LEGAL BULLETIN 1.1
Federal Civil Actions

Disclaimer: While we have attempted to provide information that is current and useful, the law changes frequently. We cannot guarantee that all information is current. If you have access to a prison library, we suggest you confirm that the cases and statutes are still good law.

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I. INTRODUCTION

This legal bulletin provides information about how to litigate a civil case in federal court. The primary source of information about litigation procedures is the Federal Rules of Civil Procedure (sometimes abbreviated as "FRCP" or "Fed. R. Civ. P."). If you have questions about procedures or next steps in your lawsuit, these rules are the first place to look. They should be available for you to review in your institution's law library. The rules are updated from time to time, so be sure that you are looking at the most recent copy. In addition, each District Court has its own set of civil procedure rules – called the "Local Rules." You should familiarize yourself with the Local Rules, to make sure that you are following all of the rules that apply in your case. If your institution does not have a copy of the Local Rules, you can ask the Clerk of Court in the district court where you are filing your complaint to send you a copy of the rules that are relevant to your case.

II. PRIMARY SOURCES OF LAW

The legal basis for federal civil rights claims brought by prisoners usually comes from the following sources:

The United States Constitution – specifically, the First, Fifth, Eighth, and Fourteenth Amendments of the Constitution.

Common Law torts (e.g., negligence, battery) brought under the Federal Tort Claims Act[1]

Federal statutes that address the treatment of people with disabilities, both inside and outside prison. The two main statutes in this category are the Rehabilitation Act (RA) and the Americans With Disabilities Act (ADA).

Federal statutes that address religious rights of prisoners, such as the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the Religious Freedom Restoration Act (RFRA).

What types of claims can I assert?

The types of claims you can bring in federal court depends on a variety of factors, including the

[1] The Federal Tort Claims Act (FTCA) applies only to prisoners held in federal custody, not in state (or county) custody. If you are a federal prisoner, see Bulletin 1.5 for information about filing an FTCA lawsuit.

facts of what happened to you, your status as a prisoner, and the characteristics of the defendants. For example, if you are in state custody, you can bring claims arising from the United States Constitution under federal statute 42 U.S.C. § 1983. Some examples of federal constitutional claims include:

First Amendment: Unlawful restriction of speech, religion
Fifth Amendment: Due process violations
Eighth Amendment: Cruel and unusual punishment
Fourteenth Amendment: Due process and Equal Protection violations

Constitutional rights of pre-trial detainees vs. convicted prisoners

Courts have held that the Constitution affords slightly more protection for pretrial detainees than for people who have been convicted, because a pretrial detainee cannot be subjected to any "punishment" under the Constitution – even if the punishment is not "cruel and unusual." *Bell v. Wolfish*, 441 U.S. 520, 561 (1979). For some constitutional claims, your status as either a pretrial detainee or a convicted prisoner will determine which constitutional amendment is the source of law for your claim. For example, a pretrial detainee who was subjected to excessive force by prison staff would bring a claim under the Fourteenth Amendment. A convicted prisoner would bring an excessive force claim under the Eighth Amendment. For many types of claims it does not make much difference whether you are a pre-trial detainee or a convicted prisoner, because you have to prove essentially the same elements in order to prevail.

III. BASIC CONCEPTS

What is a "civil action"?

A "civil action" is a lawsuit brought by a Plaintiff (or Plaintiffs) against a Defendant (or multiple Defendants) in court. A Plaintiff is the person who is filing the lawsuit and who is asserting that one or more of their rights have been violated by a Defendant. A civil action is different from a criminal case in several key respects. In a criminal case, the entity that initiates the legal proceedings is a government (federal, state, or county/ municipal). The basis for the proceedings is a violation of a criminal law. By contrast, a civil action is initiated by a Plaintiff who asserts that a defendant's conduct has resulted in a civil wrong being done to the Plaintiff. The basis for a civil action can be a law passed by a government, the "common law" (consisting of court opinions), the federal Constitution, or a state Constitution. This bulletin is focused on federal constitutional claims brought by a state or county prisoner under 42 U.S.C. § 1983, which is a federal statute.[2]

What is a "claim"?

A "claim" is an assertion by a Plaintiff that their rights (based on one or more of the above-described sources of law) have been violated by one or more Defendants. One or more "claims" can be asserted in the same lawsuit, as long as the claims are somehow related to each other or to the same facts. A Plaintiff's claims are included in a "Complaint" which is the first formal document that is filed in Court.

What is a "Complaint"?

A "Complaint" identifies the law or laws that support the Plaintiff's claims, sets out the facts that support the claims and includes a request for relief from the Court. Your Complaint is very important, because it provides the Court (and the Defendants) with an overview of what your lawsuit is about and why you believe that you should get relief from the Court.

[2] Federal prisoners should review Bulletin 1.5 on the Federal Tort Claims Act (FTCA) actions for the nuts and bolts on how to file an FTCA case.

IV. WHAT IS "SECTION 1983" AND WHAT DO I HAVE TO PROVE FOR A "SECTION 1983" CLAIM?

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

Unlike the Constitution, Section 1983 does not provide any substantive rights – it is only an enforcement mechanism – a "vehicle" by which a plaintiff can bring constitutional claims. *See Gonzaga University v. Doe*, 536 U.S. 273, 285 (2002) ("Section 1983 by itself does not protect anyone against anything.") If you want to file a lawsuit asserting that your constitutional rights were violated by state (or county or municipal) actors[3], you need to use Section 1983 to do so.

In order to prove a Section 1983 claim, you must prove:

1. Illegal conduct – in violation of the Constitution.

2. Committed by a state (or county or municipal) prison official who is using or abusing his or her power, which he possesses "by virtue of state law and made possible only because the official is clothed with the authority of state law." *Monroe v. Pape*, 365 U.S. 167 (1961).

3. The prison official's conduct deprived the prisoner of rights, privileges or immunities guaranteed by the Constitution.

Generally, a Section 1983 complaint must state that the defendants are prison officials of state/ local/ county governments, that their authority is derived from state law, and that they were personally involved in causing the violation of constitutional rights. *Parratt v. Taylor*, 451 U.S. 527 (1981).

V. HOW DO I DRAFT A SECTION 1983 COMPLAINT?

The first thing you should do when preparing to file a lawsuit is to find out if the federal District Court Clerk's office has a form you can use to draft your complaint. Check at your institution's law library to see if there are form complaints for you to use. If not, you can write to the Clerk of Court's office and explain that you are representing yourself and ask them to send you any form complaints and other documents you need to start a lawsuit in the district court. If the district court does not have a form complaint, the following list gives the standard sections in a federal complaint:

Caption: The caption states the name of the court and the names of the Plaintiff(s) and Defendant(s). After a case number has been assigned to the case (after the Court receives the complaint), the case number is also included in the caption. Some courts require that the name of the judge presiding over the case be included in the caption. These parts of the caption are formatted in a set manner. A caption is the first thing you see on a complaint and on the first page of any document that is filed in the case.

[3] Again, Section 1983 cannot be used to assert claims based on the conduct of federal actors, such as Bureau of Prisons employees. It only applies to "state actors," which includes state, county and municipal actors.

Jury Demand/ No Jury Demand: If you want your case to be decided by a jury, you should include the phrase "Jury Trial Demanded" in the caption. If you want your case to be decided by a judge instead of a jury, you should state "No Jury Trial Demanded." Note that some cases are not entitled to be tried by a jury; for example, cases brought by federal prisoners under the Federal Tort Claims Act (FTCA) are only able to be decided by a judge.

Statement about jurisdiction: This is an assertion that the court you are filing the complaint in has the authority to decide the case. This assertion should also state the legal basis for the court's authority. Usually, the legal basis is a statute, the Constitution, or other written law.

Parties: a list of the Plaintiffs and Defendants in the lawsuit, including some basic identifying information, if you have it.

Facts: The facts section is the most important part of your complaint. The facts tell the story of what happened to you and why you are entitled to relief. These statements of fact are called "allegations" when they are in your Complaint because they are what you are saying happened but they have not yet been proven to be true. At this stage of a lawsuit, you do not have to prove the facts that you list in your complaint – that will come later. You simply need to state the facts in a logical, understandable way so that they tell the story of what happened. The facts should be listed in numbered paragraphs.

Injuries: How were you injured as a result of the Defendants' actions or inactions? Include physical injuries and mental and emotional injuries.[4]

Legal Claims (sometimes referred to as "Counts" or "Causes of Action"): As described above, a "claim" must be based on a law – either a law that has been passed by a governmental entity (such as a statute passed by Congress or by a state legislature), a law that has been well established by courts' opinions and has come to be known as "common law" (these types of claims are referred to as "torts"), or a provision in the United States Constitution or the constitution of a state. The "Legal Claims" section of your Complaint is where you include a description of the rights you believe were violated and the laws that those rights arise from. Because most federal lawsuits filed by prisoners are based either on the United States Constitution or on one or more federal statutes, the examples in this bulletin will be limited to these sources of law.

Relief: The last section of the Complaint is where you state what you want the Court to do for you. There are two main types of relief you can ask for: 1) monetary damages paid by the Defendants; or 2) injunctive relief, in the form of an order issued by the Court directing the Defendants to take a specific action or to refrain from taking a specific action. Depending on the type of claim and the type of Defendant, you can ask for one or both of these types of relief.

Your signature and the date

Verification: Although it is not required by the Federal Rules, you may also want to include a "verification" statement at the end of your complaint. This is a signed statement in which you swear or declare, under penalty of perjury, that all of the facts you allege in your complaint are true.

"I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on [date]."

[signature]

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[4] Under the Prison Litigation Reform Act (PLRA), which governs legal actions filed by prisoners, you cannot assert a claim for damages for mental and emotional injury unless you can also show a physical injury. See the PLRA Fact Sheet for more information about the "physical injury requirement."

Verifying your complaint is like testifying under oath in court – if you are found to have included any false statements in your verified complaint, you can be prosecuted for perjury. Including a verification can be useful to you later in the case, because a verified complaint can be used to respond to a motion for summary judgment filed by a defendant. *See Revock v. Cowpet Bay W. Condo. Ass'n*, 853 F.3d 96, 100 n. 1 (3d Cir. 2017) (a verified complaint may be treated as an affidavit with evidentiary value at the summary judgment stage).

What types of facts and how many facts should be included in my complaint?

You should include as many facts as you can that tell the story of what happened to you, who was responsible, and how you were injured. The rule that applies to drafting a complaint in federal court is Federal Rule of Civil Procedure 8(a), which provides:

> (a) Claim For Relief. A pleading[5] that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and,
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Rule 8(a) establishes a "notice pleading" standard for what a plaintiff must include in a complaint. "Notice pleading" means that a complaint must provide sufficient notice to a defendant about the legal claim being brought against them and the factual basis for the claim. In other words, you can't simply make a general and vague statement in your complaint that the defendant violated your rights and therefore the Court should rule in your favor – you have to be more specific so that the defendant (and the Court) know what you are basing your lawsuit and your claims on.

In *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), the Supreme Court held that a complaint cannot contain merely "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. a complaint must contain sufficient facts to "raise a right to relief above a speculative level." *Id.* In 2009, the Supreme Court refined this rule in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and held that in order to withstand a motion to dismiss, a complaint must contain factual allegations that are sufficient to show that the plaintiff has a "plausible claim for relief." *Iqbal* at 678-679. After *Twombly* and *Iqbal*, it is very important to include as many facts as you can in your complaint so that you can show your claim for relief is "plausible."

How do I show that I have a "plausible" claim for relief?

Different Circuits have developed slightly different methods of determining whether a claim is supported by enough facts to make it "plausible." But they all generally follow this procedure: identify the elements of the claims, then identify the facts in the complaint that support a finding that each element of each claim can be proven at trial. Courts also eliminate statements that are conclusory or that simply state the elements of the claim – a court will not consider such statements to be "facts" that support a claim. Therefore, if your complaint merely states that a defendant "violated my rights by using excessive force and denying me medical care," without providing any details about what happened, it is likely that your complaint will be dismissed by the court.

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[5] "Pleading" is an old English word for a document that contains the legal claims (or defenses) asserted by a party in a lawsuit. This word and its variations (such as "pleader") appear throughout the FRCP.

You need to determine what the elements of the claim are and then you need to include facts that show that it is plausible that each element of the claim will be proven at trial.

What is an "element" of a claim?

An element is a substantive component of a claim: it is what you have to prove in order to prevail on your claim. For example, the Eighth Amendment to the U.S. Constitution prohibits the infliction of cruel and unusual punishments on prisoners. The excessive force by a guard on a prisoner is one type of Eighth Amendment claim. In order to prevail on an excessive force claim, you have to prove the following elements:

1) a guard used physical force against you maliciously, for the purpose of causing harm;

2) the force used was "an unnecessary and wanton infliction of pain" and was not used in a good faith effort to maintain or restore discipline;

3) as a result of the use of force, you suffered physical injury

How do I find out what the "elements" of my claims are?

The United States Constitution, other federal statutes which confer substantive rights on prisoners (such as the ADA, RA, RLUIPA), and state tort law (for example, torts such as negligence and assault and battery) all set forth the basic elements of these claims. Case law from the Supreme Court and lower federal and state courts also set forth elements of claims. For example, the elements for an excessive force claim listed above come from the Supreme Court's opinions in *Whitley v. Albers,* 475 U.S. 312 (1986) and *Hudson v. McMillian*, 503 U.S. 1 (1992). To identify the elements of the claims you wish to bring, you should review the other bulletins published by LPP on specific topics such as medical rights, visitation rights, the right to be free from assault, etc. These bulletins describe the elements of these claims in general terms. Next, you should conduct legal research to locate the leading court opinions for the legal claims you are researching, both in the Supreme Court and in the federal courts in the Circuit in which you will bring your lawsuit.

After I find out what the elements of my claims are, how do I allege enough facts to support each element?

At the complaint stage you need to allege facts that show that it is plausible that you will be able to prove each element of your claim at trial. You need to include enough facts to answer the questions of "Who, What, Where, When, and How" of what happened to you.[6] As an example, here are the elements of a constitutional "failure to protect" claim based on a prison official failing to protect you from an assault by another prisoner.

1) Defendant prison official knew about the risk of harm that another prisoner posed to your safety.

2) Even though the defendant had this knowledge, he or she failed to take reasonable steps to protect you from assault by that prisoner.

3) As a result of the defendant's failure to take reasonable steps to protect you, you were assaulted by the prisoner.

[6] If you can also allege facts that answer the question "why?" then do that as well. But keep in mind that it may be very difficult to prove "why" another person, such as a corrections officer, took the actions they did.

4) As a result of the assault by the other prisoner, you were injured.

At first glance, it might seem that the above statements would be sufficient allegations for your complaint. But look closer! Are there any details about what specifically happened ***to you*** in the list of elements? Does the list of elements tell the story of what happened ***to you*** so that the Defendant knows what your claim is and the facts it is based on? If you look closely, you'll see that there are no **facts** about the specific incident you are suing over. The names of the staff members who were involved are not included. There are no details stating what the Defendant did or did not do which caused you harm. If this list of elements was all that you included as allegations in your complaint, your complaint would be dismissed by the Court for "failure to state a claim" because this is merely a "formulaic recitation of the elements of a claim." *Twombly*, at 555. You need to "fill in the blanks" with specific facts that show that each element is true.

VI. IDENTIFYING THE DEFENDANTS TO LIST IN A COMPLAINT

Personal Involvement

A defendant in a Section 1983 case must be personally involved in the violation of constitutional rights. This personal involvement can stem from direct participation in the violation or, in some circumstances, knowledge of a violation committed by a subordinate combined with a failure to take action to prevent the violation from happening. If you fail to prove that a defendant was "personally involved," your claims against that defendant will not be successful. Even if you were badly hurt or suffered a real violation of your rights your claim will not lead to a court-ordered remedy unless you can identify one or more defendants by name and prove that they committed the violation or allowed the violation to happen.

In your lawsuit, the named defendants might include the officer(s) directly involved, their supervisor(s), the warden, and even the Commissioner of Corrections. Your best strategy will be to sue every official who was involved, their superiors and their superior's superiors, as long as you can do so with some basis in the law and facts. It is easier to include someone in your original complaint than to have to go back later and add him or her to the lawsuit.[7]

Generally, it is easiest to prove personal involvement of correctional officers where the injury can be seen and felt (i.e., a beating, inflicted by an officer present at the scene of the violation, that leaves visible scars, bruises, or cuts). Another example of direct involvement is the refusal to provide medical treatment which results in harm that is verifiable by medical examination.

When you prepare your complaint, you must name each and every defendant in the heading (caption). In the "Statement of Claim" you must state in separate numbered paragraphs what each of those named defendants did (or failed to do) and how and why each one was directly involved in violating your rights. The personal involvement in the example of a beating by staff might include the name of the guard

[7] If you do not know a defendant's name but you have other identifying information about them, you should identify the defendant in your complaint as "John Doe" or "Jane Doe" and include the identifying information. For example, if one of the defendants was working on A-unit during the 12 a.m. to 8 a.m. shift on Tuesday, March 11th, you should include that information in your complaint. You should state in your complaint that you will be serving discovery requests in order to learn the identities of the "Doe" defendants and will then be filing an amended complaint with the real names of the defendants. After you file the complaint, you should serve discovery requests on the Defendants whose names you do know, asking for the names of the defendants you identified as "Doe" defendants. Once you have the defendants' names, you should file an Amended Complaint which replaces the "Doe" placeholders with their real names. Keep in mind that if the statute of limitations has expired by the time you file your amended complaint, your amendments might not be permitted by the court. For this reason, if you have a situation where you know that you will have to serve discovery in order to get the defendants' names, be sure to file your original complaint *as early as possible*, so that you have time to serve discovery requests and obtain responses before the statute of limitations expires. Do not wait until the last minute. See the Discovery Fact Sheet for information on how to formulate and serve discovery requests.

who struck you as well as the name of any correctional officer (including any supervisors) who stood by and let the abuse happen.

"Individual Capacity" vs. "Official Capacity" claims against government officials

You should state in your complaint whether you are suing a defendant in their individual capacity or official capacity, or both. Individual capacity claims (sometimes called "personal capacity") are brought against a specific person for monetary damages (incluing compensatory and punitive damages). You cannot ask for injunctive relief in an individual capacity claim. By contrast, you can seek injunctive relief against a government official sued in his or her official capacity, which is the same thing as suing the governmental entity itself. In addition to impacting the type of relief you can seek, whether a defendant is sued in their individual or official capacity can determine which immunities, if any, the defendant can assert.

Establishing Personal Involvement of Supervisory Staff

In *Ashcroft v. Iqbal*, the Supreme Court reaffirmed the well settled principle that supervisors in Section 1983 cases "may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Iqbal*, 556 U.S. at 676. In other words, you cannot sue a supervisor merely because he or she held a supervisory position over a lower level defendant who violated your rights. If you intend to assert a constitutional claim against a supervisor, you need to allege sufficient facts to show precisely how the supervisor's conduct caused the constitutional violation – either directly or indirectly. There must be an affirmative link between the supervisor's conduct and the constitutional violation. Different Circuits have articulated this standard differently. For example, the Third Circuit has explained that "personal involvement" of a supervisor in a constitutional violation can be shown by "direct participation, directing others to violate rights, or knowledge and acquiescence in the violation." *See, e.g.*, *Williams v. Papi*, 714 F. App'x 128, 133-34 (3d Cir. 2017). The First Circuit has held that "facts showing no more than a supervisor's mere negligence vis-á-vis his subordinate's misconduct are not enough to make out a claim of supervisory liability. . . At a minimum, the plaintiff must allege facts showing that the supervisor's conduct sank to the level of deliberate indifference." *See Parker v. Landry*, 935 F.3d 9, 14-17, 19 (1st Cir. 2019).

When you describe the specific actions (or inactions) of a supervisory defendant, do not merely state that he or she "failed to supervise" the subordinates or that he or she had "knowledge and acquiescence" in the unconstitutional conduct – such allegations do not contain any facts and would violate *Iqbal*'s rule prohibiting "mere formulaic recitals." Instead, you should include facts that demonstrate that the supervisor had this knowledge. For example, was the supervisor present during the misconduct? Did the supervisor learn about the incident through a conversation with another correctional officer while it was happening? You need to include all of the facts that show that the supervisor knew about her subordinates' misconduct. Similarly, instead of simply stating "the supervisor approved of the misconduct" you need to include facts that show this to be true.

For example, in *McNeeley v. Wilson*, 649 Fed. Appx. 717, No. 15-14023 (11th Cir. May 2, 2016) (not published), the court denied summary judgment for the supervisory defendants (a Lieutenant and Corporal) in an Eighth Amendment claim because the plaintiff presented evidence to demonstrate that they had direct knowledge of their subordinates' constitutional violations. The supervisory defendants were present immediately after the guards pepper sprayed the plaintiff, put him into a four-point restraint chair and kept him there for several hours without being decontaminated. In addition, the supervisory defendants were present when the plaintiff complained repeatedly about the pain he was experiencing from the tight restraints and the effects of the pepper spray, but they did not do anything to provide him with proper decontamination.

Even if a supervisor was not physically present to witness the unconstitutional conduct, his or her knowledge and acquiescence can be shown in other ways. In *Ziglar v. Abbasi*, 582 U.S. 120 (2017), the Supreme Court reviewed the complaint's allegations that "guards routinely abused respondents; that the warden encouraged the abuse by referring to respondents as 'terrorists'; that he prevented respondents from using normal grievance procedures; that he stayed away from the Unit to avoid seeing the abuse; that he was made aware of the abuse via 'inmate complaints, staff complaints, hunger strikes, and suicide attempts'; that he ignored other 'direct evidence of [the] abuse, including logs and other official [records]'; that he took no action 'to rectify or address the situation'; and that the abuse resulted in the injuries described above[.]. ." The Supreme Court noted that these allegations "plausibly show[ed] the warden's deliberate indifference[8] to the abuse." *Abbasi*, 582 U.S. at 146-147.

Failure to Train or Supervise Subordinates

Failure to train or supervise subordinates can be the basis for supervisory liability, if that failure can be shown to have caused the constitutional injury. To state a failure to train claim against a supervisory defendant, "a plaintiff must identify a deficiency in a training program closely related to the injury complained of and must further show that the injury would have been avoided "under a program that was not deficient in the identified respect." *City of Canton v. Harris*, 489 U.S. 378, 391 (1989). In other words, what type of training or supervision would have prevented the constitutional violation from happening?

In *O'Connor v. Keller*, *et al.*, 510 F Supp. 1359, 1374 (D. Md. 1981), a cell search confrontation between inmate O'Connor and a guard led to O'Connor being beaten and then held in an isolation cell for forty-eight hours. The court found that O'Connor's detention in the isolation cell where he had no bed, mattress, or blanket and without a working sink or toilet to be a violation of the Eighth Amendment. The court went on to state that Superintendent Keller could not be held liable under a theory of *respondeat superior*, but he could be held accountable for failing to train and supervise officers in the proper use of isolation cells.

A failure to train claim often requires that a plaintiff show that there was a history of similar constitutional violations that put the supervisory defendants on notice that their failure to train subordinates would result in a constitutional violation of the type asserted by the plaintiff. *See Connick v. Thompson*, 563 U.S. 51, 62 (2011) (internal citation omitted) ("A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for the purposes of failure to train.") In *Hernandez v. City of Philadelphia*, 2022 WL 4359992, Civ. No. 22-0027 (E.D. Pa. Sept. 19, 2022), the court denied the supervisory defendants' motions to dismiss in an excessive force case because the complaint alleged detailed facts regarding twelve prior incidents of excessive force which plausibly showed that supervisory defendants knew of a history of past excessive force by CO's yet failed to take any steps to train or supervise them in order to prevent further assaults. Similarly, in G*reer v. County of San Diego*, 2023 WL 2316203, No. 19-cv-378-JO-DEB (S.D. Cal. Mar. 1, 2023), the plaintiff, who told medical staff during intake that he had epilepsy and needed to take anti-seizure medication, was nevertheless denied his anti-seizure medication and then assigned to a top bunk. After the plaintiff fell from the top bunk and sustained serious injuries, he filed suit asserting claims against the supervisors at the county jail for failing to supervise and train jail staff to communicate and follow up with each other about inmates' medical treatment needs. The court denied the supervisors' motion for summary judgment based on evidence of numerous past incidents where jail staff had failed to communicate with each other, resulting in serious injuries and deaths of inmates. The court held that this evidence created a fact question regarding whether the supervisory defendants were deliberately indifferent to the risk caused to the plaintiff by their

[8] "Deliberate indifference" describes a defendant's state of mind and is an element in several types of constitutional claims brought under Section 1983. In the context of an Eighth Amendment claim under the "Cruel and Unusual Punishments" Clause, a prison official is deliberately indifferent if "he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *See Farmer v. Brennan*, 511 U.S. 825, 848 (1994).

failure to train and supervise their subordinates. *Greer*, 2023 WL 2316203, at *12.

Official Policy or Practice (or the absence of a policy) as a basis for supervisory liability

Supervisory officials often establish policies and write regulations. A supervisor's "personal involvement" in bringing about the constitutional violation can sometimes be found by examining their policies. Thus, a supervisor may be liable even if they are not directly involved in enforcing those policies. For example, in *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010), the plaintiff was an arrestee detained in a county jail. Although bail had been set in his warrant, the plaintiff was denied the ability to post bail due to longstanding policies in the jail and the county court clerk's office that bail cannot be posted on weekends and that a detainee charged with a felony cannot be permitted to post bail until they are seen by a judge. *Dodds*, 614 F.3d at 1189-1190. On appeal, the Tenth Circuit held that the supervisory defendant – the county Sheriff – could be found liable under Section 1983 even though he was not the individual who created or enforced this policy, because he was responsible for the treatment of the prisoners in the jail and permitted this policy to continue to operate despite the fact that it violated detainees' due process rights. *Id.* at 1193. In *Hearn v. Morris*, 526 F. Supp. 267 (E.D. Cal. 1981), an official who wrote a rule resulting in improper interference with an inmate's mail was found liable. The rule was unconstitutional because it was unnecessarily broad under a fundamental rights analysis. *Hearn*, 526 F. Supp. at 271-272. Keep in mind that policies can sometimes shield a supervisor from liability – if the supervisor has written a policy to protect a right, but a line-officer violated that policy.

The absence of a policy may be the basis for supervisory liability. If supervisory officials have failed to establish ways to deal with problems they knew about or should have known about, they may be held liable for the consequences. In this type of situation "personal involvement" is shown by (1) the official's knowledge of the problem or evidece that proves they should have known about the problem and (2) their failure to implement and carry out a definitive policy directing subordinates as to how they should address the problem. In *Williams v. Heard*, 533 F. Supp. 1153 (S.D. Texas 1982) , the sheriff failed to release a prisoner after a grand jury decided not to return an indictment. The evidence in the case showed that there was no procedure for making sure that orders for a prisoner's release were entered on the prisoner's "jail card." Therefore, the sheriff was held liable based upon his failure to adopt reasonable internal procedures to address this problem, which he either knew about or should have known about.

Failure to carry out a statutory duty as basis for supervisory liability

In some situations, there are regulations or statutes that impose an affirmative duty on an official. When an official fails to perform according to the requirements of the regulations or statutes, it may be possible to establish liability on the part of the official for any harm directly related to this failure. *See Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978) (Sheriff's failure to properly carry out a prisoner transfer caused forfeiture of plaintiff's earnings from his job at an honor camp). Liability can sometimes be found even if the official claims he was unaware of the the constitutional violation that resulted from his failure. *See Brooks v. George County Miss.*, 84 F.3d 157, 164 (5th Cir. 1996) (duty to keep records of work performed by pretrial detainees for payment purposes). On the other hand, statutes may excuse some categories of individuals from legal responsibility. *See Polk v. Montgomery Co., Md.*, 548 F. Supp. 613 (D. Md. 1982) (Maryland statutes relieved county sheriffs of their duties with regard to the safekeeping of prisoners when a jailor or warden has been appointed to carry out such duties).

***Governmental entities as Defendants in a Section 1983 suit - Monell* claims**

In *Monell v. Dep't of Social Services of City of New York*, the Supreme Court held that Section 1983 claims can be brought against municipalities (cities and counties) for unconstitutional policies or customs which violate the plaintiff's rights. *See Monell*, 436 U.S. 658, 692 (1978). If you sue a city or county government under *Monell*, you must be able to establish three elements: 1) the existence of a policy maker;

2) the promulgation of a policy or custom by the policy maker; and 3) the policy or custom was the "moving force" behind the violation of your constitutional rights. *See Monell*, 436 U.S. at 694.

A "policy" can be written or unwritten and can include "the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Monell*, 436 U.S. at 691. A municipal policy can also consist of a custom or practice, such as failing to train or supervise municipal employees on avoiding constitutional violations. *City of Canton v. Harris*, 489 U.S. 378, 387 (1989).

A plaintiff bringing a *Monell* claim must demonstrate a direct "causal link" between the policy and the constitutional violation. *See City of Canton v. Harris*, 489 U.S. at 385. This involves showing that the injury would have been avoided if proper policies had been implemented. *Monell* liability can also be imposed when a municipality fails to adopt a policy and that failure is done with deliberate indifference to the risk of harm posed to those impacted by the absence of a policy. *See, e.g., Natale v. Camden County Corr. Facility*, 318 F.3d 575 (3d Cir. 2003) (private health care company's lack of policies to address the immediate medication needs of incoming inmates stated *Monell* claim); *Glisson v. Indiana Dept. of Corr.*, 849 F.3d 372, 379-80 (7th Cir. 2017) (private medical contractor's failure to establish protocols for coordinated care for inmates with chronic illness stated a deliberate indifference *Monell* claim).

As with supervisory liability claims, plaintiffs asserting *Monell* claims are often required to show a pattern of past similar incidents that put the municipality on notice that its policies or customs caused the violation of constitutional rights. Plaintiffs then must show that the policy maker(s) were deliberately indifferent to the risk of harm posed by their policies and customs – in that they failed to implement corrective policies to prevent the constitutional violations.

Private individuals, private prison corporations and their employees as Defendants in Section 1983 suits

The Supreme Court has held that private individuals can be sued under Section 1983 if they engage in constitutionally prohibited action in concert with a state actor. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Even if the unconstitutional conduct was not done "in concert with" a state actor, a private individual can be held liable under Section 1983 if they perform services and carry out the duties of a governmental entity. In *West v. Atkins*, 487 U.S. 42, 56 (1988) the Supreme Court held that a private doctor who contracted with the state to provide medical services to inmates was "acting under color of state law" and could be sued in a Section 1983 action, because the state had delegated to him its constitutional duty to provide medical care to inmates. Since *West* was decided, courts of appeal have held that private companies providing prison management or health care services to inmates can, similarly, be subject to Section 1983 liability. *See Natale*, 318 F.3d at 583-84 (private health care company contracting with the county to provide medical services to inmates in county jail was a "state actor" for purposes of Section 1983); *Rosborough v. Management & Training Corp.*, 350 F.3d 459 (5th Cir. 2003) (private prison management companies can be held liable under Section 1983 for violations of prisoners' constitutional rights); *Nugent v. Spectrum Juvenile Justice Services*, 72 F.4th 135, 143 (6th Cir. 2023) (private youth detention facility was a "state actor" subject to suit under Section 1983 because it performed the "public function" of incarcerating youth).

VII. TYPES OF RELIEF

The relief you can seek from the Court varies depending on the type of claim and the type of defendant. A general description of the three types of relief commonly sought in Section 1983 cases follows.

A. **Injunctive Relief** – the Court issues an order directing the defendant to carry out some

action or to refrain from carrying out an action. To obtain an injunction, a plaintiff must show that there is no "adequate remedy at law" - meaning that an award of monetary damages will not be sufficient relief. A plaintiff must also show that he or she faces a risk of future harm in order to get an injunction. There are three types of injunctive relief you can ask for: a temporary restraining order (TRO), a preliminary injunction, and a permanent injunction.

A jury cannot grant injunctive relief – only a judge can do this.

Can be sought against a municipality or county in a *Monell* claim.

Can be sought against a state government or entity.

Can be sought against an individual government official being sued in his or her "official capacity" (which is the same thing as suing the governmental entity).

Cannot be sought against a defendant being sued in his or her individual capacity.

In cases brought by plaintiffs who are incarcerated at the time they file their complaint, the Prison Litigation Reform Act (PLRA) imposes a number of restrictions on the availability and duration of injunctions. For more information, see the PLRA Fact Sheet.

B. **Monetary Damages** – the Court orders a defendant to pay you money.

There are three common types of monetary damages in Section 1983 cases.

Compensatory Damages – monetary damages that are designed to fairly "compensate" the plaintiff for harm (physical, mental, or emotional[9]) he or she sustained as a result of the defendant's conduct.

Can be sought against an individual defendant being sued in his or her individual capacity.

Can be sought against a municipality or county being sued for harm caused by its unconstitutional policies, customs, and practices, under *Monell*.

Can be sought against a private corporation that performs government functions (including health care services) in a jail or prison, under *Monell*.

Cannot be sought against a state government due to Eleventh Amendment and Sovereign Immunity.

Cannot be sought against a government official being sued in his or her official capacity.

[9] In cases brought by prisoners, the PLRA prohibits compensatory damages from being awarded for a mental or emotional injury unless the plaintiff has also proven a physical injury. *See* 42 U.S.C. § 1997e(e) ("[n]o 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 or the commission of a sexual act (as defined in section 2246 of title 18)."). However, courts have held that this provision does not preclude an award of nominal and punitive damages. *See, e.g.*, *Allah v. Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000) (holding that "[n]either claims seeking nominal damages to vindicate constitutional rights nor claims seeking punitive damages to deter or punish egregious violations of constitutional rights are claims 'for mental or emotional injury'" within the meaning of Section 1997e(e)). Be sure to review the PLRA Fact Sheet for more information on the physical injury requirement.

Punitive Damages – monetary damages awarded by a jury or judge to "punish" the defendant for wrongful conduct or to deter the defendant (or others similarly situated) from committing the conduct in the future. *See Smith v. Wade*, 461 U.S. 30, 51 (1983) (a jury may award punitive damages if the defendant's conduct was "motivated by evil intent" or if the conduct demonstrated "reckless or callous indifference" to the plaintiff's constitutional rights).

Can be sought against an individual defendant (either a government employee or an employee of a private company performing a government function) being sued in his or her individual capacity.

Cannot be sought against a state government or a state government official being sued in his or her official capacity, due to 11th Amendment/ sovereign immunity.

Cannot be sought against a municipality or county. *City of Newport v. Fact Concerts*, 453 U.S. 247, 271 (1981).

Some courts have held that punitive damages are available against private corporations in Section 1983 cases. *See, e.g.*, *Moore v. LaSalle Mgmt. Co.*, 41 F.4th 493, 512-514 (5th Cir. 2022) (private prison management companies do not have immunity from punitive damages in Section 1983 cases); *Beard v. Wexford Health Sources, Inc.*, 900 F.3d 951 (7th Cir. 2018) (permitting punitive damages claim against private company providing medical care in prison); *Gazzola v. County of Nassau*, 2022 WL 2274710, *13-14, No. 16-cv-0909 (JS)(AYS) (E.D.N.Y. Jun. 23, 2022) (same); *Sanders v. Glanz*, 138 F. Supp. 3d 1248 (N.D. Okla. 2015); *Lawes v. Las Vegas Metro Police Dept.*, 2013 WL 3433150 (D. Nev. 2013). *See also Campbell v. Pa. Sch. Boards Ass'n*, 2018 WL 3092292 (E.D. Pa. 2018) (holding that if private voluntary association of school boards were considered to be a corporation it would not be immune from punitive damages in Section 1983 case).

Nominal Damages – monetary damages of a small amount ($1.00) awarded by a jury or judge to acknowledge that the plaintiff's constitutional rights were violated by the defendant's conduct but the plaintiff did not suffer an actual injury.

C. **Declaratory Relief** – In addition to other requests for relief, a plaintiff can ask the court to issue a declaratory judgment that explains the plaintiff's legal rights and the defendants' legal duties. If the defendants later violate the declaratory judgment, you can then ask the court to issue an injunction. Declaratory judgments are authorized by the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

VIII. IMMUNITIES THAT GOVERNMENT DEFENDANTS CAN ASSERT

After you file your Complaint, the Defendants will respond to it – either with a motion to dismiss or an "Answer." Both individual government officials and governmental entities may assert that they have "immunity" from some or all of the claims you asserted – meaning that they cannot be sued. Three types of governmental immunity frequently asserted in Section 1983 cases are sovereign immunity, absolute immunity, and qualified immunity.

Sovereign Immunity/ 11th Amendment Immunity of States in Section 1983 cases

"Sovereign Immunity" is a legal doctrine originating in England that basically means "you cannot

sue the sovereign (the King)." Even though our form of government does not include a "sovereign," this doctrine has been carried over into our system of federal (and state) laws, including the Constitution. The Eleventh Amendment of the Constitution permits a state to assert sovereign immunity from a suit for monetary damages. Therefore, in general, unless a state consents to suit or waives its sovereign immunity, it is absolutely immune from a damages suit in federal court.[10] This immunity from damages suits also covers state agencies (including the Department of Corrections) and state employees sued in their official capacities. In addition, for purposes of a Section 1983 lawsuit, a state is not a "person" under 42 U.S.C. § 1983. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Even though you cannot sue a state for monetary damages, you can sue a state official in his or her official capacity – but not the state itself - for injunctive or declaratory relief under Section 1983. *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14 (1985); *Ex parte Young*, 209 U.S. 123 (1908) (a state official acting in his or her official capacity in violation of the United States Constitution can be sued for prospective equitable relief).

Unlike states, municipalities (including cities and counties) do not enjoy Eleventh Amendment immunity or sovereign immunity and can be sued under Section 1983. *See Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973) (counties are political subdivisions of the state, not "arms of the state," and have no Eleventh Amendment protection from suit in federal court.); *Graham*, 473 U.S. at 167, n.14 ("[L]ocal government units can be sued directly for damages and injunctive or declaratory relief.")

Absolute Immunity

Certain government officials are entitled to absolute immunity from Section 1983 damages claims (and also, in most cases, from claims seeking injunctive and declaratory relief) for conduct they engaged in as part of their official duties. In determining whether absolute immunity should be granted in a particular case, a court will generally look at the nature of the conduct at issue and the scope of the official's authority – not the title or status of the individual. *See Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (a functional approach is taken when resolving questions of absolute immunity). For example, judges, legislators, prosecutors, and witnesses enjoy absolute immunity from suit if they can show that their actions were historically considered to be functions that were entitled to immunity from suit and that granting them immunity is consistent with public policy.

Qualified Immunity

Qualified Immunity is an affirmative defense that can be invoked by a defendant who is sued for damages in his or her individual capacity.[11] If a defendant is granted qualified immunity by a court, they are shielded from liability for civil damages even if they participated in unconstitutional conduct. *See Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982).

To overcome an individual defendant's assertion of qualified immunity, a plaintiff must demonstrate that 1) a constitutional right has been violated, and 2) the right at issue was clearly established at the time of the violation. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). A court can address these two prongs of the qualified immunity test in any order it chooses. *Id.* A right is "clearly established" if "the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If "it would have been clear to a reasonable officer that the alleged conduct 'was unlawful in the situation he confronted,'" then the officer is "not

[10] Congress has abrogated (overridden) the sovereign immunity of states for certain types of claims. For example, Title II of the Americans with Disabilities Act (ADA) abrogated state sovereign immunity for some types of monetary damages claims based on disability discrimination. *See United States v. Georgia,* 546 U.S. 151, 159 (2006).

[11] Qualified immunity cannot be asserted by a governmental entity (such as a municipality) or by a government official who is sued in his or her official capacity. *See Owen v. City of Independence*, 445 U.S. 622, 657 (1980); *Graham*, 473 U.S. At 165-66 (an individual being sued in his or her official capacity is the same thing as suing the governmental entity).

entitled to qualified immunity." *Abbasi*, 582 U.S. at 152 (quoting *Saucier v. Katz*, 533 US. 194, 202 (2001)).

The Circuits are split as to which party (the plaintiff or the defendant) bears the burden of proving (or disproving) the applicability of qualified immunity. Case law also varies among the Circuit courts on the question of how specific and particularized the "clearly established" analysis must be. And, finally, there is no clear standard governing which court's precedent should be looked at in order to resolve the "clearly established" question of the qualified immunity test. For example, should a court only look at Supreme Court cases as precedent? Can a court look at Circuit level cases (from the courts of appeal) as controlling authority? Is a court limited to the cases decided in its own Circuit? The Supreme Court has not yet resolved these questions. *See District of Columbia v. Wesby*, 583 U.S. 48, 66 n.8 (2018) ("We have not yet decided what precedents – other than our own – qualify as controlling authority for purposes of qualified immunity . . . We express no view on that question here.") (internal citation omitted). Regardless of how your particular Circuit handles qualified immunity analysis, you will need to argue in your brief, with citation to supporting case law, that the facts you alleged in your complaint establish the violation of a constitutional right and that the constitutional right was clearly established at the time of the incident.

IX. PROCEDURE FOR FILING A LAWSUIT

A. Statute of Limitations

If you are involved in an incident that causes you harm and you think you may want to file a lawsuit about it, **as soon as possible** you should determine the date that your complaint needs to be filed in federal court to initiate your lawsuit. If you miss this filing date, your complaint will most likely be dismissed, and you will lose your chance to file a lawsuit about the incident. The complaint filing date is determined by the "statute of limitations" governing the specific type of claims you are asserting.

For Section 1983 constitutional claims, the statute of limitations is "determined by looking to the forum state's statute of limitations for personal injury claims."[12] *See Wilson v. Garcia*, 471 U.S. 261, 279 (1985). The "forum state" is usually the state in which the incident that you are suing about occurred. The statute of limitations for personal injury claims varies by state – some states have a short personal injury statute of limitations (e.g., one year from the date of the incident) and some have longer time periods for filing the complaint such as three years. To find out what the statute of limitations is in the state in which you are filing the complaint, check the state's "civil code" - which is the set of laws governing how lawsuits proceed in that state.

The statute of limitations for filing claims *other than* Section 1983 claims may be different. If you decide to bring claims in addition to or instead of Section 1983 claims in your lawsuit (such as claims for violations of religious rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA)), be sure to research the statute of limitations for each of those claims. Then, be sure to file your complaint before the earliest deadline expires.

Under the "prison mailbox rule," a prisoner's legal mail is considered "filed" when he or she deposits the mail in the prison mail system to be forwarded to the Clerk of Court. *Houston v. Lack*, 487 U.S. 266, 270 (1988). Be sure to keep track of when you mailed your complaint to the Court Clerk and keep any documents that show the date of this mailing – you may need this information in order to show that you filed your complaint on time.

B. Exhaustion of Administrative Remedies under the PLRA

[12] The statute of limitations for a federal prisoner filing an FTCA lawsuit containing tort claims is different. For more information, see Bulletin 1.5 - FTCA.

As soon after the incident as possible, you need to begin the grievance process at your institution. This is because the PLRA requires all plaintiffs who file their complaints in federal court while they are incarcerated to fully "exhaust" the available administrative remedies available to them *before* filing a lawsuit in court. *See* 42 U.S.C. § 1997e(a). In *Jones v. Bock*, 549 U.S. 199 (2007), the Supreme Court held that proper "exhaustion" of administrative remedies under the PLRA means that a prisoner has followed all of the rules, including deadlines, of the institution's grievance system and completed all levels of that system before filing the complaint in court. *Jones*, 549 U.S. at 218. If you do not fully "exhaust" your administrative remedies for each claim asserted in your complaint, that claim is subject to dismissal. The PLRA's provisions apply to all civil lawsuits filed by incarcerated people about issues or conditions related to their incarceration. Additional information about the PLRA's requirements can be found in the PLRA Fact Sheet.

C. Complaint Filing Logistics

Once a complaint has been prepared, it must be filed with the court. The District Court's Clerk's Office may provide forms and instruction sheets for filing your lawsuit. Check to see if your institution's law library has current versions of your District Court's forms and instructions. If not, obtain the Clerk of Court's address from your institution's law library and write to the Clerk of Court to request the forms and instructions for filing a civil action. It is not necessary or advisable to go into detail about the facts of your case when you write to the Clerk – just ask for the forms and instructions.

Filing fee and *in forma pauperis* status.

Filings with the courts require filing fees. The current filing fee for a civil complaint filed in federal court is $405.00 (composed of a $350 filing fee and a $55 administrative fee). If you do not have enough money to pay this fee all at once, you can file an application asking the Court to permit you proceed *in forma pauperis* (IFP). You will need to verify that you do not have sufficient fund in your prison account to pay the filing fee, and in most cases you will have to submit documents to support your declaration. Check in your institution's law library for a form application you can use to apply for IFP status. If your law library does not have such a form, write to the Clerk of Court to ask for one to be sent to you.

If you are granted permission to proceed IFP, you will not be required to pay the full filing fee at the time you file your lawsuit. Instead, the full filing fee will be deducted from your prison account in installments.[13] ***It is important to understand that the PLRA provides that if your complaint was filed while you were incarcerated and is dismissed at an early stage, you will still have to pay the full filing fee to the Court – the installment payments will continue to be made from your prison account***.

D. Screening of the complaint by the Court.

After you file your complaint, the Court will screen it to determine whether it should be dismissed as frivolous or malicious, or because it fails to state a claim, or because it seeks monetary damages from an immune defendant. *See* 28 U.S.C. § 1915(e) (2)(B)(i)-(iii). Again, even if your complaint is dismissed by the Court at this early screening stage, you will still be required to pay the full filing fee in installments.

E. Service of the summons and complaint on each Defendant.

If your complaint survives the Court's initial screening process, a copy of the complaint must be provided to each Defendant along with a summons. (A summons is a notice requiring the defendant to

[13]If you are *not* incarcerated at the time you file your complaint and you are granted IFP status, you will not be required to pay the filing fee at all. So, if you anticipate being released from custody in the near future and you have sufficient time left in your limitations period to file your complaint after you are released, it may make sense for you to wait to file your complaint until after you have been released from custody.

appear in court and answer the complaint.) This procedure is called "service of process," and it is governed by Federal Rule of Civil Procedure 4. If you have been granted "IFP" status, the Court will direct the U.S. Marshal to serve your complaint on the Defendants. *See* 28 U.S.C. § 1915(d) (court officers required to issue and serve all process in pauper proceedings); Fed. R. Civ. P. 4(c)(3) (court must order U.S. Marshal, deputy marshal, or other person to serve summons for plaintiff proceeding *in forma pauperis*). If you have not been granted "IFP" status, then you are responsible for fulfilling the service of process requirements set forth in Rule 4, within the time periods given by that Rule. Currently, the time limit for making service of the complaint on the Defendants is 90 days after the complaint has been filed. *See* Fed. R. Civ. P. 4(m).

X. WHAT HAPPENS AFTER I FILE MY COMPLAINT?

You should follow the instructions given to you by the Clerk of Court. If you have not been given any instructions you should write to the Clerk of Court and ask for instructions (and any relevant rules of procedure and *pro se* guides).

The Defendants are required to respond to the complaint. They can either file an answer to the allegations of the complaint or a motion to dismiss the complaint. The Court could grant judgment in your favor if the Defendants default by failing to respond to the complaint.

The deadline for a defendant to respond to the complaint – either by filing an answer or a motion to dismiss – depends on whether the defendant waives service of the complaint. If the defendant waives service, then he or she has sixty (60) days (or 90 days if the waiver form was sent to a defendant outside the district) to file an answer or other response to the complaint – starting on the date on which the waiver of service form was sent to the defendant.[14] *See* Fed. R. Civ. P. 12(a)(1)(A)(ii). If a defendant did not waive service then he or she must file an answer or a motion to dismiss the complaint within 21 days of the date of service.[15] *See* Fed. R. Civ. P. 12(a)(1)(A)(i).

Answer

If the defendant's response is in the form of an Answer, each numbered paragraph in the Answer corresponds with each numbered paragraph in the Complaint. For each of the allegations in your complaint, the defendant will either admit or deny the facts alleged. The Answer will usually go beyond mere denial of the facts and will often assert defensive claims or the defendant's version of the facts about the incidents and issues. These additional responses often take the form of what are known as "affirmative defenses." In the same way that the plaintiff is required to give notice of the allegations against the defendants in the complaint, the defendant must raise his or her affirmative defenses or risk a court ruling that will not permit them to raise the affirmative defenses later. Notice works both ways.

Another common form of response to an allegation is one that states: "Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation." The court will treat this response as a denial of the allegation in the complaint.

Frequently, defendants will plead inconsistent defenses that are logically or legally incompatible. For example, the defendant may claim that a supervisory official was not present when the inmate was beaten. He can also claim, in the alternative, that reasonable force was used. Pleading inconsistent defenses is permitted under Federal Rule of Civil Procedure 8(d)(2). Most state rules of procedure also allow this type of pleading.

[14] If you received permission from the Court to proceed "in forma pauperis," then the Court will either have waiver of service forms sent to the defendants along with copies of the complaint or will direct the U.S. Marshals Service to serve the complaint on the defendants.

[15] For federal prisoners: if the Defendant is the United States or an employee of the United States, the response deadline is 60 days from the date the complaint was served on the defendant. *See* Fed. R. Civ. P. 12(a)(2), (3).

The Answer may contain counterclaims. Counterclaims are usually not filed in prisoners' cases. If a counterclaim is asserted, it will be necessary for you to answer the allegations contained in the counterclaim. The name of the pleading used to answer a counterclaim is a "Reply."

Motion to Dismiss

The primary focus of the complaint and answer is on factual disputes. Rule 8(a)(2) requires the complaint to set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." By contrast, a motion to dismiss the complaint focuses on challenges to the *legal basis* for the action – accepting the facts alleged in the complaint as true.

A motion to dismiss is not the proper procedure to challenge factual allegations. Motions to dismiss are often filed with an "alternative" motion for summary judgment (see Rule 56 of the Federal Rules of Civil Procedure). It is at this stage that many *pro se* prisoner cases end. Below, we will review seven defenses permitted under Rule 12(b) of the Federal Rules of Civil Proceure:

1. **Lack of jurisdiction over the subject matter** – An assertion that the kind of claim in the complaint is one that the court does not have authority to decide (e.g., a divorce action in federal court).
2. **Lack of personal jurisdiction** - This is frequently raised when a named defendant contends that there are insufficient contacts (connections) between themselves and the people and / or institutions that are a part of the lawsuit to provide the court with authority to exercise judicial power over them.
3. **Improper venue** – Venue means location. The court may order that a case be transferred to another court if it agrees that the location of the court the case is filed in is improper. For example, if a prisoner who is housed in the middle district is making a claim about an incident that happened in the middle district but he files his complaint in the eastern district, the court would send the case to the middle district.**Insufficient process** – Challenges the form of process under Rule 4(b) of the Federal Rules of Civil Procedure.
4. **Insufficient service of process** – Challenges the manner in which legal documents were served upon a party or a failure to provide service.
5. **Failure to state a claim upon which relief can be granted** – This is known as a "Rule 12(b)(6) motion" and is the most frequently employed and successful of the motions to dismiss in prisoner cases.
6. **Failure to join a party under Rule 19 (compulsory joinder).** A claim that some person who is necessary to the case was not named as a party.

A motion to dismiss can be filed by a Defendant based on one or more of the above-listed defenses. The most common motion to dismiss is based on Rule 12(b)(6). In this type of motion, the Defendants are arguing that even if all of the facts you assert in your complaint are true, they do not support a valid legal claim for relief. If the Defendants file a motion to dismiss, you will need to respond by filing a brief in opposition to the motion to dismiss. Your goal is to convince the court that your complaint is in compliance with Rule 8(a); that it contains a "short and plain statement of the facts" that shows you are entitled to relief; and that you have stated a "plausible" claim for relief under the standards set forth in *Twombly* and *Iqbal*.

Begin your opposition brief by researching the cases cited in the Defendants' brief. As you review these cases, you will need to consider the law and the facts of those cases. Below are some things to consider as you prepare your opposition brief:

1. Has the government's attorney misstated or misrepresented the facts you allege in your

complaint? If so, explain why you think so. Be disciplined in how you do this. It is not advisable to ask for sanctions against the government attorney nor is it profitable to call him or her names or accuse them of fraud or other misdeeds. Your goal should be to get the court to focus on the facts you allege in your complaint and to rule that those facts state a valid claim for relief. Simply explain how the government's attorney's interpretation or recitation of the fact is in error.

2. Distinguish the facts in the cases in the opposition's brief from the facts in your case. For example, let's suppose that your case involves you being prohibited from accessing the prison's law library. The government's attorney cites a case where a motion to dismiss was granted and argues that the court should apply that case precedent in your case. Upon reviewing that case, you find that the prisoner in that case was not denied access to the law library – he was denied access to a recreation area. You may be able to distinguish your case by pointing out the more significant and constitutional issues surrounding being able to use the law library to prepare a case when compared to the less significant denial of an opportunity to access recreation. You would then argue that the difference between the cases means that the case cited in the government's brief should not be applied in your case.

3. Find cases like yours that have survived a motion to dismiss challenge. You may also reasonably assume that if you find a case similar to yours in which the court ruled favorably, the court in your case may apply the other case's reasoning and decide that your case should not be dismissed. Courts give a great deal of weight to the decisions that have come before. Such prior cases are especially useful if they were handed down by the court you are in, a higher court in your circuit, or by the Supreme Court. However, other court decisions may also be cited as having reasonable, legally correct holdings that the court should apply in the case before it – even if the court is not obligated to follow those cases.

Note: Remember it is very important to Shepardize or "Cite Check" all the cases you read in the government's brief and those you find for your brief to make sure those cases are still good law. Shepardizing and "Cite Checking" are explained in the "Legal Research" bulletin (Bulletin 1.2).

When ruling on a motion to dismiss, a court must accept as true all of the factual allegations contained in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). In addition, documents filed by a *pro se* litigant are held to a less stringent standard than those filed by a lawyer and are to be construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

Summary Judgment

A motion for summary judgment is usually filed at the conclusion of the discovery phase in the case, after the parties have had an opportunity to obtain information and documents in response to their discovery requests. Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. A motion for summary judgment asks the Court to grant judgment in a party's favor because in view of the evidence in the record (collected by the parties through discovery and investigation), there is no "genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). When a party moves for summary judgment, they are arguing that there is no need to have a trial on the claim(s) because there are no factual issues that need to be decided and based on the evidence in the record and the law governing the claims in the case, they should prevail.

"Motions to Dismiss" are sometimes converted into "Motions for Summary Judgment" under Rule 56. This conversion is authorized by Rule 12(d) if matters outside the pleadings are presented to the court and the court does not exclude those matters. One example of a "matter outside the pleadings" that might be presented to the court is an affidavit from a prison official containing assertions of fact that the

government's attorney argues are relevant to the issues in the case. If the government's attorney presents such an affidavit, or other document, as an attachment to a motion to dismiss, and the court does not exclude these documents from its consideration, you should be able to present additional pertinent information as well. *See* Fed. R. Civ. P. 12(d) ("All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.") If you need to conduct discovery in order to obtain additional information to present to the court, you should file a motion under Rule 56(d), asking the court to grant you permission to conduct discovery so that you can respond to the Defendants' motion for summary judgment.

XI. OTHER PROCEDURES GOVERNING PLEADINGS, DISCOVERY AND TRIAL

Amending the complaint

Rule 15(a) provides a mechanism for amending the complaint after it has been filed. It provides that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served." *See* Fed. R. Civ. P. 15(a). Until an Answer is received (or a motion to dismiss or the alternative summary judgment motion has been granted), an amended complaint may be submitted without waiting for permission from the court or the parties that you are suing. To amend a complaint once a response has been made, you must have permission from the court or written consent from the parties being sued.

The rules concerning amendment of complaints are supposed to be administered liberally by courts. That is, allowing amendment is favored over denying an opportunity to amend. The idea behind this principle is that pleading rules are supposed to facilitate the settlement of disputes by a trial "on the merits." *See Reaves v. Sielaff*, 382 F. Supp. 472 (E.D. Pa. 1974) (*citing United States v. Houghman*, 364 U.S. 310 (1960)). Although the policy of the law favors allowing amending complaints, the court may deny permission if it finds undue delay, bad faith, dilatory motive, undue prejudice to the opposing party, or repeated failures to properly amend.

If you do file an amended complaint, you need to keep in mind that an amended complaint supersedes (takes the place of) the original complaint. So, if you want to keep some (or all) of the allegations and defendants that you included in your original complaint, you need to include these allegations in the Amended Complaint. Do not make the mistake of assuming that anything from the original complaint "carries over" into the Amended Complaint – it does not.

Rule 15(b) allows a motion to amend the pleadings during and after trial. This rule can be used when issues come up at trial that are not clearly within the scope of the facts alleged in the complaint. The purpose of using this rule is generally to "perfect the record" in case there is an appeal and to address an objection that evidence being offered does not relate to matters within the pleadings.

Rule 15(c) addresses "relation back" of an amendment to the complaint to the date that the original complaint was filed in court. "Relation back" is useful if you need to amend your complaint to add claims or defendants because you obtained new information after you filed your complaint and the statute of limitations has expired. If you can fulfill the requirements set forth in Rule 15(c), you can ask the court to permit your amendments because they "relate back" to the original complaint. Be sure to read the rule carefully and, if possible, conduct legal research for recent cases in your circuit that pertain to "relation back" of amendments as different circuits handle relation back differently.

Supplementing Pleadings and Joinder: Rule 15(d) permits a party, upon motion, to serve a "supplemental" pleading setting forth facts which have occurred since the date of the original pleading which relate to the claims asserted in the original pleading. Supplementing with additional facts can be useful when you are asserting a claim based on a "continuing violation" of your rights, based on ongoing wrongful conduct by a defendant.

Rule 19(a) deals with parties that must be joined to an action before it can proceed. This type of joinder is called "compulsory joinder." The decision of whether compulsory joinder applies is made by answering the following questions: Will the person's absence as a party mean that complete relief cannot be accomplished among the parties already in the case? Would the person's absence mean that their interests will be jeopardized or do they pose a threat to those already a party to the action? Rule 19(b) lists the reasons which a court, using its discretion, may consider to implement Rule 19(a).

Rule 20 allows the "permissive joinder" of plaintiffs if (1) the occurrence of some question of law or fact is common to all parties, and (2) plaintiffs claim a right to relief related to or arising out of the same transaction, occurrence or series of transactions or occurrences. Rule 20 allows the "permissive joinder" of defendants using the same qualifications set forth above for plaintiffs except that the claims are being asserted against the defendants.

Class actions. Class actions are addressed in Rule 23. These cases can be quite complicated and present a difficult challenge even to attorneys who have knowledge and experience in litigating them. We recommend that you find legal counsel if you wish to pursue a class action lawsuit. If you have no private counsel in mind, file a motion for appointment of counsel.

Discovery Discovery is the disclosure by the parties of facts, documents, or other things which are in the exclusive possession or knowledge of a party opponent. These things must be necessary and relevant to the case to be considered discoverable. For more information about conducting discovery, see the Discovery Fact Sheet.

Under the Federal Rules of Civil procedure, "parties" may obtain discovery by one or more of the following methods:

- depositions upon oral examination
- depositions upon written questions
- written interrogatories
- production of documents or things or permission to enter upon land or other property
- physical and mental examinations
- requests for admissions

According to Rule 26(b)(1), the parties may obtain discovery regarding any matter, not privileged (protected by some rule or principal of confidentiality), if the material is "relevant to any party's claim or defense and proportional to the needs of the case. . ." *See* Fed. R. Civ. P. 26(b)(1).

Many inmates make the mistake of filing their discovery requests with the court or filing motions seeking permission to begin discovery. Save your postage. The court does not want you to file your requests for discovery. Instead, send your requests to the defense attorney and file them with the court only later as proof if defendants fail to respond by the deadlines imposed by the Federal Rules of Civil Procedure.

Also, you generally do not need court permission to conduct discovery. You usually should wait until the defense attorney enters their appearance so that you know to whom to send your requests. If the defense attorney has a problem with your requests, then that attorney can file a motion for a protective order, in accordance with Rule 26(c).

Depositions and oral examinations: Under Rule 30(a) of the Federal Rules of Civil Procedure any party may take the testimony of any person, including a party, by deposition upon oral examination after the complaint has been filed and served. However, court permission is required in certain circumstances set out

in Rule 30(a)(2). A party desiring to take the deposition of any person is required to give reasonable notice, in writing, to every other party in the action. See Rule 30(b) for the requirements of such notices. Rule 30(b)(3) requires that an oral deposition be recorded by a stenographer or by another approved method. Rule 30(c) requires the examination of deponents (people being questioned at a deposition) be according to the Federal Rules of Evidence.

Obtaining witness depositions obviously is difficult for inmates. Another difficulty for prisoners is the expense of hiring a stenographer. Stenographers have a basic appearance fee, charge for time, and a per page cost that can make depositions quite expensive.

Depositions upon written questions: Rule 31 of the FRCP allows for any party to take the testimony of any person, including a party, by deposition upon written questions. Under certain circumstances, including if the deponent is confined in prison, you must obtain court permission for conducting a deposition upon written questions. *See* Fed. R. Civ. P. 31(a)(2). You are also required to serve the written questions on every other party along with a notice that states, "if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken." *See* Fed. R. Civ. P. 31(a)(3).

Depositions upon written questions avoid the custody-related issues of oral depositions but not the expense problem. Also, you or your legal representative is not present so you will not be able to ask follow-up questions if an evasive or non-responsive answer comes back to you.

Interrogatories to parties: Rule 33 of the FRCP provides that any party may serve upon any other party "written interrogatories" to be answered by the party served. These may be served without leave of court with or after service of the summons and complaint. Rule 33 limits you to a total of 25 interrogatories for each defendant, including "discrete subparts." You can ask the court for permission to serve more than 25 interrogatories, if you can demonstrate that an increase is justified under Rule 26(b).

Each question is to be answered separately and fully in writing, under oath, and signed by the person answering the questions. Respondents normally have thirty (30) days to respond to both interrogatories and requests for production of documents. An advantage of interrogatories over written depositions is the avoidence of expense for an "officer" (court reporter/ stenographer) to ask the question and record the answers. However, interrogatories may only be served upon parties, not witnesses.

Production of documents: Rule 34 provides that any party may serve any other party a request to produce for inspection or copying any documents or other information, compilation, or any other "tangible things" that may be tested, sampled, or copied.

A Rule 34 request for production of documents is a very useful dicovery tool for prisoners because (1) it may be served without permission from the court; (2) at any time after service of the complaint or summons; (3) it is not costly for the inmate; (4) it does not raise the custody-related problems that oral depositions do; (5) it may be repeated with additional document requests if necessary; and, (6) Rule 34 (c) (in conjunction with Rule 45) allows requests to non-parties for similar productions.

Rule 35 provides that when the mental or physical condition of a party is in controversy, the court may order the party to submit to a physical or mental examination by a physician or like professional. Such an order may only be made for good cause.

Rule 36 provides that any party may serve upon any other party a written request for admission to the "truth of any matter" relevant to the action. Requests for admissions are helpful to narrow the issues that will require evidence to prove at trial. A word of caution, however: be very careful about the wording

of such requests because if something is admitted the court may regard the admission as evidence.

United States Magistrate Judges in Prison Litigation: Many prisoners believe that either a judge or a judge with a jury automatically will hear their case. However, in many jurisdictions and upon consent by all parties, a U.S. Magistrate Judge can conduct any and all proceedings in a civil case.

By hearing cases, Magistrate Judges help federal judges control their busy court schedules. Keep in mind that a decision by you to allow a Magistrate Judge to hear the case is entirely voluntary. However, even if your case does not go to the Magistrate Judge for disposition, expect to receive orders, memoranda, and reports by the Magistrate Judge at various stages in the case. Judges assign certain tasks to Magistrate Judges even though the judges retain control over the proceedings. Orders from a Magistrate Judge carry the authority of the court and must be followed. Challenges to a Magistrate Judge's opinions and orders are called "exceptions." The District Judge will consider and rule upon exceptions before ruling on any motion before the court.

Trial: Criminal trials and civil trials operate the same in some ways and differently in others. The Sixth Amendment only guarantees you a jury in a criminal trial – there is no such guarantee in a civil case. There are many cases that are disposed of without the inmate ever appearing before the judge. Additionally, a civil trial by jury requires anywhere between six to twelve jurors in accordance with local rules. Finally, only judges – not juries – can decide injunction claims.

If your case will be decided by a jury rather than a judge, you will need to familiarize yourself with the Federal Rules of Evidence and do some research about trial advocacy. (It's a good idea to do this research even if your case will be heard by a judge.)

As the moving party, you bear the burden of proof at trial. In a civil case, this burden is by the preponderance of the evidence. You have met this burden of proof if the proverbial "scales of justice" tip ever so slightly in your favor, as if the score was 51 to 49 for you.

As plaintiff, you will present your case first. The Defendant's attorney is allowed to cross-examine your witnesses. In your own testimony you will have an opportunity to tell the court and the jury your "story." The government's lawyer can question you.

Each side may call witnesses. The witnesses called by each side may only be asked non-leading questions by the side that calls them. (A leading question is one that suggests the answer within the question and generally can be answered "yes" or "no.") On cross-examination (conducted by the party who did not call the witness), leading questions are allowed.

There are many possible objections (based on the Federal Rules of Evidence) to questions and testimony, including, but not limited to:

Asked and answered – This objection is used to stop an opponent from repeating a question in order to emphasize the answer or get the witness to change the answer.

Hearsay – Hearsay is the repeating in court of a statement made out of court by someone other than the person testifying, offered to prove the truth of the statement. There any many exceptions to the hearsay rule of evidence.

Objections to foundation – These objections are used when a question assumes facts that have not been offered yet in court. Sometimes a judge will allow such questions provided the necessary information is properly presented later.

Relevance – The objections on relevance are used to keep out information about matters that do not tend to prove or disprove the allegations (or defenses) in the case.

There are too many objections, procedure, and practices that go into conducting a case to attempt to summarize them here. We suggest you find a book on trial advocacy and evidence and spend some time reviewing the material. Note the pertinent rules or cases on your trial notes worksheet. Don't try to depend on your memory.

Different judges have their preferred methods for dealing with objections at trial. Some want you to only say "objection," and they will then ask you for the grounds (rule of evidence) you are relying on for your objection. In some cases the judge will ask you to argue why you believe your objection is proper. It is a good idea to ask the judge, before testimony begins, how he or she wishes for you to approach objections. This will give you some guidance and express to the court that it is your intention to be respectful and orderly in your conduct of the case. Usually, the judge will hold a pretrial conference where the judge will tell you his or her preferences and answer any questions you may have.

A final word on objections. You must make your objection at the earliest point you become aware that a question or answer is not proper. If you wait too long or fail to object, the issue may be deemed waived (meaning that you have given up your right to challenge it). An appellate court may determine your failure to object meant the issue was not preserved for review on appeal.

Take time to organize your materials and notes so you can refer to them easily during trial. Prepare a list of questions for each witness you will call or cross-examine. You don't have to follow it strictly if circumstances or information developed during trial require that you modify it.

Finally, at trial, there will be the fact that you are a prisoner, with all the prejudice and unfair emotional baggage that comes with it. You also will have to understand that there may be accusations and whispers that your credibility is automatically suspect because you are a prisoner. If your cause is right, let that be your focus. You will not overcome bigotry with bigotry. Stand with dignity, not resentment.