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Jail & Prisoner Law Section – January 2020

**Procedural Due Process
In Prisoner Discipline Cases**

Part 1 (Last Month)

- **Introduction**
- **U.S. Supreme Court Requirements**
- **“Some Evidence”**
- **Notice and Procedural Rights**

Part 2 (This Month)

- **Grounds for Discipline**
- **Retaliatory Filing of Disciplinary Charges**
- **Resources and References**

This is part 2 of a two-part article. To read Part 1, click [here](#).

❖ **Grounds for Discipline**

Aside from following procedural and evidentiary rules, as spelled out in the first part of this article, there must, of course, be specific grounds for prisoner discipline, typically a violation of an established prison rule. An example is shown in [Lane v. Salazar](#), #17-35868, 911 F.3d 942 (9th Cir. 2018), in which a federal appeals court affirmed the denial of three petitions for habeas relief arising from disciplinary proceedings in which a prisoner was sanctioned for sending threatening letters from prison. The court ruled that the federal Bureau of Prisons (BOP) Prohibited Acts Code 203, which prohibits inmates from threatening

another person with bodily harm or any other offense, addressed legitimate penological concerns in a manner that was sufficiently narrow to satisfy any constitutional concerns. The court also held that the BOP's disciplinary actions were supported by sufficient evidence. The court held that when read reasonably in the context of the prison setting, and limiting the phrase "any other offense" to criminal offenses or violations of BOP rules, Code 203 was sufficiently narrow and clear to protect inmates' First Amendment rights.

Depending on the nature of the offense, a variety of defenses may be available to the prisoner that stem from the definition of the violation. In [*May v. Cline*](#), #110095, 372 P.3d 1242, 2016 Kan. Lexis 310, for example, a Kansas inmate was disciplined for violating a prohibition on fighting. The Kansas Supreme Court ruled that the inmate was not accorded due process as the finding by the hearing officer that he had violated the prohibition was unsupported by the evidence. There was no evidence to disprove self-defense, and state regulations clearly and unambiguously made the absence of self-defense an element of the offense itself.

A rule may prohibit the possession of a specific object, without making the intent to use it in a specific manner an element of the violation. In [*Jimenez v. N.J. Dept. of Corrections*](#), #A-5965-08T3, 2010 N.J. Super. Unpub. Lexis 2103, 2011 WL 6056 for instance, an intermediate New Jersey appeals court upheld the disciplining of a prisoner for possession of a weapon, sharpened instrument, or unauthorized tool, after he was observed at his welding shop work assignment using a grinder to hone a metal object to a point. While the prisoner claimed that the three-and-a-half-inch metal object was not a weapon, but for the purpose of marking his initials for identification into his metal shop project, "the regulation charged does not require proof that the inmate actually intended to use the prohibited item as a weapon. Possession in itself of an item that is a sharpened instrument or an unauthorized tool is a violation." Since he admitted possessing the object, his excuse for doing so did not alleviate the "dangerous activity of fabricating such a tool or instrument without express authorization of prison officials."

❖ **Retaliatory Filing of Disciplinary Charges**

Separate and apart from any legal requirements for prison disciplinary action, it is clear that the courts will not sanction the taking of adverse actions against prisoners by correctional agencies, officials, or employees motivated by retaliation for their exercising their constitutionally protected First Amendment rights and intended to deter and chill them from and punish them for doing so. Such protected First Amendment activities can include the filing of grievances, the pursuit of litigation,

certain other concerted activities, and the assisting of others in pursuing their grievances or litigation, such as offering testimony or other evidence.

Prisoners who believe that they have been subjected to disciplinary charges, hearings, and sanctions in retaliation for such things as filing complaints or grievances against prison employees or officials, or pursuing lawsuits about prison conditions, can assert legal claims, including claims for money damages, for such retaliation. This topic is discussed in more detail in [Retaliation Against Prisoners for Protected First Amendment Expression](#), 2010 (3) AELE Mo. L. J. 301.

In a small number of instances, prisoners have asserted such claims in relation to prison disciplinary actions concerning drug use or possession. Such claims of retaliatory discipline often require the prisoner to show that they are not guilty of the underlying drug offense, as the fact that a prison employee or official may have a motive to dislike or retaliate against the prisoner will not necessarily protect the prisoner against disciplinary action when, in the absence of the retaliatory motive, they would have otherwise been subjected to the discipline imposed anyway.

In [Farver v. Schwartz](#), #00-3729EA, 255 F.3d 473 (8th Cir. 2001), for instance, the court ruled that a prisoner who lost good-time credits when he tested positive for drug use could not pursue a claim that an officer asked him to take the test in retaliation for filing a grievance against her unless the disciplinary determination was first set aside. The prisoner could, however, pursue claims of retaliation concerning the filing of allegedly false disciplinary complaints against him or his transfer in alleged retaliation for questioning an officer's authority to deny him legal assistance. Similar principles would apply to claims that drug use or possession disciplinary charges were falsely filed for retaliatory motives.

One prisoner lawsuit over prisoner discipline initially arose with a prisoner expressing a simple complaint about prison food. In [Maben v. Thelen](#), #17-1289, 887 F.3d 252 (6th Cir. 2018), a prisoner complained after he was given only half a serving in the lunch line. A prison guard allegedly then yelled “shut the fuck up if you wanna eat.” The lunch supervisor then gave the prisoner a full portion, but the guard allegedly then said “if you’re going to complain then you’re going to get a misconduct,” and gave the prisoner a ticket.

The prisoner claimed that after that he was given shortened portions because of the guard’s retaliation. A hearing officer found the guard’s statement “more credible” without even viewing available video footage of the incident in question. The prisoner was found guilty of creating a disturbance and lost privileges for seven days.

A federal appeals court ruled that the factual findings made at the prisoner's minor misconduct hearing did not have a preclusive effect in federal court on an unlawful retaliation claim. ***The court declined to adopt the "checkmate doctrine," which provides that when a prison hearing finds that a prisoner has committed an actual violation of prison rules and the finding is based on some evidence, it "essentially checkmates" a retaliation claim.*** The prisoner introduced sufficient evidence to withstand summary judgment on his First Amendment retaliation claim against the guard individually. By complaining about the insufficient quantity of food he had received, the prisoner was pursuing a grievance about prison conditions and seeking redress of that grievance. Therefore, he was engaged in conduct protected by the First Amendment. The appeals court affirmed summary judgment on the prisoner's official-capacity claim, however, based on Eleventh Amendment immunity which protects states and their agencies from liability from damages in federal court.

See also [*Brunson v. Nichols*](#), #14-31350, 875 F.3d 275 (5th Cir. 2017), in which a federal appeals court found that a federal prisoner adequately pled claims for unlawful retaliation after he filed a grievance expressing safety concerns following several power outages at the prison.

A threat to commence civil litigation over prison conditions or pursue criminal charges is plainly protected First Amendment activity. In [*Entler v. Gregoire*](#), #14-35053, 872 F.3d 1031 (9th Cir. 2017), for instance, a prisoner filed a federal civil rights lawsuit claiming that his First Amendment rights were violated when he was allegedly disciplined for threatening to start civil litigation as well as file a criminal complaint against certain prison officials.

Such threats to sue and file criminal complaints, so long as not totally baseless or frivolous, are protected by the First Amendment. Dismissal of the complaint concerning initiating civil litigation was improper, but qualified immunity applied to the claim about filing a criminal complaint because that right was not previously clearly established at the time of the incident by prior precedent.

Courts have often been sympathetic to prisoners who can show that they faced retaliatory disciplinary action simply because they wished to pursue a grievance through established authorized channels. Such retaliation can come in the form of either formal disciplinary proceedings involving the full procedures of charges and a hearing, followed by punishment, or through less formal administrative actions involving less formality. In [*Martin v. Duffy*](#), #16-6132, 858 F.3d 239 (4th Cir. 2017), for instance, a federal appeals court ruled that a prisoner adequately pled a

First Amendment retaliation claim by alleging that he was placed in administrative segregation because he filed a grievance. It was clearly established at the time that the defendant placed the plaintiff in segregation that retaliating against an inmate for filing a grievance violates the inmate's rights under the First Amendment.

Another important ruling by the same federal appeals court held that prison officials were not entitled to qualified immunity on a prisoner's claim that they retaliated against him for filing a grievance by imposing disciplinary charges against him in violation of his First Amendment rights. ***While no prior published Fourth Circuit decision specifically directly addressed whether filing a grievance was protected First Amendment conduct, the right was clearly established, the court contended, based on general constitutional principles or a consensus of persuasive authority.***

In this case, the inmate's right was found to have been clearly established based on the Second, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits all recognizing in published decisions that inmates possess a First Amendment's Petition Clause right to be free from retaliation in response to filing a prison grievance. The cases are gathered and cited in the ruling. [*Booker v. South Carolina Department of Corrections*](#), #15-7679, 855 F.3d 533 (4th Cir. 2017).

Similar principles applied in [*Shepard v. Wise*](#), #13-15554, 840 F.3d 686 (9th Cir. 2016), in which a prisoner claimed that he faced unlawful retaliation in that he was transferred to administrative segregation after he reported a correctional officer for allegedly using excessive force against him while escorting him to a holding cell.

Upholding the rejection of qualified immunity for the defendant prison official, the federal appeals court found without merit the argument that California state regulations required that the prisoner be transferred to administrative segregation as soon as he alleged that an officer assaulted him. Cal. Code Regs. tit. 15, 3335(a) does not require that, and the plaintiff prisoner had established a genuine issue of material fact as to whether he was retaliated against.

In one case involving complicated proceedings, a federal appeals court demonstrated just how far it would go to protect a prisoner against such retaliation, despite some procedural problems. Disciplinary proceedings in three separate years resulted in a prisoner's loss of 16 months of earned good-conduct credit. He unsuccessfully, but diligently, pursued administrative grievances regarding these hearings. His lawsuit challenged proceedings from two years as

having been retaliatory in violation of his First Amendment rights, and that lawsuit was dismissed.

He then sought habeas relief in state court, which was denied. A federal habeas petition was denied as moot when he was released from custody, and he then filed a second federal civil rights lawsuit. While screening the complaint under 28 U.S.C. 1915(e), the trial court found that the plaintiff stated claims for due process violations and for retaliation, but granted the defendants summary judgment, finding that the lawsuit was barred by precedent requiring a prisoner plaintiff to pursue timely collateral relief while in custody. A federal appeals court reversed, finding that the prisoner did his best to obtain timely relief while in custody, and “precedent requires no more.” [*Whitfield v. Howard*](#), #15-2649, 852 F.3d 656 (7th Cir. 2017).

On the other hand, in one case a prisoner with a retaliatory claim was barred from relitigating the issue in federal court once a state court had adequately addressed the question. In [*Furnace v. Giurbino*](#), #13-17620, 838 F.3d 1019 (9th Cir. 2016), a prisoner claimed that the defendant prison employees falsely classified him as a gang member in retaliation for him filing a federal civil rights lawsuit against their co-workers. California courts rejected his claim for habeas relief, finding sufficient evidence to support the gang classification. A federal appeals court ruled that this determination by the California courts precluded the prisoner’s subsequent federal civil rights lawsuit asserting claims for violation of his First Amendment retaliation and equal protection rights based on the same classification. The appeals court held that the same primary right—the prisoner’s right to be free from unlawful gang validation and placement in segregated housing —was at issue in both suits. Because the suit involved the same cause of action between the same parties after a final judgment on the merits of the first suit, the subsequent suit was barred.

Prisoners are also protected against retaliatory disciplinary action for pursuing complaints against other prisoners. In [*Ogurek v. Gabor*](#), #15-1151 827 F.3d 567 (7th Cir. 2016), a prisoner’s complaint about being assaulted and injured by another inmate was not a “personal gripe” unprotected by the First Amendment. The plaintiff prisoner, therefore, could proceed with his lawsuit alleging that he was disciplined for pursuing his complaint concerning the incident.

Concerted activity on behalf of group prisoner grievances, as opposed to on behalf of the individual themselves may be protected First Amendment activity. See [*Dolan v. Connolly*](#), #14-2561, 794 F.3d 290 (2nd Cir. 2015), ruling that voicing inmate grievances as a member of an Inmate Liaison Committee qualified

as constitutionally protected First Amendment activity, so that the trial court improperly dismissed the plaintiff's claim that he faced unlawful retaliation as a result of such activity.

Of course, the mere fact that a prisoner has engaged in protected First Amendment activity, standing alone, does not serve to protect him or her against legitimate discipline or administrative action. In [*Hannon v. Beard*](#), #10-1792, 645 F.3d 45 (1st Cir. 2011), a “jailhouse lawyer” who claimed that he was transferred to an out-of-state prison in retaliation for his activities on behalf of other prisoners and for pursuing his own grievances failed to show that there was a causal relationship between these admittedly protected activities and his transfer. Instead, there was evidence that the transfer elsewhere was the result of the prisoner having accumulated a number of “separations,” which the court characterized as “a term used to indicate the existence of a placement conflict counseling against assignment of one inmate to the same institution as another inmate or staff member.”

While prisoners may be required, under the provisions of the Prison Litigation Reform Act, to exhaust available administrative remedies before pursuing federal civil rights litigation over retaliatory disciplinary actions, ***the very retaliation may make it impossible to do so, excusing the requirement.*** In [*Dimanche v. Brown*](#), #12-13694, 783 F.3d 1204 (11th Cir. 2015), for instance, the trial court erroneously dismissed a prisoner’s lawsuit claiming that he faced unlawful retaliation for filing grievances based on an alleged failure to exhaust available administrative remedies as required by the Prison Litigation Reform Act. The alleged threats of retaliation by various defendants showed exactly why he could not have filed the grievance about the reprisal internally at the facility, meeting the conditions for instead filing a grievance directly with the Secretary of the State Department of Corrections.

See also [*Fantone v. Latini*](#), #13-3611, 780 F.3d 184 (3rd Cir. 2015), in which a prisoner claimed that he had been granted parole but that it was rescinded because he was facing pending disciplinary charges and had been placed in a restrictive housing unit as a result. He claimed that these actions were retaliatory for having filed a grievance against an officer. These actions did not violate his due process rights because the misconduct determinations, his time placed in the restrictive housing unit, and his parole rescission, did not, either alone or in combination, create an atypical and significant hardship in relation to the ordinary incidents of prison life. But the prisoner did adequately allege a retaliation claim against a particular officer by claiming that when he refused to confess to a particular charge

and instead filed a grievance against this officer, he was placed in administrative custody in retaliation.

❖ **Resources**

- [California Prison and Parole Law Handbook](#).
- [Disciplinary Rules and Procedures for Offenders](#). Texas Department of Criminal Justice.
- [Inmate Discipline Program](#). Federal Bureau of Prisons.
- [Prisoner Discipline](#). Michigan Department of Corrections.
- [Prisoner Discipline](#). AELE Case Summaries.
- [Retaliation](#). AELE Case Summaries.

❖ **Prior Relevant Monthly Law Journal Articles**

- [Disciplining Prisoners for Drug Use or Possession--Part 1](#), 2010 (10)
AELE Mo. L. J. 301.
- [Disciplining Prisoners for Drug Use or Possession--Part 2](#), 2010 (11)
AELE Mo. L. J. 301.
- [Disciplining Prisoners for Drug Use or Possession--Part 3](#), 2010 (12)
AELE Mo. L. J. 301.
- [Retaliation Against Prisoners for Protected First Amendment Expression](#), 2010 (3)
AELE Mo. L. J. 301.

❖ **References:** (*Chronological*)

1. [In Prison, Discipline Comes Down Hardest On Women](#), NPR report (Oct. 15, 2018).
2. Andrea C. Armstrong, [Race, Prison Discipline, and the Law](#), 5 U.C. Irvine L. Rev. 759 (2015).
3. [Judicial Intervention in Prison Discipline](#). 63 J. Crim. L. Criminology & Police Sci. 200 (1972).

4. [Procedural Due Process in Prison Disciplinary Actions](#) by Joseph P. Condom, 2 Loyola University Law School of Chicago Journal Issue 1 (Winter 1971).

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