

WHAT TO DO IF FACED WITH ASSAULT & EXCESSIVE FORCE IN PRISON

ACLU: KNOW YOUR RIGHTS IN PRISON

Important Note: *The law is always evolving. If you have access to a prison law library, you always need to confirm that the cases and statutes cited below are still good law. This information was updated in November 2008. Much of the following information was taken from a book by John Boston and Daniel Manville called the Prisoners' Self-Help Litigation Manual (3d ed. 1995).*

1. Protection from Assault

Prison officials have a legal duty to refrain from using excessive force and to protect prisoners from assault by other prisoners. "Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society." *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994). However, prison officials are not automatically responsible for all assaults on prisoners, and a prison official's use of force does not automatically violate the Constitution. Courts apply different rules to decide whether the Eighth Amendment has been violated after an assault by a prisoner or a use of force by prison staff.

2. Assault by another Prisoner

Prison officials may be held liable under the Eighth Amendment only if they act with "deliberate indifference" or "reckless disregard" for a prisoner's safety. *See id.* at 836-37. In other words, prison officials may be liable if they knew that a prisoner was at substantial risk of serious harm, but ignored that risk and failed to take reasonable steps to protect the prisoner. *See id.* at 847. Generally, courts have distinguished between a substantial risk of serious harm (or strong likelihood of injury) and the everyday risk of harm that comes from being in prison (or mere possibility of injury). *See, e.g., Purcell ex rel. Estate of Morgan v. Toombs County, Ga*, 400 F.3d 1313, 1319-20 (11th Cir. 2005); *Brown v. Hughes*, 894 F.2d 1533, 1537 (11th Cir. 1990). In addition, even when a prisoner is harmed, if prison officials responded reasonably to the risk, they are not held liable. *Farmer*, 511 U.S. at 844-45. Courts often dismiss isolated failures to protect as "mere negligence," even when prison officials had prior information about a threat to a prisoner, but failed to act on that information. *See Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986).

There are two ways to show deliberate indifference in a prisoner assault case. One is to show that prison officials failed to respond or act reasonably in light of knowledge of a particular threat of danger to an individual prisoner. *See, e.g., Odom v. South Carolina Dep't of Corr.*, 349 F.3d 765, 772 (4th Cir. 2003) (plaintiff warned officer that other prisoners would try to kill him); *Scicluna v. Wells*, 345 F.3d 441, 445 (6th Cir. 2003) (plaintiff testified he had told unit manager of risk of assault by his co-defendant); *Cottone v. Jenne*, 326 F.3d 1352 (11th Cir. 2003) (failure to monitor prisoner known to be violent is deliberate indifference); *Peate v. McCann*, 294 F.3d 879 (7th Cir. 2002) (plaintiff attacked twice by the same prisoner); *Cantu v. Jones*, 293 F.3d 839 (5th Cir. 2002) (guards allowed prisoner out of his cell to attack another prisoner); *Horton v. Cockrell*, 70 F.3d 397 (5th Cir. 1995) (staff failed to protect prisoner from attack despite

his grievances requesting protection); *Swofford v. Mandrell*, 969 F.2d 547, 549 (7th Cir. 1992) (guards put sex offender in unsupervised holding cell). The other is to show prison conditions or practices that create a dangerous situation for prisoners in general. *See, e.g., Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1029 (11th Cir. 2001) (no segregation of nonviolent, pretrial detainees from violent, convicted prisoners; overpopulation; understaffing; locks on cell doors that did not properly function; availability of homemade weapons; and no medical, mental health, or conflict screening at intake); *Butler v. Dowd*, 979 F.2d 661, 675 (8th Cir. 1992) (en banc) (random housing assignments of vulnerable prisoners and obstacles to admission to protective housing); *Skinner v. Uphoff*, 234 F. Supp. 2d 1208 (D. Wyo. 2002) (unwritten policy of failing to investigate assaults). Sometimes both theories apply to the same fact situation.

In addition to showing deliberate indifference, a prisoner must show that the actions or practices of prison officials actually caused the assault. There must be a connection between what prison officials did or failed to do and the harm that occurred. *See Best v. Essex County*, 986 F.2d 54, 56-57 (3d Cir. 1993). Thus, courts have imposed liability on line correctional officers who observed an assault or knew of a risk to a prisoner, but did nothing, *see, e.g., Ayala Serrano v. Lebron Gonzales*, 909 F.2d 8, 14 (1st Cir. 1990); on higher-level supervisors who made or failed to make policies, or failed to act on risks they knew about, *see, e.g. Redman v. County of San Diego*, 942 F.2d 1435, 1447-48 (9th Cir. 1991); and on city or county government when a prisoner's assault resulted from a governmental policy, *see, e.g., Berry v. City of Muskogee*, 900 F.2d 1489, 1497-99 (10th Cir. 1990). Courts require prisoners to show how individual named defendants are responsible for causing the assault. *Morales v. New York State Dep't of Corr.*, 842 F.2d 27, 29-30 (2d Cir. 1988) (explaining how several defendants were liable in the same incident).

3. Use of Force by Prison Staff

With respect to convicted prisoners, prison staff violate the Eighth Amendment when they use force "maliciously and sadistically for the very purpose of causing harm," but they are permitted to use force "in a good faith effort to maintain or restore discipline." *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). Courts apply different legal standards to arrestees, pretrial detainees, and convicted prisoners; however, a prisoner generally must show that the force used was not justified by any legitimate law enforcement or prison management need, or was completely out of proportion to that need. *See Hudson*, 503 U.S. at 5-6 (convicted prisoners); *Graham v. Connor*, 490 U.S. 386, 397 (1989) (arrestees). Inflictions of pain that are "totally without penological justification" are necessarily "unnecessary and wanton" in violation of the Eighth Amendment. *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)).

The amount of force that courts consider excessive depends on the specific fact situation. As a general rule, however, the force used by prison staff must be more than *de minimis* (very small or insignificant) to violate the Eighth Amendment. *See Hudson*, 503 U.S. at 9-10. Courts disagree on what constitutes a *de minimis* use of force. *Compare Hudson*, 503 U.S. at 10 (kicks and punches resulting in bruises, swelling, loosened teeth and a cracked dental plate are not *de minimis*) to *Riley v. Dorton*, 115 F.3d 1159, 1168 (4th Cir. 1997) (sticking pen a quarter of

an inch into a detainee's nose, threatening to rip it open and using medium force to slap his face is *de minimis*). If there is a legitimate need to use force and no intent to cause unnecessary harm, prison staff can use serious and even deadly force without violating the Constitution. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 322-26 (1986) (use of shotgun in riot/hostage situation). However, when no such legitimate need exists, courts will be more likely to find an Eighth Amendment violation. *See, e.g., Treats v. Morgan*, 308 F.3d 868, 872 (8th Cir. 2002) (use of pepper spray on a prisoner who "had not jeopardized any person's safety or threatened prison security" provided valid basis for Eighth Amendment claim).

However, prisoners do not need to show a serious or permanent injury to establish an Eighth Amendment violation. The extent of the injury is simply one factor to consider in deciding whether staff acted maliciously and sadistically or in good faith. *See Hudson*, 503 U.S. at 7-9. Establishing malice does not require direct proof of what was in an officer's mind. Prison staff's actions alone, in light of the circumstances, may be sufficient to show malice. *See Fillmore v. Page*, 358 F.3d 496, 509 (7th Cir. 2004); *Thomas v. Stalter*, 20 F.3d 298, 302 (7th Cir. 1994). The official's state of mind may also be inferred "from the fact that the risk of harm is obvious." *Hope*, 536 U.S. at 738 (citing *Farmer*, 511 U.S. at 842). Moreover, sexual abuse or rape of a prisoner by staff is, by definition, a "malicious and sadistic" use of force. *Smith v. Cochran*, 339 F.3d 1205, 1212-13 (10th Cir. 2003).

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