LEGAL BULLETIN 8.2
Psychiatric & Disability Rights

Set 8: Medical Care
Bulletin 8.2
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I. Introduction

This bulletin addresses the rights of prisoners with disabilities and psychiatric needs, and the accommodation and treatment due to them. In addition to constitutional theories of protection under which you may sue, there are a number of federal laws establishing rights and remedies for prisoners with disability and mental health issues, including the Americans with Disabilities Act and the Rehabilitation Act: we deal with each separately below (although there is often overlap between these laws).

This bulletin discusses, usually without distinguishing, the rights of both pretrial detainees (people in jail who may not yet be charged and/or are awaiting trial) and convicted prisoners. Though the Supreme Court has made legal distinctions between pretrial detainees and prisoners in other contexts, the Court has held that, with respect to medical treatment, pretrial detainees have rights at least as extensive as those of convicted prisoners. *City of Revere v. Massachusetts Gen. Hosp.,* 463 U.S. 239 (1983).

II. Claims in federal court and the Prison Litigation Reform Act

If you bring a claim in federal court for a violation of your civil rights under the United States Constitution (called a 1983 action for state prisoners and a Bivens action for federal prisoners), you must comply with the Prison Litigation Reform Act (PLRA) (The PLRA is discussed at length in a separate publication - The Prison Litigation Reform Act, Chapter in the Jailhouse Lawyer's Manual). However, there may be claims under certain federal statutes, like the Americans with Disabilities Act (ADA), where in some jurisdictions exhaustion of administrative remedies under the PLRA is not necessary. Carefully research your jurisdiction to see what is required. We've included an overview here to acquaint you with the basics of the PLRA, since the statute has a number of major implications for your lawsuit that you need to understand before you file.

A. Highlights of the PLRA

1. Filing fees: 28 U.S.C. § 1915(f)(2). The filing fee in federal court actions is $350. A prisoner who cannot pay the full filing fee can ask the court if he can file as indigent (*in forma pauperis)*. In order to do this, an inmate needs to submit certified statements of his prison account for the last six months, because the fee will be drawn from the account over time. Inability to pay up front is not cause for your suit to be dismissed. Note though that if you file your case and it is dismissed before you have paid the fee, the amount is still due.

2. "Three Strikes": 28 U.S.C. § 1915(g). Under the PLRA, the district court first reviews prisoners' lawsuits to see if they are frivolous, malicious, or if they fail to state a valid legal claim. If a suit is found to be one of the three, it will be dismissed and count as one "strike." If an individual gets three strikes (if he has three suits

dismissed on one of these grounds), he or she will be unable to file any future suits *in forma pauperis*, "unless the prisoner is in imminent danger of serious physical injury" when the case is filed. In practical terms, this means you should carefully plead (meaning "set out") your case to ensure that you state a valid claim that the court can address, and that the defendants you name are not immune from suit. (More below on this).

3. Exhaustion of administrative remedies: 42 U.S.C. § 1997e(d)(2). Exhaustion means raising your issues in the grievance system in your institution, and pursuing them to the fullest extent possible. Courts have interpreted this provision pretty strictly; for instance, the Seventh Circuit has held that a prisoner alleging there were no available remedies, and that any that were said to exist were a sham, failed in his pleading to meet the PLRA's requirements, and his claim was dismissed. *Massey v. Wheeler*, 221 F.3d 1030 (7th Cir. 2000). You'll need to raise all the issues you would in a lawsuit, since courts have held that failure to raise particular issues at the administrative level prohibits you from litigating them. As noted above, failure to exhaust before filing can get your case dismissed. Dismissal for failure to exhaust should be without prejudice, enabling you to re-file after you've pursued administrative remedies. Even if the incidents in your case occurred before the PLRA's passage in 1996, if you *filed* your complaint after that date, this requirement applies.

The U.S. Supreme Court has held that an inmate seeking only monetary damages must exhaust any prison administrative process that could address the prisoner's complaint and provide some remedy, even if that remedy is not the type being sought by the prisoner. *Booth v. Churner*, 121 S. Ct. 1819 (2001).

a. Special circumstances regarding exhaustion requirement:

- **Singular, statutorily-based claims, like the Americans with Disabilities Act (ADA):** As stated in the introduction to this section, some courts have decided that the ADA does not require administrative exhaustion, despite the requirement under the PLRA. For example, see *Parkinson v. Goord*, 116 F.Supp.2d 390 (W.D. N.Y. 2000); but contrast with *Lavista v. A.F. Beeler*, 195 F.3d 254 (6th Cir. 1999) (the district court held that a blind prisoner who used a wheelchair must first exhaust administrative remedies before seeking any form of relief under the ADA). It's essential, then, that you carefully research the requirements in your particular federal jurisdiction. When in doubt, it is better to be cautious and exhaust your administrative remedies.

- **Multiple claims (for example, an ADA and an Eighth Amendment claim):** If your suit includes *both* an ADA and a federal constitutional claim, you will need to exhaust administrative remedies, at least regarding the federal constitutional claim. If you do not properly exhaust administrative remedies regarding a federal constitutional claim, as required under the PLRA, *all* claims may potentially be dismissed, even those that may not require exhaustion if presented alone. The relationship between the ADA and PLRA in this, and other respects, has yet to be definitively worked out in the courts.

4. "Prior showing of physical injury": 42 U.S.C. § 1997e(e). This provision limits suits for redress of mental or emotional injury to those cases where a prisoner has suffered a physical injury. This means effectively that all Eighth Amendment suits must now include a claim of physical harm, which must be more than minimal (or "de minimis") but not necessarily substantial. In a somewhat notorious case, the Seventh Circuit affirmed a case in which prisoners' exposure to asbestos in the prison was not a physical injury for the PLRA, without a showing of resulting disease. *Zehner v. Trigg*, 133 F.3d 459 (7th Cir. 1997). The 6th Circuit has taken a similarly strict position on the physical injury requirement, finding that, for example, conditions of unsanitary eating and showering and excessive heat did not in themselves constitute physical injury. *Pryor v. Cox*, 1999

U.S. App. Lexis 32518 (6th Cir. 1999).

This standard, however, is particular to the 6th Circuit, and varies between federal circuits: so know what the standard is in your jurisdiction. For example, on this issue the Tenth Circuit found that mental injury is sufficient to cause physical deterioration, thus satisfying the PLRA requirement. *Perkins v. Kansas Dep't of Corrections*, 165 F.3d 803 (10th Cir. 1999). Yet another court held that the physical injury requirement doesn't apply to alleged violations of fundamental constitutional rights, under the Fourth, Eighth, and Fourteenth Amendments if the plaintiff can establish conditions causing severe deprivations of basic human needs. *Waters v. Andrews*, 2000 U.S. Dist. Lexis 16004 (W.D. N.Y. 2001). The court in *Waters* also noted that there was a genuine issue of fact as to whether the treatment in question amounted to a physical injury, noting that the statute doesn't define the term. So far, federal courts have held that the physical injury requirement *doesn't* apply to injunctive or declaratory relief, which are remedies designed to get a defendant to do or stop doing a particular thing (in contrast to money damages). See, *Zehner,* above.

a. ADA claims and the "prior showing of physical injury" requirement:

Circuits are also divided on whether this physical injury requirement section applies to ADA claims. Several courts have held that the physical injury provision applies without regard to whether a claim has constitutional or statutory basis. *Davis v. District of Columbia,* 158 F.3d 1342 (D.C. Cir. 1998); *Cassidy v. Indiana Dep't of Corrections,* 199 F.3d 374 (7th Cir. 2000). Some circuits rely on what type of remedy is sought to determine if the prior physical injury requirement applies. See *Geiger v. Jowers, 404 F.3d 371, 375 (5th Cir. 2005)* (physical injury requirement does not apply to claims for declaratory or injunctive relief); *Searles v. Van Bebber, 251 F.3d 869, 875-76, 878-80 (10th Cir. 2001)* (plaintiff could recover punitive and nominal damages although compensatory damages award was vacated); *Nelson v. Horn, 138 Fed. Appx. 411, 2005 WL 1526454 (3rd Cir. 2005)* (§ 1997e(e) does not bar a claim for nominal damages, which need not be alleged in the complaint); *Allah v. Al-Hafeez, 226 F.3d 247, 252 (3rd Cir. 2000)* (claim for punitive damages stemming from violation of First Amendment rights and not from emotional or mental distress suffered therefrom are not barred by § 1997e(e)). And some circuits haven't reached this question. See *Jarriett v. Wilson,* 414 F.3d 634, 639 n.5, 162 Fed. Appx. 394 (6th Cir. 2005) (declining to reach the question of whether injunctive relief is available).

5. Revocation of Earned Time: 28 U.S.C. § 1932. If a court finds that a claim is malicious or filed to harass a party, or that you knowingly present false information, it may revoke your earned time credit. This is obviously another provision designed to discourage prisoners' litigation, and just another reason to plead your case with great care.

6. Diversion of damages: provision appears after 18 U.S.C. § 3626. Compensatory damages are "diverted" from payment to the successful prisoner plaintiff to satisfy restitution owed. Any remainder then goes to the prisoner.

As you can see, the restrictions of the PLRA are critical to understand before you file. These notes are just to give you some sense of what's involved, so look closely at the Act, and review the cases in your area that address it. The U.S. Code Annotated (U.S.C.A.) provides cases that illustrate the provisions that make up the PLRA.

III. Other general litigation issues

A. Central limitations recognized by the courts

The major limiting case and theory in the prison context is whether the complained-of policy or regulation is "reasonably related to legitimate penological objectives." *Turner v. Safley*, 482 U.S. 78 (1987), superseded on other grounds; see also *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), superseded on other grounds; and *Thornburgh v. Abbott*, 490 U.S. 401 (1989). Keep this limiting principle in mind when crafting your claim, for it is bound to be your adversary's defense, and one the court will be inclined to uphold.

B. Immunity: Who can you sue?

Immunity means an individual or entity is protected from being sued. Prison officials often get "qualified immunity" from suit, meaning they are protected from suit for damages *if* their conduct doesn't violate constitutional rights which they should have known about. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Officials acting on advice from medical personnel will not be liable. The kinds of actions on the part of officials that may give rise to liability include failure to provide adequate staff (in terms of number or training), or to maintain policies that make adequate care possible. See *Ramos v. Lamm*, below, for a case in which various policies and practices contributed to system-wide constitutional violations.

The Supreme Court has held that private guards working for a jail or prison may be liable under §1983 if they were acting "under color of state law" when they committed a constitutional violation (meaning that there is some policy, law or directive from a superior under which they perform the unconstitutional act complained of), and they do not have immunity from suit. *Richardson v. McKnight*, 521 U.S. 399 (1997). You can count on defendants claiming they're immune; for example, the typical defense is that the person(s) complained of in your claim acted alone, as an individual or without authority from a superior.

In terms of indirect liability, a superior acting in his or her official capacity may be liable for a "failure to train" prison employees/subordinates if you can show that training would have prevented the constitutional violation. You must also show that the superior official deliberately chose not to institute training. *Erwin v. County of Manitowoc*, 872 F.2d 1292 (7th Cir. 1989). For instance, if a warden or deputy were aware of an inmate's injury and aware of a guard's failure to get the inmate necessary treatment, the officials could be held liable for failure to adequately supervise and train the guard. You can see that what's crucial is not just that a problem of constitutional dimension existed, but that a responsible official knew about it.

1. The immunity issue in ADA claims

The ADA and RA statutes in the prison context are discussed more fully below, but regarding the immunity issue, know that in ADA and RA suits in the prison setting, a plaintiff must again show that the defendant(s) acted in an "official," not "personal" capacity to establish liability. See, for example, *Berthelot v. Stadler*, 2000 U.S. Dist. Lexis 15615 (E.D. La. 2000) (holding that while prison officials can't be individually liable under the ADA, they can be sued in their official capacities). In other words, a rogue actor behaving on his own in a way that violates the ADA or Rehabilitation Act is not enough to win a suit: you must show that the actor violated these statutes, again, under some directive, policy or law.

IV. Laws that protect your rights as a prisoner: the Constitution and federal civil rights statutes

A. Constitutional Protections*:* The Eighth Amendment

1. Medical care: "deliberate indifference to serious medical needs"[1]

The Eighth Amendment is violated by "deliberate indifference" to "serious medical needs." *Estelle v. Gamble*, 429 U.S. 97 (1976). The Eighth Amendment does not provide a remedy for medical malpractice, that is, an error in judgment by a qualified professional acting without deliberate indifference. *Id.* The thrust of the Eighth Amendment protection is that prison officials must provide access to qualified medical providers, emergency care and follow-up of ordered care, and that prison medical staff cannot act indifferently to serious medical needs. See, for example, *Hoptowit*, 682 F.2d 1237, 1252-1254 (9th Cir. 1982). Although a prisoner's mere disagreement with the course of treatment falls far short of establishing an Eighth Amendment claim, the fact that a prisoner received some medical attention does not foreclose an Eighth Amendment claim. See *Hemmings v. Gorczyk*, 134 F.3d 104, 108-09 (2d Cir. 1998) (fact that prisoner received two X-rays weakened, but did not foreclose, his claim that prison staff were deliberately indifferent to his sprained ankle).

2. The constitutional standard to meet in an eighth amendment claim:
a showing that officials acted with "reckless disregard" or "deliberate indifference"

The landmark case *Estelle v. Gamble*, (see above), establishes that prison officials acting with "reckless disregard" or "deliberate indifference" violate a prisoners' Eighth Amendment right to be free from cruel and unusual punishment. Where a prisoner or pre-trial detainee requires serious medical treatment, and is denied such treatment by prison officials, this is the constitutional theory that may apply in addition to other constitutional theories (like under the ADA, see above discussion). However, in cases relying on an Eighth Amendment analysis, a prisoner (or pre-trial detainee) must also show a "culpable state of mind" on the part of the prison official. *Wilson v. Seiter*, 501 U.S. 294 (1991) (prisoner claiming that prison conditions violate Eighth Amendment must show a culpable state of mind on the part of prison officials). This is a very high standard, requiring some proof of the actor's knowledge of his wrongdoing, and intention to act wrongfully. Additionally, injuries need not be serious to satisfy this standard, although the degree of injury is a relevant factor.

Since *Seiter*, the Court has addressed the level of culpability necessary for recovery by prisoners under the Eighth Amendment. In an excessive force claim, in *Hudson v. McMillan*, 503 U.S. 1 (1992), the Court held that when prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishment Clause, the core judicial inquiry is whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

Essentially, *Estelle* requires that when you claim that your Eighth Amendment right to be free of cruel and unusual punishment is violated because of neglect of your psychiatric condition or disability, you will need to

[1] This section relies heavily upon materials prepared by David C. Fathi and John Midgley, in *The Rights of Prisoners*, for Columbia Legal Services, Seattle, Washington, December, 1999; and John Boston for the Prisoners' Rights Project, New York Legal Aid Society, 1999.

show *both* that officials' mistreatment was *deliberate* and that your needs were *serious.* Doctors' bad judgment, refusal to use a specific treatment, mere negligence or accidents will not support an Eighth Amendment claim; you will need to show that your pain or injury was serious and the result of deliberate indifference. Our bulletin on medical care (8.1) discusses the Estelle standard and medical rights generally at length.

3. Proving "deliberate indifference"

Deliberate indifference can be shown by any of the following (this list is not exhaustive):

- **Denial of or delay in access to medical personnel**: See *Weyant v. Okst*, 101 F.3d 845, 856-57 (2d Cir. 1996) (delay of hours in getting medical attention for diabetic in insulin shock raised question of deliberate indifference); *Hewett v. Jarrard*, 786 F.2d 1080, 1083, 1087 (11th Cir. 1986) (isolation of injured prisoner and deprivation of medical attention for three days). Delay is evaluated in the context of the prisoner's particular medical condition.

- **Denial of access to medical practitioners qualified to address the prisoner's medical problem:** See *Howell v. Evans*, 922 F.2d 712, 723 (11th Cir. 1991) (failure to provide access to a respiratory therapist could constitute deliberate indifference), vacated as settled, 931 F.2d 711 (11th Cir. 1991); *Mandel v. Doe*, 888 F.2d 783, 789-90 (11th Cir. 1989) (physician assistant failed to diagnose a broken hip, refused to order an x-ray, and prevented the prisoner from seeing a doctor).

- **Failure to inquire into facts necessary to make a medical judgment:** See *Liscio v. Warren*, 901 F.2d 274, 276-77 (2d Cir. 1990) (physician failed to inquire into the cause of arrestee's delirium and thus failed to diagnose alcohol withdrawal); *Miltier v. Beorn*, 896 F.2d 848, 853 (4th Cir. 1990) (doctor failed to perform tests for cardiac disease in patient with symptoms that called for them).

- **Interference with medical judgment by budgetary or other non-medical factors:** See *Anderson v. County of Kern*, 45 F.3d 1310 (9th Cir.), amended, 75 F.3d 448, cert. denied, 516 U.S. 916 (1995) (failure to provide a translator for medical encounters can constitute deliberate indifference); *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1461 (9th Cir. 1988), vacated, 490 U.S. 1087 (1989), reinstated, 886 F.2d 235 (9th Cir. 1989), cert. denied, 494 U.S. 1091 (1990) (understaffing such that psychiatric staff could only spend "minutes per month" with mentally ill prisoners); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (budgetary restrictions).

- **Failure to carry out medical orders**: See *Estelle v. Gamble*, 429 U.S. at 105 ("intentionally interfering with the treatment once prescribed"); *Koehl v. Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996) (denial of prescription eyeglasses); *Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991) (nurse's failure to perform prescribed dressing change); *Erickson v. Holloway*, 77 F.3d 1078, 1080 (8th Cir. 1996) (correctional staff interference with physician orders).

- **Treatment so incompetent or lazy it isn't really "medical"**: "Medical treatment that is so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness" constitutes deliberate indifference, as does "[a] doctor's decision to take an easier and less efficacious course of treatment." *Adams v. Poag*, 61 F.3d 1537, 1543-44 (11th Cir. 1995), disapproved

on other grounds. See also *Smith v. Jenkins*, 919 F.2d 90, 93 (9th Cir. 1990) (prisoner entitled to prove that treatment "so deviated from professional standards that it amounted to deliberate indifference"); *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974) (doctor's throwing away prisoner's severed ear and stitching the stump, rather than trying to reattach it, may constitute deliberate indifference).

4. What is a "serious medical need"?

A "serious medical need" is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity of a doctor's attention." *Hill v. DeKalb Regional Youth Detention Center*, 40 F.3d 1176, 1187 (11th Cir. 1994), overruled on other grounds. Alternatively, "[a] 'serious' medical need exists if the failure to treat the need could result in further significant injury or 'unnecessary and wanton infliction of pain.'" *Carnell v. Grimm*, 872 F. Supp. 746, 755 (D. Hawaii 1994), appeal dismissed in part, aff'd in part, 74 F.3d 977 (9th Cir. 1996).

This is largely a common-sense inquiry. Conditions that result in significant and unnecessary pain will usually be found to constitute serious medical needs. See *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992), overruled on other grounds ("chronic and substantial pain"); *Martin v. DeBruyn*, 880 F. Supp. 610, 614 (N.D. Ind. 1995) (ulcers); *Starbeck v. Linn County Jail*, 871 F. Supp. 1129 (N.D. Iowa 1994) (herniated disk).

Similarly, conditions that result in disability or loss of function, even without pain, will constitute serious medical needs. See *McGuckin*, 974 F.2d at 1060 (condition that "significantly affects an individual's daily activities" is actionable); *Koehl v. Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996) (loss of vision).

5. Mental Health Treatment

Constitutional standards for prison health care "apply to physical, dental, and mental health." *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982). Mental health treatment is of grave concern in jails and prisons because so many prisoners have mental and developmental problems. Inadequate mental health treatment and suicide prevention procedures are actionable under the "deliberate indifference" standard. For example, see *Bowring v. Godwin*, 551 F. 2d 44 (4th Cir. 1977); *Cabrales v. County of Los Angeles*, 864 F.2d at 1460-62; *Balla v. Idaho State Bd. of Corrections*, 595 F. Supp. 1558, 1577 (D. Idaho 1984).

6. Dental Care

"Dental care is one of the most important medical needs of prisoners. Accordingly, the eighth amendment requires that prisoners be provided with a system of ready access to adequate dental care." *Hunt v. Dental Department*, 865 F.2d 198, 200 (9th Cir. 1989) (internal quotation marks, citations omitted). A prisoner is entitled to treatment for dental conditions that cause "pain, discomfort, or threat to good health." *Dean v. Coughlin*, 623 F. Supp. 392, 404 (S.D.N.Y. 1985). Excessive delays in providing appropriate treatment for painful dental conditions violate the Constitution. See *Fields v. Gander*, 734 F.2d 1313, 1315 (8th Cir. 1984) (three weeks); *Fambro v. Fulton County, Georgia*, 713 F. Supp. 1426, 1429-31 (N.D. Ga. 1989) (three weeks); *Canell v. Bradshaw*, 840 F. Supp. 1382, 1387, 1393 (D. Or. 1993), aff'd, 97 F.3d 1458 (9th Cir. 1996) (several days).

Numerous courts have condemned prison or jail dental systems in which the only "treatment" available is extraction of teeth. See *Heitman v. Gabriel*, 524 F. Supp. 622, 627 (W.D. Mo. 1981); *Williams v. Scully*, 552 F. Supp. 431, 432 (S.D.N.Y. 1982); *Nicholson v. Choctaw County, Ala*., 498 F. Supp. 295, 300, 308 (S.D. Ala. 1980); *Newman v. State of Ala.*, 466 F. Supp. 628, 634 (M.D. Ala. 1979).

B. Due Process and Equal Protection: the Fifth and Fourteenth Amendments

The Fifth Amendment Due Process Clause (which applies to federal prisoners and, through the Fourteenth Amendment, to state prisoners and jail prisoners) prohibits the government from depriving you of life, liberty or property without due process of law. The major limiting case and theory in this context (and to almost any claim related to prison policy) is whether the depriving policy or regulation is "reasonably related to legitimate penological objectives." *Turner v. Safley*, 482 U.S. 78 (1987), superseded on other grounds; see also *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), superseded on other grounds; and *Thornburgh v. Abbott*, 490 U.S. 401 (1989). Keep this limiting principle in mind when crafting your claim, for it is bound to be your adversary's defense, and one the court will be inclined to uphold.
Most often a "liberty interest" will be at issue for prisoners in the context of a Due Process claim. Where there is a protected interest, some process is due before a deprivation. For instance, courts have found that prisoners have a *liberty interest* in the following:

- Avoiding unwanted administration of antipsychotic drugs *(Riggins v. Nevada,* 504 U.S. 127 (1992); and *Washington v. Harper*, 494 U.S. 210 (1990));
- Preventing a transfer from a prison to a mental institution (*Vitek v. Jones*, 445 U.S. 480 (1980) (due process hearing required in such transfer));

In contrast, courts have found no liberty interest in avoiding administrative segregation (*Sandin v. Conner,* 515 U.S. 472 (1995), overruled on other grounds); in avoiding transfer to another institution (*Wilson v. Yaklich,* 148 F.3d 596 (6th Cir. 1998)); or with respect to a particular prison classification (*Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999)).

"Due process" is a flexible concept that is defined depending on the situation, but will usually mean the right to notice and a hearing before the deprivation, with the level of protection you get in the process depending on the kind of deprivation involved and the government's interest. See *Matthews v. Eldridge*, 424 U.S. 319 (1976). Where a "state-created" interest is involved--say, a state law or regulation-- and a plaintiff alleges it has been violated in his or her case (because, for example, he or she is punished for behavior not forbidden by regulation), the Supreme Court has set out the following standard:

> Due process protections apply only if the restriction or deprivation creates an "atypical or significant hardship" with respect to conditions prisoners typically confront, *or* if it necessarily affects the length of sentence.
>
> *Sandin*, above. (The 5th and 6th Circuits have held that the heightened *Sandin* standard does not apply to pre-trial detainees.)

1. Bureau of Prisons and other prisons' regulations

The Bureau of Prisons (BOP), most correctional departments, and many jails have regulations that create protected interests for due process purposes. The BOP regulations regarding the basic standard of care for prisoners is set out at 18 U.S.C. § 4042 (revised in 2000 by Public Laws 105-314, 105-119, and 106-553). There are also more specific BOP rules for psychological evaluations, if not treatment, where prisoners are "segregated" or in "special housing units." This obligation is found in FEOP Program Statement 5270.5 or 28 C.F.R. (Code of Federal Regulations) § 541.22 et.seq. Under these rules the BOP is required to provide a psychological evaluation of each segregated prisoner every 30 days to ensure the prisoner isn't suffering psychologically (though the concept of administrative segregation without suffering will probably seem absurd to people who've endured it).

2. What to do if you're in segregation and require mental health treatment

As a side note, we recommend that people in segregation do two things, for their own and others' benefit:

1) advise staff through the administrative grievance system when they have not received these reviews, and
2) advise other prisoners of their right to both evaluation and treatment for serious psychological conditions like depression, anxiety, paranoia, and other forms of painful mental and emotional distress. See cases organized by condition-type in the last section of this bulletin for more on the right to mental health treatment.

3. Equal protection claims

Equal protection claims also derive from the Fifth and Fourteenth Amendments. To succeed under this claim (which, essentially, mandates that all similarly-situated people will be treated equally (with some important distinctions not discussed at length here) a petitioner must prove that:

1) prisoners in a similar situation are treated differently; and
2) there is no rational basis for the difference.

Unless the plaintiff is a member of a "suspect class," like a racial "minority," (which, though it sounds strange, actually means that the discriminatory practice or classification requires stricter judicial review of challenged practices and so a better chance for your case) and can show purposeful discrimination, equal protection can be a hard claim to make out. At the federal level, another "suspect class" includes national origin. Note that some states, like Washington, offer higher levels of protection to classes like gender under that state's Constitution, so higher protections may be found at a state level, rather than federal. Courts have found that there was no equal protection violation when prison officials failed to provide a hearing impaired inmate with a specially modified phone, *Hansen v. Rimel*, 104 F.3d 189 (8th Cir. 1997), or when officials failed to provide an interpreter for a hearing and speech-impaired inmate, *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988). Unless a "suspect class" is involved institutional practices that produce unequal treatment are not unconstitutional if they are "rationally related" to a legitimate penal interest B a fairly easy standard for a defendant prison to meet.

C. Applicable federal statutes: 42 U.S.C. § 1983, the Rehabilitation Act, and the American with Disabilities Act

1. 42 U.S.C. § 1983

Referred to as "Section 1983," this provision is unique in that it doesn't actually create legal rights or protections upon which you may sue, but instead provides a means by which to get your constitutional claim into federal court. Most prisoners alleging a constitutional violation, as illustrated in the Eighth Amendment discussion above, will use § 1983, which requires you to state that:

1) a **person** (prison official or employee, or a city county or municipality, but *not* a state)
2) **acting under color of law** (meaning under legal authority)
3) **deprived you of a federal right** (either constitutional or statutory).
See the Medical Rights bulletin for a general discussion of the use of § 1983 to exercise your rights where medical treatment is involved.

2. The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 (RA), at 29 U.S.C. § 701, et.seq., was for many years the major federal statute designed to prevent discrimination against people with disabilities. The RA was intended specifically to foster vocational rehabilitation programs and equal opportunity for handicapped people: its scope is restricted to federal agencies and agencies receiving federal funds. In other words, a state prisoner must establish and plead that his or her institution receives federal money in order to get relief under this statute.

The ADA is based on the RA, so there is substantial overlap (though the ADA is broader in its protections). The definition of the "handicapped individual" under the RA is the same as the ADA's definition of a person with a "disability." Under these statutes, a handicapped or disabled person is one who:

1) has a **physical or mental impairment** which **substantially limits one or more of such person's major life activities**;
2) has a **record of such an impairment**; or
3) is **regarded** (by others) as having such an impairment.

Additionally, the RA is made up of subchapters, the following of which you may want to consult:
§§ 721-722 (requiring individualized written rehabilitation programs);
§§ 776-77 (describing the general requirements the federal government must insure are met by projects for the handicapped);
§ 791 and § 793 (on employment);
and § 794 (on non-discrimination generally).

While the Act does not directly address medical services for the physically or mentally disabled, it does address the renovation of facilities and reduction of physical barriers; the provision of specialized training, recreation, and related therapy; and the specific extension of equal opportunity law to handicapped people. Cases such as *Layne v. Vinzant*, 657 F.2d 468 (1st Cir. 1981) and *Villa v. Franzen*, 511 F. Supp. 231 (N.D. Ill. 1981) address the Bureau of Prisons' obligation to provide appropriate treatment or alternative placement in acceptable institutions for those who are severely disabled.

3. The Americans with Disabilities Act

The Americans with Disabilities Act (ADA), beginning at 42 U.S.C. § 12101, is the most important and relevant

statute for bringing suit for prisoners with disabilities who are not receiving the accommodations or care they require. The following is a quick breakdown of the key requirements to meet under the ADA, based on the same key language in the RA:

- **"Disability:"** same broad meaning as under the RA. See 42 U.S.C. § 12102; (a physical or mental impairment that substantially limits one or more major life activities, etc.; see above discussion under the RA for complete list).

- *"***Substantially limits:"** The Supreme Court has established that whether a person is "substantially limited in a major life activity" is determined by considering the extent of disability given reasonable corrective measures, such as glasses or medication. See *Sutton v. United Airlines,* 119 S. Ct. 2139 (1999); *Murphy* v. *United Parcel Service,* 119 S. Ct. 2133 (1999); *Albertson's, Inc. v. Kirkingburg,* 119 S. Ct. 2162 (1999).

- **"Major life activities:"** includes such things as walking, seeing, hearing, speaking, breathing, learning, and working; included are basic activities that the average person can do with little or no difficulty. See *McAlinden v. County of San Diego,* 192 F.3d 1226 (9th Cir. 1999).

a. Application of the ADA to prisons

In *Pennsylvania Dep't of Corrections v. Yeskey,* 524 U.S. 206 (1998), the Supreme Court established that the ADA's Title II (dealing with public entities) applies to state prisons, and numerous decisions have held it applies to jails. 42 U.S.C. § 12131 et. seq. (*Yeskey* involved a prisoner's claim that he was, for health reasons, denied access to a boot camp program.) The ADA has been held *not* to apply to federal entities. *County of St. Louis v. Thomas,* 967 F. Supp. 370 (D. Minn. 1997); *Hurtado v. Reno,* 34 F. Supp.2d 1261 (D. Colo. 1999) (where the federal entity was an INS detention center). There is much that is still unsettled though when it comes to the ADA, so, again, you should certainly do your own research to establish the current law that applies to you. The RA as noted expressly applies to federal government.

Note that, as one court has said, the ADA & RA are designed to address different issues than Eighth Amendment claims. *Galvin v. Cook,* 2000 U.S. Dist. Lexis 15181 (D. Or. 2000). While the *Estelle* standard for Eighth Amendment suits requires a plaintiff to establish deliberate indifference to serious medical needs, the ADA requires a plaintiff to show he/she is:

1) a "qualified individual with a disability,"
2) who was excluded from participation in or denied access to a program or service, and
3) that this denial or discrimination was because of a disability.

See *Dean v. Knowles*, 912 F. Supp. 519 (S.D. Fla. 1996), in which a prisoner was allegedly denied trustee status because he was HIV-positive.

In *Love v. Westville Correctional Center*, 103 F.3d 558 (7th Cir. 1996), evidence showed an inmate was denied access to services he could have used if the prison had provided minimal accommodations, and supported the quadriplegic inmate's ADA claim of intentional discrimination because officials admitted they knew the inmate had requested access and that they had denied him access because of his disability. And, in *Schmidt v. O'Dell,*

64 F.Supp.2d 1014 (D. Kan. 1999), the fact that a double amputee was able to use most jail services did not prevent his suing under the ADA and RA, since his access was by extreme and painful exertion, contrary to a doctor's instructions regarding his disability.

b. No showing of intentional discrimination under the ADA

In contrast with most constitutional claims, under the ADA, discrimination on the basis of a disability doesn't have to be intentional to constitute a violation. Even facially neutral policies that apply to both physically-able and disabled prisoners may be found to violate the ADA where a plaintiff can show such a policy has a negative impact upon the disabled. For example, in the 7th Circuit, a prisoner successfully argued that shackles he was forced to wear caused him to be unable to perform his personal care needs because of his disability, or to participate in jail programs. He showed that he had requested and been denied help with a "reasonable accommodation" for his illness. The court found this denial of a reasonable accommodation was an ADA violation, as was the shackling policy. While the policy was neutral, applying to both disabled and non-disabled prisoners, it had a much more severe impact on the disabled and was therefore in violation of the ADA. *May v. Sheahan,* 226 F.3d 876 (7th Cir. 2000).
The standard, therefore, is affirmative, rather than negative: under the ADA, persons with disabilities requiring accommodation, treatment, etc., must be so accommodated. This is a much more accessible standard to meet than the standard required under constitutional theories.

c. What's a "service" or "program" under the ADA?

- **Communication access:** Provision of phone access was a "service," and fiancée of a deaf inmate stated a claim where she argued that restriction of inmate's access to adequate equipment was discriminatory. *Niece v. Fitzner,* 922 F. Supp. 1208 (E.D. Mich. 1996). A state prison which received a significant amount of federal funding was required, under the RA, to provide a hearing-, speech-, and vision-impaired inmate with an interpreter for counseling sessions, hearings, and medical treatment. *Bonner v. Arizona Dep't of Corrections,* 714 F. Supp. 420 (D. Ariz. 1989).

- **Education/Rehabilitation:** Education, when provided by a prison, should under the ADA be accessible to otherwise qualified disabled people. *Crawford v. Indiana Dep't of Corrections,* 115 F.3d 481 (7th Cir. 1997). Generally, courts have held that the ADA phrase "service, program, or activity" included the same educational opportunities available to sighted prisoners. However, the Fourth Circuit has limited this principle, stating that a prisoner is not guaranteed the right to have the prison implement a program under the ADA that is not already available. *Garrett v. Angelone,* 940 F. Supp. 933 (W.D. Va. 1996), affirmed, 107 F.3d 865 (4th Cir. 1997).

- **Activities & Services:** Use of a state prison library and dining hall are ADA "activities." *Crawford,* above. A federal court in Indiana granted a legally blind prisoner summary judgment in his claim that prison officials violated the ADA & RA by failing to provide him access to library and educational materials or help in moving safely around the prison. *Williams v. Illinois Dep't of Corrections,* 1999 WL 1068669 (N.D. Ill. 1999). Counseling services and medical diagnosis and treatment are also ADA activities. See *Bonner,* above. Transportation of prisoners and the provision of bathroom facilities are ADA Aservices.*"* *Temples v. Crow,* 1999 U.S. Dist. Lexis 17724 (M. D. Fla. 1999).

- **Not an ADA "service, program or activity":** Cable TV in a prisoner's infirmary cell. *Aswegen v. Bruhl,* 113 F.3d 109 (8th Cir. 1997); access to a personal computer. *Jester v. Duncan,* 161 F.3d 13 (9th Cir. 1998).

d. Requests for accommodation

To obtain relief under the ADA, plaintiffs must request a "modification" of an existing service or structure so as to make it accessible to him or her. For example, where an inmate with a kidney condition, epilepsy, and diabetes did not inform officials of his disability, the court found that any discrimination could not be *because* of that disability, as required to state an ADA claim. *Hall v. Thomas,* 190 F.3d 693 (5th Cir. 1999). Where the plaintiff doesn't take advantage of available treatment or programs, she is not a "qualified individual" able to sue under the Act. *Tangires v. Johns Hopkins Hosp.,* 79 F. Supp.2d 587 (D. Md. 2000), affirmed, 230 F.3d 1354 (4th Cir. 2000). But compare the following cases: while hearing-impaired inmate did not repeat his request for a sign language interpreter before every visit to the nurse or disciplinary hearings, evidence of his numerous requests supported his ADA claim. *Randolph v. Rogers,* 253 F.3d 342 (8th Cir. 2001). And where inmate had several times requested access to programs, with knowledge that it had a legal duty to provide access, discrimination was an intentional ADA violation. *Love v. McBride,* 896 F. Supp. 808 (N.D. Ind. 1995), affirmed 103 F.3d 558.

e. Remedies and relief

Courts have held that the full spectrum of remedies are available to successful plaintiffs under the ADA, including compensatory damages if discrimination is proved intentional. See, for example, *Matthews v. Jefferson,* 29 F.Supp.2d 525 (W.D. Ark. 1998). But, regarding relief available, some courts have seriously limited relief available in ADA-prison suits, holding that even where individuals act as "officials" in violation of the ADA and/or Rehabilitation Act, any relief in the form of money damages is barred. Courts have allowed only declaratory or injunctive relief that has "no impact on a state's treasury" (no dollar impact at all, in other words). *Montez v. Romer,* 32 F.Supp.2d 1235 at 1241 (D. Colo. 1999)*;* see also *Parkinson v. Goord,* discussion above.

What this means, is that all money damages and anything that could be construed as having an impact on a state's financial resources is out. Courts have barred this type of relief under an 11th Amendment theory (the 11th Amendment bars suits in federal court against a state unless the state consents to it). See *Amos v. Maryland Department of Public Safety and Correctional Services,* 178 F.3d 212 (4th Cir. 1999) (the court found the application of the ADA and the Rehabilitation Act to state prisons to be a valid exercise of the Congress' legislative powers under Section 5 of the Fifth Amendment)).

f. What is "qualified" to sue under the ADA?

Would-be ADA plaintiffs should know that an individual is not "qualified" (to sue under the Act) if he poses a significant risk to others by virtue of his disability, and that risk can't be eliminated by reasonable accommodation. In the prison context, the determination whether an individual is "qualified" will consider the possibility of the proposed accommodation with respect to prison operations. See *Crawford v. Indiana Dep't of Corrections,* 115 F.3d 481 (7th Cir. 1997) (abrogated on other grounds); *Bullock v. Gomez,* 929 F. Supp. 1299

(C.D. Cal. 1996); but compare *Niece v. Fitzner*, 922 F. Supp. 1208 (E.D. Mich. 1996) (in which the court held that the Act applies to a prisoner who suffered discrimination based on his association with a person with a disability).

Prisoners found not to be qualified include HIV-positive prisoners seeking food handling jobs, *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994), and HIV-positive prisoners who the court found posed a significant risk of communicating the infectious disease to others. *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999); and *Hopper*, 171 F.3d 1289 (11th Cir. 2000). In the Seventh Circuit, an inmate's ADA claim could not succeed where he alleged he wasn't permitted to take a cooking class without first taking an HIV test; the court held that he showed neither that he was a "qualified individual" nor that any discrimination had been based on his disability, since all prisoners were required to take such a test. *Murdock v. Washington*, 193 F.3d 510 (7th Cir. 1999). Several courts have agreed that the standard of *Turner v. Safley*, 482 U.S. 78 (1987) superseded on other grounds, applies to determining "qualification" and what modifications in a prison are reasonable: the standard itself asks if the prison had a reasonable basis for its decision, and is deferential to prison "security" and operations considerations. Under the ADA Title II generally, a modification is not required if it involves a "fundamental alteration" in the program, service, or structure.

V. Specific conditions and your rights

A. Alcoholism, Substance Abuse, and Addiction

Generally, the Rehabilitation Act and the Americans with Disabilities Act protect alcoholics and drug addicted people who are maintaining sobriety. Rehabilitation Act of 1973, §§ 504, 29 U.S.C.A. §§ 794. *Rodgers v. County of Yolo Sheriff's Dept*., 889 F. Supp. 1284 (E.D. Cal. 1995). And see, *Golson-El v. Runyon*, 812 F. Supp. 558 (E.D. Pa. 1993) (rehabilitated alcoholic is entitled to protection afforded by Rehabilitation Act. Rehabilitation Act of 1973, §§ 7(8)(C)(v), 29 U.S.C.A. §§ 706(8)(C)(v)); and *Davis v. Bucher*, 451 F. Supp. 791 (D.C. Pa. 1978) (people with histories of drug abuse, including participants in methadone programs, are "handicapped" under the RA)).

The following is a sampling of case examples of the application of the ADA and/or the RA to prisons or jails recognizing alcoholism and/or drug abuse as disabilities under the statutes:

- Eighth Amendment violation where jail personnel failed to obtain treatment for pre-trial detainee suffering from acute alcoholism, cirrhosis, and delirium tremens, resulting in inmate's death. *Colle v. Brazos City*., 981 F.2d 237 (5th Cir. 1993), overruled on other grounds.

- Prisoner who alleged he informed officials of his drug addiction and requested treatment, and was treated only 10 days later and then inadequately, stated an Eighth Amendment claim. *United States ex rel. Walker v. Fayette* County, 599 F.2d 573 (3d Cir. 1979).

- Arrestee's claims that he was denied proper police protection and fair treatment due to his psychological and alcohol problems stated an ADA claim. *Barber v. Guay*, 910 F. Supp. 790 (D. Me. 1995).

- Suit alleging failure to implement an alcohol detoxification program, failure to provide prescribed medication immediately, etc., was found not to raise an 8th Amendment claim where an

addicted inmate died in custody. *Jinks v. McAuley,* 163 F.3d 598 (4th Cir. 1998).

B. HIV/AIDS: Testing, Treatment, Segregation, Privacy

Generally, the Fourteenth Amendment guarantees constitutional rights that may protect you from discriminatory treatment on the basis of your HIV status. For example, your rights under the Equal Protection Clause of the Fourteenth Amendment prohibit discrimination by the state or the federal government that is not rationally related to a legitimate purpose. The Due Process Clause of the Fourteenth Amendment forbids the prison facility from taking away your entitlements without due process of law. Furthermore, as discussed above, the Eighth Amendment protects you from "cruel and unusual punishment." Keep in mind, however, that these constitutional rights are balanced against "legitimate penological interests," which may allow prison officials to lawfully infringe upon your rights. The following is a mere selection of examples of case law on the issue of AIDS in prison. [2]

- Asymptomatic HIV is a disability under the ADA. *Bragdon v. Abbott,* 118 S. Ct. 2196 (1998).

- A pretrial inmate with HIV may bring a § 1983 claim where he sufficiently pled the facility was deliberately indifferent when they denied him his medication for 3 days. *McNally v. Prison Health Servs. Inc.,* 28 F.Supp.2d 671 (D. Me. 1998); HIV-positive inmate in county jail could bring ADA claim alleging inappropriate medical care and segregation. *Roop v. Squadrito,* 70 F.Supp.2d 868 (N.D. Ind. 1999).

- Class action by HIV+ prisoners challenged their segregation in terms of prison programs as both unconstitutional and violating Rehabilitation Act. The court found integration might produce violence, and that forcing the prison to hire additional guards to deal with this was an undue burden; they also found that transmission of HIV was a real risk in programs. *Onishea v. Hopper,* 171 F.3d 1289 (11th Cir. 1999).

- Defendants who knew inmate had AIDS & needed daily medication responded to her condition only when she lay in a coma in her cell. The court condemned this treatment as virtually criminal, noting defendants had "put themselves out on a limb and refuse to appreciate the sawing sound underneath them." *Rivera v. Sheahan,* 1998 WL 531875 (N.D. Ill. 1998).

- Right to informational privacy. In some states and federal circuits, HIV-positive prisoners have protections against disclosure of this information. For example, prisoners' substantive due process rights were found to be violated when prison officials allowed non-medical employees and other prisoners to find out prisoners' HIV status. *Woods v. White,* 689 F. Supp. 874, 877 (W.D. Wis. 1988); see Michael Irvine, "Using 42 U.S.C. § 1983 and 28 U.S.C. 1331 to Obtain Relief from Violations of Federal Law," *Excerpts from a Jailhouse Lawyer's Manual,* Fifth Edition, 31 Columbia Human Rights Law Review 305. Spring, 2000.

[2] For an excellent in-depth discussion of issues (legal and otherwise) related to AIDS in the prison setting, see: Jin Hee Lee, "AIDS in Prison," *Excerpts From A Jailhouse Lawyer's Manual,* Fifth Edition, 31 Columbia Human Rights Law Review 355, Spring 2000.

C. Mental health conditions and access to treatment

As discussed above (see "Eighth Amendment," and "Mental Health Treatment"), inadequate mental health treatment and suicide prevention procedures are actionable under the Eighth Amendment "deliberate indifference" standard. In addition, rights related to mental health treatment may be found within 14th Amendment Due Process protections, and affirmative rights to treatment as provided under the ADA and RA. For example, prisoners who possess psychiatric disorders have the right to treatment by qualified staff. *Prisoners of Allegheny County Jail v. Pierce,* 612 F.2d 754 (3d Cir. 1979).

An inexhaustive sample of case law follows (and see discussion supra, "Eighth Amendment," and "Mental Health Treatment" for other cases in Eighth Amendment context, only):

- Due process claim stated where pretrial inmate alleged denial of medication for mental illness. *Thomas v. Kimmerman,* 846 F.2d 1009 (5th Cir. 1988).

- Inmate stated a § 1983 claim against a prison psychiatrist who failed to provide her with appropriate medication for her panic and depression. *Key v. Brewington-Carr,* 2000 WL 1346688 (D. Del. 2000).

- Deliberate indifference claim stated where inmate alleged failure to train staff to accommodate mentally ill prisoners. *Young v. City of Augusta,* 59 F.3d 1160 (11th Cir. 1995).

- Arrestee known to be epileptic had a seizure in unpadded cell & was injured; though a doctor was later called, court held "deliberate indifference." *Blankenship v. Kerr County, Texas,* 878 F.2d 893 (5th Cir. 1989).

- Doctor advised psychiatric consultation, but would not refer indigent prisoner to specialist unless he could pay; court found deliberate indifference. *Ancata v. Prison Health Serv.*, 769 F.2d 700 (11th Cir. 1985).

- Prison doctor's prescribing inmate new medication and suspending his prescription from a doctor no longer treating the inmate was not denial of adequate psychiatric treatment. *Vaughan v. Lacey,* 49 F.3d 1344 (8th Cir. 1995).

1. Involuntary mental health commitment hearings and treatment

Prisoners are protected directly by the Due Process Clause against involuntary transfer to a mental hospital or involuntary administration of psychotropic drugs without procedural due process. *Vitek v. Jones*, 445 U.S. 480 (1980) (transfer to mental hospital); *Washington v. Harper,* 494 U.S. 210 (1990) (psychotropic medication).

D. Transsexuals and accommodation and/ or treatment

- Transexualism has been found to require some forms of accommodation as a serious medical need. *White v. Farrier,* 849 F.2d 322 (8th Cir. 1988).

Pscychiatric disorders as a result of transsexualism are considered serious medical needs. See *White*. However, hormone therapy may or may not be considered a serious medical need depending on the circuit. Compare *White* and *Maggert v. Hanks*, 131 F. 3d 670 (7th Cir. 1997) (prison officials not required to provide hormone therapy. Not serious medical need) with *Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792 (W.D. Mich. 1990) (prison required to continue hormone treatments at prisoners' expense).

- General: The Rehabilitation Act, § 706(8)(F), excludes from the protected class people with "sexual behavior disorders." *Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000).

E. Restraints

- Hog-tying pre-trial inmate who had tried to commit suicide was unrelated to any reasonable penal objective, and was a 14th Amendment violation. *Jones v. Thompson*, 818 F. Supp. 1263 (S.D. Ind. 1993); but see *Rehbein v. Terry*, 836 F. Supp. 677 (D. Neb. 1992), affirmed, 7 F.3d 1042 (8th Cir. 1993), in which a psychiatrist was not liable for keeping inmate in restraints for 39 hours because this decision was a matter of professional judgment.

F. Sex offenders and treatment

- Washington State's special facility for "sexually violent predators" failed to provide constitutionally adequate mental health treatment that would offer prisoners a reasonable chance of improving their condition. *Turay v. Seling*, 2000 U.S. Dist. Lexis 11403 (W.D. Wa. 2000).

G. Right to Refuse Psychiatric Treatment and/or Medication

Prisoners have a substantive due process right to avoid forced medication of antipsychotic drugs, *unless* the condition to be treated is likely to cause harm to the patient or others, and the medication is prescribed and monitored by a psychiatrist (in which case it may be forcibly administered without process of law). *Washington v. Harper*, 110 S. Ct. 1028 (1990).

- An inmate may be forcibly medicated where the government showed, to a reasonable degree of medical certainty, that it was medically necessary, and relative to less intrusive alternatives, essential for the inmate and others' safety, and where the administrative hearing complied with due process. *United States v. Weston*, 69 F.Supp.2d 99 (D. D.C. 1999); *Dancy v. Simms*, 116 F.Supp.2d 652 (D. Md. 2000).

- An inmate who had attempted suicide and was bound by doctor-ordered restraints while abusive and fighting; court found restraints justified by risk of inmate harming himself. *O'Donnell v. Thomas*, 826 F.2d 788 (8th Cir. 1987).

- Eighth Amendment claim stated where prisoner alleged repeated use of segregation and restraints without prior medical approval while in psychiatric hospital. *Buckley v. Rogerson*, 133 F.3d 1125 (8th Cir. 1998).

- Guardian of "incompetent" inmate could give effective consent to medication on inmate's behalf (so no due process claim). *Holley v. Deal,* 948 F. Supp. 711 (M.D. Tenn. 1996).

- Prisoner not allowed to refuse medication for the purpose of proving he didn't need it. *Sullivan v. Flanagan,* 8 F.3d 591 (7th Cir. 1993).

- Giving an inmate psychotropic drugs (drugs used to treat emotional/mental conditions) to make him competent for trial was unjustified, because it wasn't clear the drugs would work. *Woodland v. Angus,* 820 F. Supp. 1497 (D. Utah 1993). But compare *United States v. Brandon,* 158 F.3d 947 (6th Cir. 1998), in which the court held that medication could be administered to render an inmate competent for trial, if there were a judicial hearing to satisfy due process.

- Prison doctors can give an un-consenting mentally ill inmate a sedative in an emergency without violating due process. *Hogan v. Carter,* 85 F.3d 1113 (4th Cir. 1996).

H. Housing and Transfers Between Facilities

Prison officials generally are afforded wide discretion in transferring prisoners to and from facilities. However, in some instances, a transfer may be unconstitutional because of a prisoners' particular vulnerability as a person with a disability or mental illness.

- Eighth Amendment violation when officials housed psychologically disturbed prisoner among general population despite federal court decree requiring segregation of severely mentally ill prisoners, and prisoner was killed: warden knew or should have known of inmate's condition. *Cortes-Quinones v. Jimenez-Nettleship,* 842 F.2d 556 (1st Cir. 1988).

- Eighth Amendment claim stated where small inmate with low IQ and seizure disorder placed in general population prison camp barracks was raped. *Taylor v. Michigan Dep't of Corrections,* 69 F.3d 76 (6th Cir. 1995).

- ADA violation where inmate who uses cane but who was not mentally ill was, because of his disability, housed with mentally ill prisoners and thus subjected to risk or injury. *Carty v. Farrelly,* 957 F. Supp. 727 (D. Virgin Islands 1997).

- Inmate with Tourette's syndrome and a joint disorder stated an ADA claim and department should accommodate his diseases by allowing him to remain in a handicapped-accessible cell or have a chair in his cell and shower room; they also had an ADA obligation to accommodate his Tourette's by letting him return to his cell when he needed to express his verbal tics. *Purcell v. Pennsylvania Dep't of Corrections,* 12 Nat'l Disability Law Rep. P 41, 1998 WL 10236 (E.D. Pa. 1998).

I. Physical Disabilities

As discussed above in the section on the ADA and RA in the prison setting, prisoners are afforded equivalent protections under these statutes as free people. Other constitutional theories may apply, too, with more limitations that under the ADA or RA. The following is a very brief general discussion, with discussions of specific disabilities and relevant case law.

1. In general

- Denial of adequate shower facility to an inmate with leg brace and crutches raised §1983 issue. *Frost v. Agnos,* 152 F.3d 1124 (9th Cir. 1998); disabled inmate's claim that prison didn't provide readily accessible bathroom and shower was an appropriate ADA claim. *Saunders v. Horn,* 959 F. Supp. 689 (E.D. Pa. 1996); shower must be accessible to inmate with artificial leg. *Outlaw v. City of Dothan, Ala.,* 1993 U.S. Dist. Lexis 21063 (M.D. Ala. 1993).

- Multiple sclerosis is a disability under the ADA. *Temples v. Crow,* 1999 WL 1053120 (M. D. Fla. 1999).

- Plaintiffs in a class action claimed mentally and physically disabled prisoners were denied, because of their disabilities, the opportunity to earn the maximum good time, and an appeals court approved a settlement on these grounds. *Raines v. State of Florida,* 987 F. Supp. 1416 (N.D. Fla. 1997).

- A prisoners' artificial leg was confiscated when he was arrested and not returned to him after his conviction on the theory that it might be evidence in an appeal. The result for the inmate was his confinement to his cell, and the court found both an 8th Amendment violation and a 14th Amendment violation of deprivation of property without due process. *Parkinson v. Columbia County District Attorney,* 178 Misc. 2d 52 (Sup. Ct. Columbia Cty. 1998).

2. Paraplegic and quadriplegic prisoners

- Deliberate indifference found where prison officials were aware that paraplegic prisoners in solitary confinement were denied medical care. *Simmons v. Cook,* 154 F.3d 805 (8th Cir. 1998).

- Deliberate indifference where officials failed to provide reasonable accommodation for partially paraplegic inmate and confiscated braces, crutches, and orthopedic shoes. *Evans v. Dugger,* 908 F.2d 801 (11th Cir. 1990); ADA violation where prison officials denied prisoner needed crutches. *Owens v. Chester County,* 2000 U.S. Dist. Lexis 710 (E.D. Pa. 2000).

- A prisoner with partial paraplegia could bring ADA claim against the county and private company operating the prison where they had limited his travel time to the dining room and medical dispensary, thus depriving him of food and medical treatment. The prisoner had his §1983 claim dismissed, though, since he didn't establish that the individual defendants personally deprived him of constitutional rights. *Rainey v. County of Delaware,* 2000 U.S. Dist. Lexis 10700 (E.D. Pa. 2000).

- Where facts could not support a §1983 claim, an ADA claim could be made in the case of a

semi-quadriplegic prisoner subject to unhygienic conditions and denied access to various programs. *Noland v. Wheatley*, 835 F. Supp. 476 (N.D. Ind. 1993); contrast *Little v. Lycoming County*, 912 F. supp. 809 (M.D. Pa. 1996), affirmed, *Little v. Smith*, 101 F.3d 691 (3rd Cir. 1996).

3. Deaf and hearing-impaired prisoners

- Prison authorities liable for failing to provide interpretive and assistive communication devices for deaf and hearing-impaired prisoners. *Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D. N.Y. 1995).

- Hearing impaired prisoner sued state department of corrections and prison officials, alleging violation of Title II of the ADA and the Rehabilitation Act. The prisoner had major hearing loss that left him unable to understand speech spoken at normal volume, and he had been denied a sign language interpreter at a disciplinary hearing. The court held that this denial constituted a violation of the ADA & RA. *Randolph v. Rogers*, 253 F.3d 342 (8th Cir. 2001).

- Deaf prisoner stated a claim under the ADA and RA when he alleged he was denied, due to his disability, the opportunity to post bond and to make phone calls when the sheriff's department failed to provide alternatives such as interpreters or a TDD. *Hanson v. Sangamon County Sheriff's Dep't*, 991 F. Supp. 1059 (C.D. Ill.1998).

4. Blind prisoners

Sight-impaired prisoners have brought successful claims regarding assistive technology and other forms of accommodation required under the ADA.

For example, An Illinois federal court held that a legally blind prisoner was entitled to summary judgment on his claim that the prison violated the Americans with Disabilities Act (ADA) Title II, 42 U.S.C. §§ 12131-12165, and the Rehabilitation Act § 504, 29 U.S.C. § 794, when it failed to provide him access to library and educational materials suited to his visual impairment and assistance in safely navigating through the facility. See *Williams v. Illinois Dep't of Corrections*, 1999 WL 1068669 (N.D. Ill. Nov. 17, 1999); as discussed in The ABA's "Prison/ Jail: Treatment/ Conditions," 24 Mental and Physical Disability Law Reporter 152, January/February, 2000.

In *Williams*, Milton Williams, who is legally blind, sued the state prison and the Illinois Department of Corrections (DOC), alleging he had been denied access to library and educational services on the basis of his disability. He claimed that the prison failed to provide any materials on tape, Braille, or in large print even though such materials were available at other DOC facilities. He also claimed that he was denied assistance in safely navigating around the facility.

A point of interest in this case for Rehabilitation Act § 504 claims: Williams established that DOC received federal funds, required for an action under § 504 (but the section does not require that he show DOC received funds for the particular programs and activities at issue).

Also note that for such claims (and all claims, really), allegations must be very specific. For example, a blind prisoner failed to state an ADA claim when he failed to allege that he was denied a service because he was blind, and his allegations were merely conclusory (non-specific and unsupported by evidence). *Devivo v.*

Butler, 13 Nat'l Disability Law Rep. P 290, 1998 U.S. Dist. Lexis 17719 (S.D. N.Y. 1998).

5. Diseases

Prisoners may also possess viable claims for lack of treatment of diseases, like Hepatitis C, AIDS/ HIV (see discussion above and cited resources), diabetes, etc. Here are a few case examples:

- No right to refuse TB screening for religious or other reason: state had compelling interest in containing infection. *Karolis v. New Jersey Dep't of Corrections*, 935 F. Supp. 523 (D. N.J. 1996).

- Diabetic prisoners, who alleged they were excluded from access to prison services when they were denied adequate treatment for their diabetes and complications, stated a cause of action under § 1983 and the ADA. *Rouse v. Plantier*, 997 F. Supp. 575 (D. N.J. 1998), vacated on other grounds, 182 F.3d 192 (3d Cir. 1999).

J. Medical Co-Pays

Systems under which prisoners are charged a fee for visits to medical providers have generally been upheld when charges are small, provision of medical care is not dependent upon ability to pay, and prisoners receive reasonable notice of the charges and have some mechanism to challenge erroneous charges. See *Reynolds v. Wagner*, 128 F.3d 166 (3d Cir. 1997). Conversely, such systems might be vulnerable if charges are large compared to prisoners' earnings, prisoners are not given adequate notice of the charges, or the system seriously impedes access to necessary health care.

VI. Conclusion

Though this bulletin contains a great deal of information, it is nonetheless a very broad and therefore incomplete discussion. There are much more detailed discussions on specific topics that were only touched on here; but it is our hope that this may give you a good place to start in crafting your claim. Good luck.