 4612 (1997). It would now appear that for state prisoners, the law on religious freedom reverts to Shabazz. See Sasnett v. Litscher, 197 F.3d 290 (7th Cir. 1999) (discussing the First Amendment rights of prisoners post-City of Boerne). The Act may still be constitutional and viable for federal prisoners.

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

Decisions

Hakim v. Hicks, 223 F.3d 1244, 1249 (11th Cir. 2000) (The free exercise rights of an inmate who had legally changed his name to a Muslim name were violated by prison policy refusing to follow dual-name policy for identification card and related services.)

Sasnett v. Litscher, 197 F.3d 290 (7th Cir. 1999) (State prison regulation that allowed inmate to wear cross only when attached to rosary discriminated, without justification, against inmates of Protestant faith and thus violated First Amendment free exercise principles.)

Rapier v. Harris, 172 F.3d 999, 1006 & n.4 (7th Cir. 1999) (No free exercise violation when officials failed to provide pork-free food at 3 of 180 meals served to Muslim prisoner because deprivation was minimal.)

Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996) (Inmate brought § 1983 action against corrections officials, alleging that requiring him to attend religion-based narcotics rehabilitation meetings violated his constitutional rights. The court held that a prison violates the establishment clause of the first amendment by making benefits such as parole contingent on receiving religious instruction and professing religious faith.)

Harris v. Chapman, 97 F.3d 499, 503 (11th Cir. 1996) (No free exercise violation of Rastafarian inmate's rights by "close custody" facility's hair length rule; rule was warranted by security interests in escapee identification.)

Richards v. White, 957 F.2d 471 (7th Cir. 1992) (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.)

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 IDOC 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 prison regulation regarding wearing of yarmulkes, and other religious practices, was reasonably related to a legitimate penological interests. Inmates 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.)

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.)

Illinois Department of Corrections Rules:

20 Ill. Admin. Code §§ 425.10-.120: Chaplaincy Services and Practices.

26. 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) parole, commutation, and work release, (2) disciplinary proceedings, (3) transfers to mental health institutions, and (4) forced administration of medication.

(1) Parole Eligibility and Revocation, Pardons/Commutation, and Work Release

Decisions

Ohio Parole Authority v. Woodard, 523 U.S. 272 (1998) (State prisoner under sentence of death filed suit under § 1983, alleging that Ohio's clemency process violated his Fourteenth Amendment due process right. The Court held that some *minimal* procedural safeguards may apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency. The Due Process Clause is not violated, however, where clemency and pardon procedures do no more than confirm that the clemency and pardon power is committed to the authority of the executive. Opportunities for early release, such as parole or pardon, constitute a property or liberty interest only if the state has made a promise.)

Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) (Life sentenced prisoner brought suit against Connecticut Board of Pardons seeking declaratory judgment that Board's failure to

provide him with written statement of reasons for denying commutation violated his rights under the due process clause. The Supreme Court held that pardon and commutation decisions are rarely, if ever, appropriate subjects for judicial review. The power vested in the Board of Pardons to commute sentences conferred no rights on life prisoners beyond the right to seek commutation. A constitutional entitlement to commutation is not created merely because a discretionary privilege has been granted in the past.)

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (Prisoners brought action against Nebraska State Board of Parole alleging due process violations in the Board's consideration of prisoners' suitability for parole. There is no constitutional right of a convicted person to be released before the expiration of a valid sentence. A state may establish a parole system, but it has no duty to do so.)

Morrisey v. Brewer, 92 S. Ct. 2593 (1972) (Parole revocation determination must meet certain due process standards.)

Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001) (Freedom from confinement is not necessarily a form of "liberty" under the due process clause. "A judgment of conviction extinguishes natural liberty for its full length . . ..Opportunities for early release, such as parole or pardon, constitute either property interests or a form of synthetic liberty, and then only if the state has made a promise. Unilateral expectations and hopes for early release do not constitute property, which depends on a legitimate claim of entitlement.")

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.)

DeTomaso v. McGinnis, 970 F.2d 211 (7th Cir. 1992) (Illinois regulations setting out eligibility requirements for an inmate to be entitled to work release do not create a liberty or property interest in work release for an inmate who meets the requirements; prison officials have discretion to choose among eligible inmates.)

Joihner v. McEvers, 898 F.2d 569 (7th Cir. 1990) (The court affirmed district court's holding that due process was not violated when the prison refused to transfer the plaintiff 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 defendants' discretion in deciding which eligible prisoners would be assigned to work camp.)

(2) Disciplinary Proceedings

Introductory Comment

Prisoners are entitled to certain procedural protections before they are deprived of a constitutionally protected interest in life, liberty, or property. A prisoner who has been deprived of a protected interest in the course of a disciplinary proceeding without the requisite procedural protections may bring a due process challenge in federal district court.

It may be helpful to briefly review the nature of disciplinary proceedings. In the typical case, a prisoner receives a disciplinary report ("ticket") for violations of IDOC rules and regulations. The ticket could cover conduct ranging from minor violations, such as stealing a piece of bread, to 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 §§ 504.30-504.150 (West Supp. 2001).

If the adjustment committee finds the prisoner guilty, it will recommend punishment which could range from loss of privileges, to loss of good time, transfer to the prison's segregation unit, or even transfer to another facility. The matter then goes to the warden for consideration. The warden may 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 § 504.810-504.870 (2001).

When a prisoner contests the results of a disciplinary hearing in federal district court, the legal theory upon which the action is based will vary, depending upon the nature of the deprivation. For example, an action challenging conditions of the disciplinary confinement, such as the loss of a job or educational opportunities, may be brought under 42 U.S.C. § 1983. An action challenging the duration or fact of disciplinary confinement, however, must be brought under the applicable habeas corpus statute. [8/]

The Supreme Court has imposed a number of obstacles to a prisoner's ability to challenge an adverse disciplinary action. This section looks at two pivotal Supreme Court cases that provide the background against which you measure your client's due process claim. The first case, Sandin v. Connor, will help you decide whether the disciplinary action taken against your client is of the type that

---

8/ 28 U.S.C. § 2254 authorizes federal courts to grant collateral relief to state prisoners "in custody in violation of the Constitution or laws." By contrast, 28 U.S.C. § 2255, known as "Motion to Vacate Sentence," is the habeas corpus statute that applies to prisoners in federal custody.

entitles the client to some sort of due process. The second case, Edwards v. Balisok, provides that even when the Sandin test is met, certain § 1983 claims must fail if they will improperly invalidate the result of a disciplinary hearing. Finally, this section discusses the types of procedural safeguards that are required before certain disciplinary sanctions can be imposed.

(a) Sandin v. Connor: Is Process Due?
The "Atypical and Significant Hardship" Test

In 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 analysis 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 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 sanction 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 was not 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 which suggest that the Sandin burden is not insurmountable. 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.

Decisions

Montgomery v. Anderson, 262 F.3d 641 (7th Cir. 2001) (Prisoner brought a § 2254 habeas action claiming that Indiana prison officials violated the due process clause when it placed him in segregation and reduced his credit earning class. The court considered whether a prisoner has a liberty

interest in credits that have not yet been awarded. To answer this question the trial court must determine whether the state has created a liberty interest in a particular credit-earning class. Here, Indiana regulations provided that prisoners are eligible for good-time credit so long as they do not violate certain rules. These regulations curtailed administrators' discretion. It followed that Indiana must afford due process before reducing a prisoner's credit-earning class. What process is due? Less than that prescribed in Wolff for parole revocation decisions.)

Webb v. Anderson, 224 F.3d 649, 650 n.1 (7th Cir. 2000) (In this circuit, the loss of good time credits will support a claim for the deprivation of due process.)

Shoats v. Horn, 213 F.3d 140, 143 (3d Cir. 2000) (Solitary confinement of 8 years with no prospect of immediate release, lack of contact with family, and deprivation of education and vocational activities during confinement was sufficiently "atypical and significant" in hardship to create protected liberty interest implicating procedural due process guarantees. Cf. Wagner v. Hanks, 128 F.3d 1173 (7th Cir. 1997)).

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 could not show that conditions of confinement were significantly different from that which a general population prisoner might expect.)

Wagner v. Hanks, 128 F.3d 1173 (7th Cir. 1997) (State prison inmate sought federal habeas corpus, alleging that inmate's placement in disciplinary segregation violated due process. The Court held that inmate's claim was to be evaluated by comparing conditions of inmate's confinement in segregation with conditions of segregation in state's entire prison system, not just inmate's individual prison. The Court noted the difficulty that any prisoner would have in meeting this standard, and observed that since Sandin, no court of appeals has found a disciplinary confinement to be a deprivation of liberty.)

Williams v. Ramos, 71 F.3d 1246, 1249-50 (7th Cir. 1995) (Conditions in segregation at Stateville do not greatly exceed what one could expect from prison life generally; thus plaintiff had no liberty interest in avoiding confinement there.)

Black v. Lane, 22 F.3d 1395 (7th Cir. 1994) (Prison officials violated inmate's procedural and substantive due process rights when they repeatedly filed false and unjustified disciplinary charges in retaliation for his successful pursuit of administrative complaints.)

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, who was 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. Because this action was not disciplinary, he had no liberty or property interest in keeping a better paying job.)

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.)

(b) Edwards v. Balisok: Would Lawsuit Improperly Invalidate Conviction?

Even when the Sandin test is met, the Supreme Court has imposed other obstacles to due process actions contesting the validity of a disciplinary hearing. Some background information is in order. In Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), defendant had been convicted of voluntary manslaughter in state court. He filed a § 1983 action against two prosecutors and a state investigator, alleging that his conviction was the result of altered and falsified evidence. His appeals to the Indiana Supreme Court and collateral attacks on his conviction were denied. The Supreme Court held that the § 1983 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 extended the Heck principle to § 1983 damage claims challenging the loss of good time credits in prison disciplinary actions. The plaintiff-prisoner at a state penitentiary received a ticket for several internal prison rules violations. The hearing committee 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 procedural due process because the hearing committee denied him the opportunity to present exculpatory witness statements. 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 would assume that the result of the hearing (loss of good time credits) was necessarily invalid. Therefore, the Court held, the § 1983 claim was properly dismissed.

Note that the Balisok decision does not bar all § 1983 challenges to disciplinary sanctions. In DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000), the Seventh Circuit made it clear that Heck and Balisok do not necessarily bar a prisoner's challenge under § 1983 to a disciplinary sanction that does not affect the overall length of confinement (e.g. loss of prison job, placement in segregation, etc.). In

other words, a prisoner may bring a suit for damages under § 1983 if federal habeas is unavailable to challenge that conviction.

Decisions

Spencer v. Kemma, 523 U.S. 1 (1998) (Five justices in concurring and dissenting opinions attempted to clarify their positions regarding the scope of the Heck rule, suggesting that if a plaintiff has no recourse to habeas corpus, he may not be barred from bringing a § 1983 action.)

DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000) (A prisoner alleged that officer-defendants filed false disciplinary charges and fired him from his prison job because of his race. Since plaintiff did not challenge the fact or duration of his confinement, but only a condition of his confinement, he could not pursue a habeas action. The Seventh Circuit held that plaintiff could bring an equal protection claim for loss of his job, even though the underlying disciplinary sanction was not overturned or invalidated. Heck and Balisok do not necessarily apply to a disciplinary sanction that does not affect the length of confinement. The court relied on Spencer v. Kemma, 523 U.S. 1 (1998) for the proposition that a § 1983 action must be available to challenge constitutional wrongs where federal habeas is unavailable.)

Johnson v. Litscher, 260 F.3d 826 (7th Cir. 2001) (Heck and Edwards did not bar prisoner's claim that prison officials retaliated against him by imposing extra segregation time and transferring him to maximum security prison.)

Moran v. Sondalle, 218 F.3d (7th Cir. 2000) (Any decision that determines the fact or duration of state custody may (and usually must) be challenged under 28 U.S.C. § 2254. But **only** the change in credit-earning class may be challenged under § 2254. Disciplinary segregation –which challenges the severity rather than the duration of custody – must be challenged under § 1983 in the unusual circumstances when it can be challenged at all.)

Carr v. O'Leary, 167 F.3d 1124 (7th Cir. 1999) (Prisoner brought suit contesting disciplinary sanction imposing loss of six-months good time. After filing suit, plaintiff was released from prison. The court held that the sanction was not a bar to a § 1983 suit, even though the suit called into question the validity of the sanction. Because plaintiff was released from prison after the suit was filed, he could no longer bring a habeas corpus proceeding. A prisoner who cannot challenge the validity of a sanction by either appeal or post-conviction procedure can do so by bringing a civil rights suit for damages.)

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 a written statement of reasons for the conviction.)

(c) The Procedural Rules Governing Disciplinary Hearings &

the "Some Evidence" Standard of Review

Prison disciplinary hearings must meet the following requirements to satisfy the Due Process Clause: (1) written notice of the charge against the prisoner, given at least twenty-four hours prior to the hearing; (2) the right to appear in person before an impartial hearing body; (3) the right to call witnesses and to present documentary evidence, when to do so will not unduly jeopardize institutional safety or correctional goals; (4) a written statement of reasons for the disciplinary action taken. See Wolff v. McDonnell, 418 U.S. 539 (1974); Cain v. Lane, 857 F.2d 1139, 1145 (7th Cir. 1988). Due process requires not only that Wolff be satisfied, but also that the disciplinary decision be supported by "some evidence." Black v. Lane, 22 F.3d 1395, 1402 (7th Cir. 1994).

The majority of federal court cases arising out of prison disciplinary proceedings concern loss of good time credits. The Supreme Court has held that good time credits must not be taken away without the minimal safeguards of due process, as set forth above in Wolff. See Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 454 (1985) (citing Wolff v. McDonnell, 418 U.S. 539, 563-67 (1974)).

The decision of a disciplinary board to revoke an inmate's good time credit must be supported by "some evidence." Hill, 472 U.S. at 455. This is a "lenient standard" which requires "no more than a modicum of evidence." Webb v. Anderson, 224 F.3d 649, 651 (7th Cir. 2000). In ascertaining whether this standard has been met, courts are not required to examine the entire record, or independently assess credibility, but rather to determine whether the decision has some factual basis.

Decisions

United States v. Gouveia, 467 U.S. 180, 185 n. 1 (1984) ("[I]nmates have no right to retained or appointed counsel at prison disciplinary proceedings.")

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.)

White v. Indiana Parole Board, 266 F.3d 759 (7th Cir. 2001) (Prison conduct committee stripped plaintiff of 120 days good-time for dealing drugs. Prisoner brought a § 2254 action claiming that the prison committee denied him due process of law. The court first held that a prison disciplinary board is not a "court" whose decision is entitled to deferential collateral review under Antiterrorism and Effective Death Penalty Act, disapproving language in Evans v. McBride, 94 F.3d 1062, Sweeney v. Parke, 113 F.3d 716, and Gaither v. Anderson, 236 F.3d 817, so that § 2254(d) did not bar plaintiff from brining suit. In this case, however, there was no due process violation. *Ex parte* communications between the officer who prepared plaintiff's disciplinary report and the members of the disciplinary committee did not constitute a violation of due process rights. If the board were a "court," then *ex*

parte communications would be improper, but non-record discussions between agency staff members are allowable.)

Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000) (A federal prisoner and a state prisoner challenged the imposition of prison disciplinary measures resulting in the loss of good time credit. If a case is properly filed as an action under 28 U.S.C. §§ 2241, 2254, or 2255, it is not a "civil action" to which the PLRA applies. State prisoners who challenge the results of prison disciplinary proceedings which affect the length of their sentence must proceed under 28 U.S.C. § 2254, not 28 U.S.C. § 2241 or 28 U.S.C. § 1983.)

McPherson v. McBride, 188 F.3d 784 (7th Cir. 1999) (Plaintiff who lost 90 days earned good time credit brought habeas corpus action claiming violation of due process. The "some evidence" standard is less exacting than preponderance of the evidence standard, requiring only that decision not be arbitrary or without support in the record. Here, the prison disciplinary board's decision finding inmate guilty of violating rule forbidding sexual acts between inmates did not violate due process since it was supported by officer's incident report that described alleged infraction in sufficient detail.)

Whitlock v. Johnson, 153 F.3d 380 (7th Cir. 1998) (Prisoners faced with revocation of good time credits have a qualified due process right to call witnesses in their defense. Prison's policy of interviewing requested witnesses and summarizing their testimony in an unsworn report did not conform to the requirements of due process. Prison should instead adopt a case-by-case approach to determine whether a witness will be permitted to testify. District court could not, however, order defendant to review past hearings at which the unconstitutional witness policy may have played a role in the revocation of good time credits. Unlike the prospective part of the court's injunctive order, an injunction to restore revoked good-time credits may only be sought in habeas corpus proceedings.)

Meeks v. McBride, 81 F.3d 717 (7th Cir. 1996) (There is no double jeopardy in the context of prisoner disciplinary hearings. An acquittal in an earlier prison disciplinary hearing is no bar to a subsequent hearing to consider the very same charge.)

Henderson v. U.S. Parole Com'n, 13 F.3d 1073 (7th Cir. 1994) (In context of disciplinary proceeding, prisoners do not possess Sixth Amendment rights to confront and cross-examine witnesses; additionally, there is no due process right to be informed of identity of confidential informants.)

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.)

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.)

(3) 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). In 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.)

(4) Forced Administration of Medication

The forced administration of psychotropic drugs may also raise due process questions. In Illinois, if an inmate is in need of forced medication, the prison medical staff must follow the guidelines in Ill. Admin. Code 20 § 415.70 (2000).

Decisions

Washington v. Harper, 494 U.S. 210 (1990) (Mentally ill state prisoner filed civil rights action challenging prison policy that authorized his treatment with antipsychotic drugs against his will without judicial hearing. The Court held that treatment of a prisoner against his will did not violate substantive due process where prisoner was found to be dangerous to himself or others and treatment was in prisoner's medical interest. Review by administrative panel (as opposed to judicial decision maker) comported with requirements of procedural due process.)

Fuller v. Dillon, 236 F.3d 876 (7th Cir. 2001) (Prison inmate who had been given psychotropic medication against his will brought § 1983 action against prison officials and medical personnel, alleging a violation of his due process rights. Given prisoner's serious mental illness and in light of the Supreme Court's decision in Washington v. Harper, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990), defendants could reasonably have believed that involuntary administration of medication did not violate inmate's due process rights.

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.)

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. Defendants' procedure, whereby the individual parole agent determined said condition, was violative of due process. However, defendants were entitled qualified immunity because the parolee's procedural rights were not clearly established at the time.)

27. SEARCHES

A majority of courts agree that prisoners are protected by the Fourth Amendment's prescriptions on search and seizure. The scope of the protection, however, is extremely limited.

Note also that a prisoner may challenge an unconstitutional strip search under the Eighth Amendment's prohibition against cruel and unusual punishment. See, e.g., Pekham v. Wisconsin Dep't of Corrections, 141 F.3d 694 (7th Cir. 1998).

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.)

Pekham v. Wisconsin Dep't of Corrections, 141 F.3d 694 (7th Cir. 1998) (Strip searches of state prisoner upon prisoner's arrival at facility, return to facility after medical appointment or court proceeding, and completion of contact visit with non-prisoner, and upon general search of cell block, did not violate Fourth Amendment or Eighth Amendment, absent any evidence that searches were performed for purposes of harassment or punishment rather than legitimate, identifiable purposes.)

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. Cf. Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994.))

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.)

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.)

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.)

Illinois Department of Corrections Rules:

20 Ill. Admin. Code §§ 501.200-.220: Searches for and Disposition of Contraband.

28. BLOOD, 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 when they are conducted in a reasonable manner. In determining whether a search of a prisoner is reasonable, the court must balance the significant and legitimate security interests of the institution against the privacy interests of the prisoner. See Bell v. Wolfish, 441 U.S. 520, 560, 99 S.Ct. 1861, 1885, 60 L.Ed.2d 447 (1979), and give prison administrators "wide-ranging deference in [their] adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Id. at 547, 99 S.Ct. at 1878.

Forbes v. Trigg, 976 F.2d 308 (7th Cir. 1992) 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. The tests may be considered unreasonable if they 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

Block v. Rutherford, 468 U.S. 576, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984) (The random urine collection and testing of prisoners is a reasonable means of combating the unauthorized use of narcotics and does not violate the Fourth Amendment.)

Portillo v. U.S. Dist. Court, 15 F.3d 819, 824 (9th Cir. 1994) (Prison order requiring inmate convicted of theft and awaiting sentencing to submit to urine testing vacated because inmate's crime bore no correlation to drug usage.)

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.)

29. GENERAL CONDITIONS CASES

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.[9/] 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. In 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."

9/ Cases against county jail personnel by pretrial detainees are based on the Fourteenth Amendment.

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" — applies to all conditions cases. See PART II, SECTION 6: EXHAUSTION OF PRISON GRIEVANCE PROCEDURES. See also Appendix C, 18 U.S.C. § 3626(g)(2), for definition of conditions.

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

Dixon v. Godinez, 114 F.3d 640 (7th Cir. 1997) (In determining whether low temperatures in a prison cell violate a prisoner's right to be free from cruel and unusual punishment, the court will consider: (1) the severity of the cold; (2) its duration; (3) whether the prisoner had alternative means to protect himself from the cold; (4) whether the alternatives were adequate to combat the cold; and (5) whether the prisoner endured other uncomfortable conditions as well as cold. Just because low temperatures force a prisoner to bundle up indoors does not mean that prison conditions violate the Eighth Amendment. On the other hand, a plaintiff need not prove that he suffered from hypothermia or frostbite to establish a violation of the Eighth Amendment. The plaintiff must prove that the temperature was so low that it caused "severe discomfort." See also Del Raine v. Williford, 32 F.3d 1024 (7th Cir. 1994.))

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.)

Pritchett v. Page, 2000 WL 1129891 (N.D. Ill. 2000) (Inmate's complaint that his cell was infested for many months by "hazardous bugs" that regularly bit him stated a claim for relief.)

(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 because 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 court upheld the magistrate's conclusion that the exposed wiring "was a minor hazard that was easily avoided" and "was primarily an unpleasant inconvenience.")

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.)

30. CONDITIONS OF CONFINEMENT

Introductory Comment

There are several cases that deal with conditions of confinement at the Cook County Jail. These cases are considered under the Fourteenth Amendment rather than the Eighth Amendment because 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 Mayoral v. Sheahan, No. 00-1034 (7th Cir. 2001); Hall v. Sheahan, 2001 WL 111019 (N.D. Ill. 2001); May v. Sheahan, 226 F.3d 876 (7th Cir. 2000); and Antonelli v. Sheahan, 81 F.3d. 1422 (7th Cir. 1996). 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.)

Henderson v. Sheahan, 196 F.3d 839 (7th Cir. 2000) (Pretrial detainee who was held in County Jail for four-and-one-half years brought § 1983 action claiming due process violation based upon injuries sustained as a result of second-hand smoke. As for plaintiff's claim of present injury, the court found that complaints (breathing problems, chest pains, dizziness, headaches) were not serious enough to state a claim. As to plaintiff's claim of future injury, the court upheld the district court's grant of summary judgment. To withstand summary judgment, "plaintiff had to proffer competent and reliable expert medical testimony that there was a reasonable medical certainty that he himself faces some defined level of increased risk of developing a serious medical condition and that the increased risk was proximately caused by his exposure to second-hand smoke at the jail." Plaintiff did not meet this high burden.)

Goffman v. Gross, 59 F.3d 668 (7th Cir. 1995) (Inmate who had survived lung cancer requested 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.)

(2) Showers and Yard

Pearson v. Ramos, 237 F.3d 881 (7th Cir. 2001) (Prison official's imposition of four, consecutive 90-day denials of prison yard privileges upon prisoner for "serious" violations of prison disciplinary rules was not cruel and unusual punishment, although prisoner was thereby deprived of yard time for one full year. Every disciplinary sanction, like every sentence, must be treated separately, not cumulatively, for purposes of determining whether it is cruel and unusual.)

Thomas v. Ramos, 130 F.3d 754, 764 (7th Cir. 1997) (Lack of exercise may rise to a constitutional violation in extreme and prolonged situations where movement is denied to the point that the inmate's health is threatened. In this case, however, prison official's denial of any outdoor exercise to inmate while he was confined in disciplinary segregation unit for 70-day period did not violate inmate's clearly established rights under Eighth Amendment. Defendant was entitled to qualified immunity on inmate's claim of cruel and unusual punishment.)

Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1996) (Appellant alleged that his exercise area was "about the size of a small house trailer with at least 37 other prisoners," that inmates housed in that area were not permitted to recreate for periods of up to seven successive weeks, and

that there was no room for exercise in his cell. These circumstances stated an Eighth Amendment claim.)

(3) Privacy

Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995) (Judge Easterbrook 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. (Posner, C.J., concurring in part, dissenting in part).)

Anderson v. Romero, 72 F.3d 518 (7th Cir. 1995) (Prison officials may warn staff or other inmates about an inmate's HIV positive status only if those other persons are at risk of infection, and so long as the warning is not punitive in nature. Disclosure to inmate's cellmate and to prison barber, for example, are acceptable.)

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

Reed v. McBride, 178 F.3d 849 (7th Cir. 1999) (Deprivation of food for repeated three- to five- day periods stated a claim under the Eighth Amendment, especially where prisoner was already weakened by illness.)

Pritchett v. Page, 2000 WL 1129891 (N.D. Ill. 2000) (Plaintiff articulated a claim regarding food preparation where he alleged that he often found "foreign matters" in his food, and he frequently became physically ill after meals. The discovery of an occasional "foreign object" may be insufficient to

support an Eighth Amendment violation, but the constant presence of contaminants rises to the level of constitutional concern.)

(5) Drinking Water

Carroll v. DeTella, 255 F.3d 470 (7th Cir. 2001) (The court rejected an Eighth Amendment claim based on lead in the prison's water. "The Eighth Amendment does not require prisons to provide prisoners with more salubrious air, healthier food, or cleaner water than are enjoyed by substantial numbers of free Americans.")

(6) Prison Industry

Bagola v. Kindt, 131 F.3d 632 (7th Cir. 1997) (Prison officials' failure to protect inmate whose arm was severed by textile machine while he took part in prison industrial work program did not rise to the level of deliberate indifference under the Eighth Amendment, where evidence indicated that officials believed that safety violations had been remedied.)

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.)

(7) 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

31. RACIALLY DISCRIMINATORY POLICIES

DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000) (Prisoner claimed that prison officials fired him from his job because of his race. The fact that plaintiff does not have a liberty or property interest in his former prison job does not foreclose his equal protection or retaliation claims arising from the loss of that job.)

Jones v. Sandahl, 35 F.3d 568 (7th Cir. 1994) (Plaintiff alleged that defendants discriminated against black inmates in the assignment of prison jobs. In order to establish an equal protection violation based on racial discrimination in the delegation of job assignments to inmates, plaintiff must sufficiently show a discriminatory purpose as the motivating factor; it is not enough to show that employment practices have a discriminatory impact on black inmates.)

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.)

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.)

32. DISABLED PRISONERS / 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 Americans 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.)

Erickson v. Bd. of Governors of State Colleges and Universities for Northeastern Illinois Univ., 207 F.3d 945 (7th Cir. 2000) (abrogating Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997) (State university employee sued under ADA and Pregnancy Discrimination Act. As a general rule, Congress may subject non-consenting States to suit in federal court pursuant to a valid exercise of its power to enforce the Fourteenth Amendment. Statutes that create new rights or expand old rights beyond the Fourteenth Amendment's bounds, however, do not "enforce" that amendment. Under the Constitution, the rational basis test applies to distinctions on the ground of disability. Most disability discrimination is rational, and therefore, constitutional, and yet the ADA forbids it. Since the Equal Protection Clause does not mandate the mandatory accommodation rules found in the ADA, the Seventh Circuit held that Title I of the ADA does not "enforce" the Fourteenth Amendment. Consequently, under Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996), the

Eleventh Amendment bars a private person from bringing a claim pursuant to Title I of the ADA against a state, or an arm of the state in *federal* court.)

Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000) (Inmate with impaired vision brought suit alleging that failure to provide books on tape and brightly lit cell violated ADA. Following Erickson v. Bd. of Governors for Northeastern Illinois Univ., 207 F.3d 945 (7th Cir. 2000), the court held that inmate's ADA claim could not proceed against State in federal court. Where an inmate seeks accommodation of disabilities–rather than simply requiring government to disregard disabilities–a private suit against a state entity under Title II of the ADA may not be brought in federal court.)

Stanley v. Litscher, 213 F.3d 340 (7th Cir. 2000) (Inmate diagnosed with psychopathy who alleged that denial of his application to participate in sex offender program violated ADA failed to state a claim. Distinctions on the ground of disability are permitted as long as they are rational, and Wisconsin did not act irrationally in excluding psychopaths from its program.)

Cassidy v. Indiana Dep't of Corrections, 199 F.3d 374 (7th Cir. 2000) (Blind prisoner alleged that prison officials discriminated against him by denying him access to various programs, services, and benefits enjoyed by non-disabled prisoners in violation of ADA. The Court held that PLRA § 1997(e)--the "physical injury requirement"--applies to ADA claims.)

Tesch v. County of Green Lake, 157 F.3d 465 (7th Cir. 1998) (Disabled pre-trial detainee's inability to put on jail-issued pants, obtain drinking water from cell sink, and get into bed in his cell during 44 hours of detention were insufficiently severe to amount to punishment in violation of detainee's substantive due process rights.)

33. CIVIL COMMITMENT OF SEXUALLY VIOLENT PERSONS IN ILLINOIS

A person who is deemed to have a mental disorder that makes it substantially likely that he will commit further acts of sexual violence may be civilly committed to the custody of the Illinois Department of Human Services. The Illinois Sexually Violent Persons Commitment Act ("SVPCA"), 725 ILCS 207/1 *et seq*. sets forth the civil commitment procedure.

The SVPCA applies to "sexually violent persons," that is, persons who have been convicted, or found not guilty by reason of insanity, of a sexually violent offense. The SVPCA requires that the agency having custody of a such a person (typically the Department of Corrections) must notify the Attorney General and the State's Attorney for the county in which the person was convicted within 90 days of the person's release. The Attorney General or State's Attorney may then petition the court for

an order declaring the person to be civilly committed under the Act. If the court or a jury finds the respondent to be a sexually violent person, the court will order him committed to the care of the Department of Human Services "for control, care and treatment until such time as the person is no longer a sexually violent person." 725 ILCS 207/40. Periodic re-examination is required within six months after the initial commitment, and once per year thereafter.

If the committed person constitutes a danger, the SVPCA directs that he be held in a secure facility. The Illinois Department of Human Services contracts with the Department of Corrections to provide the secure facility. Currently, the facility used to house SVPs is at the Joliet Annex, Joliet, Illinois.

The SVPCA became effective in 1998, so the case law with respect to this class of persons is as yet undeveloped. Challenges to the constitutionality of the Act will almost certainly fail since the U.S. Supreme Court has upheld laws similar to the SVPCA. See Selling v. Young, 121 S. Ct. 727 (2001); Kansas v. Hendricks, 521 U.S. 346 (1997). To date, persons committed under the Act have challenged conditions of confinement and inadequate therapeutic treatment, as well as alleged due process and equal protection violations stemming from their classification as sexually violent persons.

Note the distinctions between the Sexually Violent Persons Commitment Act and the Sexually Dangerous Person Act ("SDPA"), 725 ILCS 205/0.01 *et seq*. The latter statute applies to a much larger group of offenders.[10/] A person may be committed pursuant to the SDPA as an alternative to criminal prosecution, whereas a person deemed to be sexually violent under the SVPCA is generally committed following a criminal proceeding. The state is obligated to provide care and treatment to both groups of persons. Sexually violent persons, however, fall under the supervision of the Department of Corrections, whereas sexually dangerous persons fall under the care of the Department of Human Services. For a discussion of the difference between the two Acts, see People v. McVeay, 302 Ill. App.3d 960, 706 N.E.2d 539 (Ill. App. 1999) and People v. McDougle, 3030 Ill.App.3d 509, 708 N.E.2d 482 (Ill. App. 1999).

Decisions

Rogers v. Illinois Dep't of Corrections, 2001 WL 914490 (N.D. Ill. Aug. 17, 2001) (Plaintiffs alleged that IDOC's Special Evaluations Unit, which has authority to petition for post-sentence confinement under the SVPCA, selectively recommended African-American offenders who committed crimes against Caucasian victims. The court held that under the rule in Heck v. Humphrey, 512 U.S. 477 (1994), plaintiffs could not bring § 1983 action since, if successful, the claim would necessarily imply the invalidity of the confinement. Plaintiffs must first petition for habeas corpus relief. As for those plaintiffs who were released, however, since they have no remedy under § 2255, they may sue for damages.)

10/ Cf. 725 ILCS 205/1.01 and 725 ILCS 207/5(f).

Tineybey et al. v. Peters, 2001 WL 527409 (N.D. Ill. May 16, 2001) (Plaintiff's claim that therapeutic program for sex offenders was patently ineffective medical treatment could not survive a motion to dismiss. Claims for constitutionally ineffective medical treatment require an objectively serious medical condition and an act of deliberate indifference by defendants, neither of which were alleged here. In addition, having to shower in the company of homosexuals did not rise to the sort of sexual harassment or abuse prescribed by the Eighth Amendment.)

Kilbury v. Budz, 2001 WL 845471 (N.D. Ill. July 24, 2001) (Plaintiff alleged that former security therapist sexually harassed him. No constitutional tort existed where sexual acts were admittedly consensual and plaintiff suffered no injury.)

Tineybey v. Peters, 2000 WL 705983 (N.D. Ill. May 18, 2000) (Plaintiffs alleged denial of access to law library. The court held that a prison policy permitting sexually violent persons different hours of access to library facilities was related to a legitimate purpose. Certain sexually violent persons may be at risk of harm at the hands of the general population; their presence could be disruptive. These are sufficient reasons to justify disparate treatment.)

CHAPTER 7: RECOVERY

34. 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, a federal court may order garnishment of the defendant's wages. See, e.g., Balark v. Curtin, 655 F.2d 798 (7th Cir. 1981).

Rules and Statutes

28 U.S.C.A. § 2202 (West 2001):	Further Relief.
FED. R. CIV. P. 69:	Execution.
FED. R. CIV. P. 70:	Judgment for Specific Acts; Vesting Title.
N.D. ILL. LOCAL RULE 37.1:	Contempts.
5 ILL. COMP. STAT. ANN. 350/1-350/2 (West Supp. 2001):	State Employee Indemnification Act
65 ILL. COMP. STAT. ANN. 5/8-1-16 (West 2001):	Tax to Pay Judgment.
745 ILL. COMP. STAT. ANN. 10/2-301-302 (West 2001):	Indemnification of Public Employees

35. ENFORCEMENT OF CONSENT DECREES AND OTHER EQUITABLE REMEDIES

Introductory Comment

The new issue involving consent decrees is their termination or modification. In general, see the Prison Litigation Reform Act, 18 U.S.C. § 3626 (West Supp. 2001). The Act provides that "[i]n any civil action with respect to prison conditions in which prospective relief is ordered," the court-ordered relief is terminable "upon the motion of any party or intervener" either:

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

You should also be aware that existing consent decrees are subject to *immediate* termination under the PLRA if they do not conform to the requirements set forth in the legislation. The Act allows a defendant to seek termination of any prospective relief if the relief was granted in the absence of a finding by the court that "the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." See 18 U.S.C. § 3626(b)(2). In addition, this section contains an "automatic stay"

provision, which provides that a motion to terminate a consent decree will operate as a stay of the consent decree, beginning 30 days after the motion is filed.

Decisions

Miller v. French, 120 S.Ct. 2246 (2000) (abrogating French v. Duckworth, 178 F.3d 437 (7th Cir. 1999) (State moved to terminate a remedial order that had been in place at a state prison since 1975. Plaintiff class challenged § 3626(e)(2) which provides that a motion to terminate a consent decree "shall operate as a stay" of the consent decree beginning 30 days after the motion is filed and ending when the court rules on the motion. The Court held that the automatic stay provision did not violate separation of powers principles; the provision did not unconstitutionally suspend or reopen the judgment of an Article III court, but merely implemented new standards for the grant of prospective relief by requiring the trial court to stay any such relief which was granted in absence of findings required under the PLRA. The Court also held that the automatic stay provision prohibits district courts from exercising their equitable authority to suspend operation of stay)

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.)

Harvey v. Schoen, 245 F.3d 718 (8th Cir. 2001) (Mandatory termination provisions of the Prison Litigation Reform Act did not violate separation of powers principles. See also Ruiz v. U.S., 243 F.3d 941 (5th Cir. 2001); Gilmore v. People of the State of California, 220 F.3d 987 (9th Cir. 2000)).

Berwanger v. Cottey, 178 F.3d 834 (7th Cir. 1999) (Treating subsection of the PLRA stating prison conditions "relief shall be terminable" on a party's motion as doing no more than setting a period during which litigants cannot ask the judge to terminate a decree, avoids any possible constitutional infirmities.)

36. SETTLEMENT

Introductory Comment

Although settlement is always encouraged and should be explored at an early stage, see PLRA, 18 U.S.C. § 3626(g), 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.[11/] 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. Under 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. 2001). 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. (For example, outstanding child support, educational loans, etc.)

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.

11/ 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. 2001). 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.

Statutes

5 ILL. COMP. STAT. ANN. 350/1-350/2 (West Supp. 2001): State Employee Indemnification Act.

CHAPTER 8: ATTORNEYS' COSTS AND FEES

37. ATTORNEY'S 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. 2001).

Appointed counsel should remember that this statute is a "two-way" street, that is, attorney's fees may be awarded to the plaintiff as a prevailing party, but the court may also award attorney's 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 attorney's fees (despite the discretionary language of the statute); however, a prevailing defendant is entitled to attorney's fees only if the suit is adjudged frivolous. 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. 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.

Note also that the Prison Litigation Reform Act limits the amount of attorney's fees that the prevailing party may recover, 42 U.S.C.A. § 1997e(d) (West Supp. 2001). Under the PLRA, attorney's fees may be taxed at a maximum of 150% of the fees paid to a court-appointed defense counsel, as set by that district. See 42 U.S.C. § 1997e(d)(1) and (3). In the Northern District of Illinois, the amount set by statute is $75.00 per hour for time spent in court and $50.00 per hour for out-of-court time. See 18 U.S.C. § 3006A.

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. 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. LOC. R. 54.3. 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.

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 attorney's 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 were not entitled to an award of attorney's 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.)

Harper v. City of Chicago Heights, 223 F.3d 593, 603 (7th Cir. 1999) ("To determine if a party is "prevailing," courts ask whether the plaintiff has succeeded on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit.... The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.")

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 attorney's 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 attorney's fees based on local market rates.)

Maul v. Constan, 23 F.3d 143 (7th Cir. 1994) (Inmate who received only nominal damages on his § 1983 suit for denial of procedural due process in the forced administration of psychotropic medication should not have been awarded attorney fees under § 1988; although inmate prevailed on significant legal issue, the difference between judgment sought and obtained was great and public purpose of litigation was minimal.)

Campbell v. Illinois Dept. of Corrections, 2001 WL 289783, *1 (N.D.Ill. 2001) (vacated and remanded on other grounds) (An attorney who litigates a fee petition in a PLRA case is entitled to compensation for time spent litigating the fee petition. See also Hernandez v. Kalinowski, 146 F.3d 196 (3d Cir. 1998)).

(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)).

Esposito v. Piatrowski, 223 F.3d 497, 501 (7th Cir. 2000) (Unlike prevailing plaintiffs in Section 1983 actions, who receive attorney's fees as a matter of course, prevailing defendants in such actions may recover fees only upon a finding that the plaintiff's action was frivolous.)

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

(3) Amount of Fees

Martin v. Hadix, 527 U.S. 343, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999) (The Court held that the PLRA's attorney fee limitations, see 42 U.S.C. § 1997e(d)(3), apply to any post-judgment monitoring performed after the PLRA took effect, even if the underlying case was filed prior to the PLRA's effective date.)

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.)

Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996) (Attorney's fees provision in PLRA limiting the amount of fees that may be awarded in prison civil rights litigation does not have retroactive effect.)

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)).

38. ATTORNEY'S FEES UNDER EQUAL ACCESS TO JUSTICE ACT: 28 U.S.C. § 2412

Introductory Comment

The Equal Access to Justice Act ("EAJA") provides for attorney's 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. 2001) (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 attorney's 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.)

U.S. v. Hallmark Const. Co., 200 F.3d 1076, 1078 (7th Cir. 2000) (The EAJA provides that a district court may award attorney's fees where 1) the claimant is a "prevailing party"; 2) the government's position was not substantially justified; 3) no "special circumstances make an award unjust"; and 4) the fee application is submitted to the court within 30 days of final judgment and is supported by an itemized statement. The government bears the burden of proving that its behavior meets the "substantially justified" standard. The government must show that its position was grounded in: " '(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.' " In making a determination of "substantial justification," the district court must examine the government's conduct in both the prelitigation and litigation contexts. EAJA fees may be awarded if either the government's prelitigation conduct or its litigation position is not substantially justified.)

Wisconsin v. Hotline Industries, Inc., 236 F.3d 363, 367 (7th Cir. 2000) (The Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), authorizes monetary recovery for attorney's fees "incurred" as a result of unjustified federal action. The Act, which "aim[s] to check or deter unjustified governmental conduct, permit[s] parties to be reimbursed for fees *actually incurred* in achieving victory.")

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)).

39. 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 2001) (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 attorney's fees); 28 U.S.C.A. § 1921 (regarding United States marshal's fees); and 28 U.S.C.A. § 1821(b) (regarding the payment of witnesses).

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.)

Kulmani v. Blue Cross Blue Shield Ass'n, 224 F.3d 681 (7th Cir. 2000) (Section 1920(4) the district court to tax as costs "[f]ees for exemplification and copies of papers necessarily obtained for use in the case.")

Cefalu v. Village of Elk Grove, 211 F.3d 416, 428 (7th Cir. 2000) (As long as a photographic reproduction "furthers the illustrative purpose of an exhibit ... it is potentially compensable as exemplification.")

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 which overturned a jury award in the inmate's favor. 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 "at this time or in the future." 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. See also Badillo v. Central Steel and Wire Co., 717 F.2d 1160, 1165 (7th Cir. 1983)).

APPENDIX A

Prison Litigation Reform Act ("PLRA"): 2002 Summary of Key Provisions

28 U.S.C. § 1915(a) - *In forma pauperis*

- Prisoner needs an affidavit to proceed *in forma pauperis*; also a 6 month trust account statement, certified by trust officer

28 U.S.C. § 1915(b) - filing fees

- Prisoners required to pay the full amount of the filing fee ($150) in installments. Initial partial payment formula: 20% of the greater of average monthly deposits or average monthly balance for 6 months immediately preceding the filing of the complaint. Monthly payments of 20% of preceding month's income, until the full $150 is paid. Agency with custody forwards payment each month that the balance exceeds $10.

28 U.S.C. § 1915(e) - appointment of counsel and initial review

- Court may request an attorney to represent any person unable to afford counsel
- Notwithstanding payment of the filing fee or any portion thereof, the court shall dismiss the case at any time if the court determines that the allegation of poverty is untrue, or the action or appeal is frivolous or malicious, fails to state a claim on which relief may be granted or seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915(g) - three strikes

- In no event shall a prisoner bring a civil action or appeal a judgment in a civil action if the prisoner has, on three or more occasions, while incarcerated, brought an action or appeal in a federal court that was dismissed as frivolous, malicious, or failed to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C § 1915A - initial review

- the court shall review, before docketing or in any event as soon as practicable after docketing, a complaint in a civil action in which a prisoner sees redress from a governmental entity or officer or employee of a governmental entity.
- the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief.

42 U.S.C. § 1997(e)(a) - exhaustion of administrative remedies

- no action shall be brought with respect to prison conditions by a prisoner until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997(e)(d) - attorney's fees

- 150 percent of the hourly rate established under section3006A of Title 18, for payment of court-appointed counsel

42 U.S.C. § 1997(e)(e) - physical injury requirement

42 U.S.C. § 1997(e)(f) - telephonic hearings

- to the extent practicable, all hearings shall be telephonic or through video conference

42 U.S.C. § 1997(e)(h) - definition of prisoner

APPENDIX B

PRISON LITIGATION REFORM ACT

42 U.S.C.A. § 1997e (West Supp. 2001)

(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.

xxx

APPENDIX C

PRISON LITIGATION REFORM ACT

18 U.S.C.A. § 3626 (West Supp. 2001)

(a) Requirements for relief.--

(1) Prospective relief.--

(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless--

(i) Federal law requires such relief to be ordered in violation of State or local law;
(ii) the relief is necessary to correct the violation of a Federal right; and
(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) Preliminary injunctive relief.--In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90- day period.

(3) Prisoner release order.--

(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless–

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that–

(i) crowding is the primary cause of the violation of a Federal right; and
(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

(b) Termination of relief.--

(1) Termination of prospective relief.--

(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener--

(i) 2 years after the date the court granted or approved the prospective relief;
(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or
(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

(2) Immediate termination of prospective relief.--In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation.--Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

(4) Termination or modification of relief.--Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

(c) Settlements.--

(1) Consent decrees.--In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

(2) Private settlement agreements.--

(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) State law remedies.--The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief.--

(1) Generally.--The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

(2) Automatic stay.--Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period--

(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or (ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

(B) ending on the date the court enters a final order ruling on the motion.

(3) Postponement of automatic stay.--The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.

(4) Order blocking the automatic stay.--Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

(f) Special masters.--

(1) In general.--

(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

(2) Appointment.--

(A) If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

(3) Interlocutory appeal.--Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

(4) Compensation.--The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

(5) Regular review of appointment.--In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

(6) Limitations on powers and duties.--A special master appointed under this subsection--

(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

(B) shall not make any findings or communications ex parte;

(C) may be authorized by a court to assist in the development of remedial plans; and

(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

(**g) Definitions.--As used in this section**--

(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to 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;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

(8) the term "special master" means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

X X X

INDEX

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES