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Staff Use of Force Against Prisoners--Part III: Use of Chemical Weapons

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Introduction

The [first article](#) in this multi-part series on the use of force by correctional staff members against prisoners covered the general legal standard for permissible use of such force, and individual liability for excessive use of force. The [second article](#) focused on governmental and supervisory liability arising out of excessive use of force. This third article discusses the use of deadly force and the use of chemical weapons. Later articles in the series will include discussion of the use of deadly force, Tasers, stun guns and other electronic control devices, and use of dogs. This article, like the others in the series, concentrates on federal civil rights law, and does not discuss, in any detail, liability under state law.

At the conclusion of this article, and each article in the series, a number of useful resources are listed, along with on-line links to the source documents whenever available. The listing of an item does not necessarily imply any endorsement or agreement with the views expressed therein.

Use of Chemical Weapons

Chemical weapons are designed and intended to be disabling agents, used in an attempt to quell resistance and subdue offenders without the more drastic measures of using deadly force, and without the need to get “up close and personal” in directly applying force to the resisting offender’s body in a manner which places the officer more directly in the path of possible harm. They are often used in situations where there are disturbances involving a number of people, but

some chemical weapons, such as pepper spray, are also used as a non-lethal means of attempting to impose control over resisting individuals.

This article will not attempt to discuss the wide variety of chemical weapons available to law enforcement today, or weigh their pros and cons. Instead, the focus is a brief examination of how the courts have regarded their use in custodial situations, and claims that their deployment constituted an excessive use of force in particular instances.

When a prisoner refuses to obey lawful orders and there is an actual or threatened disturbance, there may be a need to use force to compel compliance. In [Danley v. Allen](#), No. 07-12328, 2008 U.S. App. Lexis 17837 (11th Cir.), for instance, a federal appeals court ruled that a prisoner who refused to obey a jailer's orders during a disagreement created a situation in which force was needed, and that a short burst of pepper spray was not excessive. Illustrating the fact that it is often not a question of whether or not the chemical weapon should be used, but how it is used, and how the aftermath of its use is handled which gives rise to liability, the court also ruled, however, that the prisoner's assertion that he was confined in a small cell following the incident and was not allowed to wash off the spray was sufficient to state a claim for excessive use of force.

Any force used, of course, must be justified by a need to use force under the circumstances, and not simply used maliciously and sadistically for the purpose of causing pain or other harm, as set forth in earlier articles in this series. In [Walker v. Bowersox](#), No. 06-3118, 2008 U.S. App. Lexis 11507 (8th Cir.), for example, a federal appeals court held that summary judgment should not have been entered against a prisoner on his excessive force claims since there were genuine factual disputes as to whether officers used force against him, including pepper spray, after he had begun to comply with their orders to him. Additionally, he allegedly was not warned before the use of the pepper spray, was not permitted to clean up after its use, and was then handcuffed to a bench and denied bathroom breaks, food, and water during that restraint.

The proper use of chemical weapons is clearly illustrated in [Allen v. Bosley](#), No. 06-16541, 253 Fed. Appx. 658, 2007 U.S. App. Lexis 25933 (Unpub. 9th Cir.), in which the court found that the prisoner failed to show that officers violated his rights in using pepper spray in the process of extracting another inmate from a cell near his.

The officers were not shown to have acted with malicious and sadistic intent, but instead used the pepper spray to restore discipline when the other inmate refused to comply with their orders. The officers also followed written policies designed to minimize other inmates' exposure to the fumes of the pepper spray.

On the other hand, in [Johnson v. Blaukat](#), No. 05-3866, 453 F.3d 1108 (8th Cir. 2006), the court found that two correctional officers were not entitled to summary judgment when there were factual issues about whether they used excessive force and pepper spray against a female inmate at a time when she was allegedly not actively resisting them.

The case involved a female inmate at the Jasper County Detention Center in Missouri claimed that correctional officers there used excessive force against her. A federal appeals court upheld summary judgment for most of the defendants, but reversed it as to claims against two officers, finding that there was sufficient evidence to create a triable issue as to whether they used excessive force against the prisoner.

The plaintiff prisoner and three other female inmates, including her two sisters, were put in lockdown after staff members received complaints that they had "bullied" other prisoners. The four women were "upset" when this order was announced to them, and the plaintiff admits that she did not, at first, cooperate with it, and asked to speak with a sergeant. A number of other officers and officials then came to the common room where the women were.

The plaintiff and her sisters then returned to their cell, and one of the sisters started banging a shampoo bottle on a desk and throwing toilet paper at the wall. Officers entered the cell, and the plaintiff states that she stepped in front of the sergeant, asking him not to touch her sister, telling him that she could calm her down.

She was subsequently allegedly tackled to the floor, and an attempt to handcuff her was made, during which a number of officers allegedly piled on top of her. While she says she attempted to explain that her hand was stuck, an officer allegedly placed an Orcutt Police Nonchaku (OPN) around her neck and choked her, twisting the device until it broke. She also claimed that her head was slammed down on the floor, that her hair was pulled, and that an officer sprayed mace on her face and eyes.

All of this allegedly caused bruising and lacerations on her arms, a broken thumb, and two black eyes.

The officers stated that the sister was throwing objects around the cell, that the plaintiff "lunged" at one of the officers trying to restrain her sister, and that an officer was able to handcuff one of her hands, but not the other, because the plaintiff "kept turning," and she kept resisting after she was taken to the ground, locking her hands under her stomach. The OPN, an officer claimed, was used on her forearm to try to open her hand, and one of the plastic sticks on it broke.

The appeals court found that the plaintiff stated possible claims for excessive use of force against two officers. The detention center's policies allow the use of force and the use of pepper spray by officers in limited circumstances. Officers may use force to defend themselves or others or to subdue a resisting subject. Mace may be used for "self-defense, defense of a third person, or to subdue a violently resisting subject" but not to "threaten, to elicit information or persuade people to comply with orders" once they are handcuffed or otherwise properly in custody. The regulations on use of pepper spray further state that it may be used when an aggressor has failed to comply with an officer's verbal instructions and a warning has been given, but may not be used in "anticipation against mere verbal threats of violence or resistance."

In this case, the plaintiff claimed that force was used against her by two officers in violation of these policies at a time when she was not resisting. She claimed that she was trying to "calm and protect" her sister, when she was suddenly thrown to the ground, and buried under officers, as well as choked and maced without warning.

The appeals court found that there were several material issues of fact about whether two of the officers used excessive force, including whether their acts were defensive in nature, "or motivated by anger," and whether they were necessary to maintain order or instead "excessive reactions by frustrated officers," as well as whether the amount of force used was appropriate in the situation they faced. The plaintiff also disputed issues concerning whether she failed to comply with orders the officers gave her in the cell, and whether she was actively resisting them, as well as whether or not a warning was issued before the use of the pepper spray.

The appeals court, however, found no basis for claims against supervisory personnel who were present. The plaintiff provided no evidence that those supervisors were deliberately indifferent, the court found, or that they tacitly authorized any excessive force. It also rejected claims against the county, since the plaintiff did not argue that any of the county's policies were themselves unconstitutional or caused her injuries, but rather that the officers violated her rights when they violated the policies in various ways.

In [Estate of Moreland v. Dieter](#), No. 03-3734, 395 F.3d 747 (7th Cir. 2005), cert. denied, sub nom., [Estate of Moreland v. Speybroeck](#), 545 U.S. 1115 (2005), discussed in more detail in the first article in this series, a federal appeals court upheld a jury's award of \$29 million in compensatory and \$27.5 million in punitive damages against two deputy sheriffs for causing an intoxicated pre-trial detainee's death through the use of excessive force, including pepper spray. But the court also found that the plaintiff's failure to show that the death was caused by any official policy or custom, or by deliberate indifference to a widespread

pattern of violation of jail policies, required summary judgment on claims against county sheriff.

The degree of resistance presented by a prisoner, and the presence or lack of presence of an opportunity to “reason” with the prisoner may have some impact on the reasonableness of use of force, including the use of chemical weapons. In [Atwell v. Hart County, Kentucky](#), No. 03-6421, 122 Fed. Appx. 215 (6th Cir. 2005), for instance, a detainee was suffering from paranoid schizophrenia, acute psychosis, impulse-control disorder, and “polysubstance abuse.” Jail personnel, the court found, did not use excessive force in using pepper spray to subdue him when he actively resisted his transfer to a hospital for treatment, and did not violate his right to receive adequate medical attention.

When he was being transferred to a hospital because of fears for his own safety, he resisted and fought with guards, who used a stun shield and pepper spray to subdue him. The incident was videotaped and later resulted in convictions against the prisoner for assault on the guards. A federal appeals court found that the amount of force used was reasonable in light of the detainee's resistance to his transfer to the hospital and assault on the guards who were attempting to get him to needed medical treatment.

Courts have generally upheld the use of chemical weapons in prison riot or disturbance circumstances, but have also clearly indicated that certain excesses in their use can lead to liability. In [Combs v. Wilkinson](#), #00-4270, 315 F.3d 548 (6th Cir. 2002), for instance, the court found that a correctional officer's use of mace in the course of quelling a disturbance among death row inmates was not malicious or sadistic. It also held, however, that genuine issues remained as to whether the commander of special response team failed to adequately control and instruct subordinates in suppressing confrontational prisoners or allowed the excessive use of “lethal levels” of gas and other chemical agents before ordering an entry into the death row unit.

The appeals court upheld the trial court's determination that one officer's use of liquid mace to spray one plaintiff prisoner in the eyes and face was reasonable. The officer used the mace when the plaintiff placed his face near the broken window in his cell. The trial court had found that the prisoner had failed to establish that the officer acted in a malicious or sadistic manner.

It noted that it had to be kept in mind that the officer was acting in the context of a prison disturbance in which prison officials had lost control of the death row unit, so that “substantial deference” must be given to the officer's decision to use mace, “which he made in haste and under significant pressure.”

Further proceedings were ordered, however, on the possible liability of the Lieutenant who commanded the special response team, based in part on the

investigation report which found that he had inadequately briefed team members prior to their entry into the unit, and that "no instructions" were given regarding the extraction of the inmates from their cells. The investigating committee had concluded that this led to team members "free lancing" as they encountered a situation and the onsite supervisors "losing control" of the team members' actions.

Additionally, the report found that at least four explosive distraction devices, 113 explosive gas devices, and six canisters of pepper mace were used to quell the disturbance and that "it is believed that the air concentration level could have reached a lethal level. The committee found that the Lieutenant failed to "maintain fundamental control of the operation," and that the "use of gas, mace and distraction control devices was excessive, uncontrolled, and clearly compromised the safety of staff and inmates." This raised genuine issues of material fact as to the Lieutenant's liability, the court held.

What about the use of a chemical weapon such as tear gas against prisoners confined to a cell? In [Beaudry v. Corrections Corporation of America](#), No. 02-6073, 331 Fed. 3d 1164 (10th Cir. 2003), the court upheld a jury verdict in favor of correctional officers' use of tear gas against prisoners locked in their cells during a prison riot.

The clearly justifiable use of chemical weapons in volatile situations, of course, may cause, at times, unintended "collateral" damages to unintended persons. In [Torres-Viera v. Laboy-Alvarado](#), #01-2712, 311 F.3d 105 (1st Cir. 2002), for instance, the court ruled that prison officials were not liable for a prisoner's injuries from being struck in the head by a tear gas canister fired during an inmate disturbance, when there was no showing that the canister was fired maliciously or sadistically.

The prisoner, confined in a Puerto Rican correctional facility, suffered serious injury from being hit by a tear gas canister fired by a prison official during a prison disturbance in which prisoners fought guards following the prisoners being locked into a room while a general search of the facility was conducted.

In response, prison guards allegedly began firing tear gas indiscriminately at inmates, both those who were participating in the fight and those who were not. One officer fired a tear gas canister directly into the room and into the back of the prisoner's head. The prisoner was knocked to the ground, stunned, and began bleeding profusely from his wound, which later required eight stitches. Since the incident, the prisoner has allegedly suffered from headaches and discomfort.

Upholding the dismissal of the prisoner's lawsuit, a federal appeals court noted that "deliberate indifference" is the standard for determining whether there is a constitutional claim for "tolerating threats to inmate health or safety," but that the U.S. Supreme Court has established a "very different" standard by which to

evaluate the behavior of prison officials during riots or other disturbances. Deliberate indifference does not apply:

Instead, the standard is whether unnecessary and wanton pain and suffering were inflicted, with that question ultimately turning on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."

In this case, the appeals court found, there was nothing in the record that permitted a reasonable inference that the tear gas canister was fired maliciously or sadistically for the very purpose of causing harm. Prison officials are given "wide-ranging deference" in their measures to restore order during disturbances, the court noted.

When prisoners, whether intentionally or accidentally, suffer injuries as a result of exposure to chemical weapons, beyond the issue of whether the use of the chemical weapons was justified to begin with, there are issues concerning whether their injuries were subsequently suitably treated.

In [Clement v. Gomez](#), # 01-16088, 298 F.3d 898 (9th Cir. 2002), for instance, the court found that prison officials' use of pepper spray to quell a fight in a cell between two prisoners in which one threatened to kill the other did not constitute an excessive use of force, even if a second application of pepper spray was administered after the prisoners began to cough, but before they were restrained. The appeals court ruled, however, that officials were not entitled to qualified immunity from a deliberate indifference to medical needs claim by other prisoners in the cell block that the vapors drifted into their cells and they were not given showers or medical attention for four hours.

Courts have been very willing to find liability for the use of chemical weapons when there is evidence that they are used unnecessarily or in a malicious manner. In [Lawrence v. Bowersox](#), #01-1813, 297 F.3d 727 (8th 2002), a federal appeals court upheld an award of \$10,002 against a correctional officer who allegedly "orchestrated" an unnecessary soaking with pepper spray of two inmates confined to their cell five hours after a prison riot had been quelled. The officer allegedly instructed a co-worker to soak the cell with pepper spray after one of the inmates questioned his alleged calling out "Niggers get naked."

The appeals court noted that the plaintiff prisoners were confined to their cells and that the evidence did not show that they disobeyed orders. Rather than just a small spray of pepper spray, the plaintiffs in this case were "doused with pepper spray," so that their faces and bodies were "soaked" in it and their entire cell was covered with. One of the plaintiffs claimed that he experienced spotting on his lower body for almost two years following the incident, and the other testified that he has suffered problems with his skin and eyes since then.

The appeals court also found that the facts were sufficient to allow the jury to reasonably conclude that the officer "orchestrated a vicious attack on the inmates for no legitimate reason."

Other cases of interest include:

* [Barber v. Pinion](#), No. 1:04CV00118, 2007 U.S. Dist. Lexis 72982 (M.D.N.C.), stating that prison officials were not entitled to summary judgment on a prisoner's claim that the use of pepper spray against him constituted excessive force. A reasonable jury could conclude, from the evidence presented, that the prisoner had not advanced on the prison officials in a threatening manner, and that the use of the pepper spray had not been necessary to keep order.

* [Thomas v. Comstock](#), No. 04-41696, 2007 U.S. App. Lexis 6159 (Unpub. 5th Cir.), in which a court ruled that the use of one burst of pepper spray against inmate who refused orders to move from solitary confinement to general housing was not objectively unreasonable under clearly-established law, so that defendant prison lieutenant who did so was entitled to qualified immunity. The plaintiff inmate had refused to move because he was allegedly fearful of his safety in the general population.

* [Eccleston v. Oregon](#), No. 04-36122, 168 Fed. Appx. 760 (Unpub. 9th Cir. 2006), concluding that the use of a chemical agent to extract a prisoner from his cell did not violate his rights when it was used only after he repeatedly disobeyed orders to come out by himself.

* [Norton v. City of Marietta](#), Ok, No. 04-7133, 432 F.3d 1145 (10th Cir. 2005), ruling that a sheriff and defendant officers were not entitled to summary judgment in a prisoner's lawsuit challenging their use of pepper spray against him at county jail. Factual issues existed as to how long he was sprayed, and whether he was "adequately irrigated" afterwards or allowed to suffer unnecessarily.

* [Kervin v. Barnes](#), No. 05-1443, 144 Fed. Appx. 551 (Unpub. 7th Cir. 2005), holding that a correctional officer's alleged action of making an inmate wait from five to ten minutes before he could wash pepper spray from his face and eyes was not a violation of the Eighth Amendment when the prisoner had failed to comply with an order to enter his cell before being subjected to the spray.

* [Davis v. Cannon](#), #02-41596, 91 Fed. Appx. 327 (Unpub. 5th Cir. 2004). In this case a federal appeals court ruled that an officer did not violate prisoner's right to be free of cruel and unusual punishment in spraying him with a chemical agent when the facts showed the officer acted in a good faith effort to maintain or restore discipline and not maliciously or sadistically to cause him harm.

* Jennings v. Mitchell, No. 03-1922, 93 Fed. Appx. 723 (Unpub. 6th Cir. 2004), concluding that prison employees did not use excessive force by spraying a prisoner with pepper spray after he refused to exit a shower. The evidence showed that they applied the force used in a good-faith effort to maintain or restore discipline, and not maliciously to cause injury or pain. A videotape of the incident showed that the prisoner refused to obey several direct orders to leave the shower before the use of the pepper spray. Additionally, the use of the spray only caused discomfort, rather than any physical injury.

* Fairweather v. Giles Dalby Correctional Facility, #5:00-CV-072-86, 154 F. Supp. 2d 921 (N.D. Tex. 2001). In this case, a prisoner's claim that officials' use of tear gas to enforce lockdown was an excessive use of force was contradicted by a videotape showing that prisoners, including the plaintiff, did not return into their cells when the order to do so was initially given. A prisoner's claim that he "begged" for medical attention but that prison employees would not help him was also contradicted by a videotape that showed officers asking him whether he needed medical attention and him replying that he did not. The court also noted that a videotape of the incident shows that corrections officers visually checked and verbally asked each inmate in the housing unit if he needed medical attention. A section of the tape even showed the plaintiff being interviewed late that evening and stating that he did not require medical assistance. "The court finds that plaintiff's Complaint has no basis in fact or law."

* Jones v. Shields, #99-1869, 207 F.3d 491 (8th Cir. 2000), stating that a correctional officer did not impose cruel and unusual punishment when he sprayed an inmate in the face with pepper spray after the prisoner refused a direct order from his work supervisor and "questioned" an order from the officer.

* Ryder v. Freeman, #1:95CV67, 918 F.Supp. 157 (W.D.N.C. 1996) upholding a requirement that a prison guard undergo "mace training," involving her being sprayed in the face with pepper mace did not violate her right to due process or privacy or shock the conscience. A federal court found the requirement "rationally related" to a correctional department's interest in encouraging officers to "take care" when using pepper mace, to discourage "indiscriminate use" of it, and to teach the importance of "prompt remediation" of its effects.

* McLaurin v. Morton, 94-1422, 48 F.3d 944 (6th Cir. 1995), in which the court ruled that a policy directive on the use of chemical agents, such as mace, against resisting prisoners did not create a constitutionally protected liberty interest for violation of which Michigan state prisoner could sue correctional officer.

* U.S. v. Holloway, #95-40053, 906 F.Supp. 1437 (D. Kan. 1995) (Use of pepper spray to force arrestee to disgorge crack cocaine from his mouth was a reasonable use of force and was not "outrageous.").

Resources

The following are a few useful resources on the use of force by correctional personnel. It should be utilized together with the similar list of resources in the [first](#) and [second](#) articles in this series. Further listings will appear in subsequent articles in this series.

- State of Arkansas Board of Corrections. Administrative Regulations Sec. 410 on [Use of Chemical Agents and Other Non-Lethal Weapons](#). (8/25/1989).
- [The Effectiveness and Safety of Pepper Spray](#). National Institute of Justice (2003).
- [Less Lethal Weapons for Law Enforcement: A Performance-Based Analysis](#), by Charlie Mesloh, Ross Wolf, Mark Henych, and Frank L. Thompson. (2008). Discusses strengths and weaknesses of less lethal weapons systems, including chemical agents.
- [Review of Use of Force at Mississippi State Penitentiary](#) by Kenneth McGinnis (October 2007). Discusses the use of tear gas and oleoresin capsicum as chemical agents.
- [Pepper Spray: Civil Liability Perspective](#) by John Makholm, Peter M. Walsh & Associates (June 2003).
- [The Use and Abuse of Pepper Spray](#), by Lynne Wilson.
- [Riot control agents: pharmacology, toxicology, biochemistry and chemistry](#), by Olajos, EJ, and Salem H. U.S. Army, Edgewood Chemical and Biological Center, 3 Appl. Toxicol. 2001 Sep-Oct 21(5):355-91. (Abstract).
- [The Regulation of Personal Chemical Weapons: Some Anomalies in American Weapons Law](#), by James B. Jacobs, 15 University of Dayton Law Review, No. 1, pg. 141 (1989).

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