AELE Seminars:

Public Safety Discipline and Internal Investigations
Sept. 28-Oct. 1, 2020– Orleans Hotel, Las Vegas

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MONTHLY CASE DIGEST

- Some of the case digests do not have a link to the full opinion.
- Most Federal District Court opinions can be accessed via PACER. Registration required. Opinions are usually free; other documents are 10¢ per page.
- Access to cases linked to www.findlaw.com may require registration, which is free.

COVID-19

A federal appeals court stayed an injunction that was issued against a county and the Director of the Miami-Dade Corrections and Rehabilitations Department (MDCR), requiring them to employ numerous safety measures to prevent the spread of COVID-19 and imposing extensive reporting requirements. Inmates had filed a class action challenging the conditions of their confinement seeking relief for the named plaintiffs with a "medically vulnerable" subclass of inmates. The court ruled that defendants established that they were likely to prevail on appeal. The trial court likely committed errors of law in granting the preliminary injunction when it incorrectly collapsed the subjective and objective components of the deliberate indifference inquiry. The defendants were also likely to succeed on appeal, the court found, because the plaintiffs offered little evidence to suggest that the defendants were deliberately indifferent. Furthermore, the defendants had shown that they would be irreparably injured in the absence of a stay because they would lose the discretion vested in them under state law to allocate scarce resources among different county operations necessary to fight the pandemic. Finally, the balance of the harms and the public interest weighed in favor of the stay. *Swain v. Junior*, #20-11622, 958 F.3d 1081 (11th Cir. 2020).

Disability Discrimination: Prisoners

An Illinois prisoner suffering from Parkinson's disease took a prescription medication, Mirapex, to manage his symptoms. As a specialty prescription,

Mirapex was not kept in stock at the prison, but instead was filled by an outside pharmacy. The prison allowed him to keep a monthly supply of Mirapex in his cell. To refill his prescription, he was required to submit a sticker within seven days of the end of the prescription. He usually received his refill when he had three to five days of pills left. On three occasions, however, he received his refill a few days late, causing him to experience withdrawal symptoms. His symptoms also render his handwriting illegible, so he used a typewriter to draft documents. He requested to keep that typewriter in his cell, which the prison denied because it was considered contraband. The prison provided him with an assistant to help him draft documents and increased access to the library where he could use a typewriter. With those accommodations, he has not missed any court deadlines. He sued Wexford Health, a private entity providing health care services, and correctional administrators under 42 U.S.C. Sec. 1983 and the Americans with Disabilities Act for violation of civil rights and disability discrimination.

A federal appeals court rejected these claims, finding that three instances of prescription delays over nineteen months solely involving one inmate failed to qualify as a widespread unconstitutional practice so well-settled that it constituted a custom or usage with the force of law sufficient to impose municipal liability for civil rights violations. On the disability discrimination claims, even if reasonable accommodations were not made, the plaintiff was not entitled to damages because he did not show deliberate indifference to his disability or his serious medical needs. *Hildreth v. Butler*, #18-2660, 2020 U.S. App. Lexis 15949 (7th Cir.).

Governmental Liability: Policy/Custom

Two female county jail inmates claimed that they endured repeated sexual assaults by the same male correctional officer. The county's written policy prohibited sexual contact between inmates and guards but failed to address the prevention and detection of such conduct. The county allegedly did not provide meaningful training on the topic. Near the beginning of the relevant period, the county learned that another officer made predatory sexual advances toward a different female inmate. The county imposed minor discipline on the guard but made no institutional response—no review of its policy, no training, and no communication with inmates on how to report such abuse. In a civil rights suit, the jury returned verdicts for the inmates.

A federal appeals court overturned the verdict against the county, determining that the evidence failed to meet the standard for municipal liability. On a rehearing en banc, the federal appeals court upheld the verdicts against both the correctional officer and the county. While the standard for municipal liability is demanding, the court ruled that the evidence was sufficient to support the verdict. The evidence did not require the jury to accept as inevitable that the officer's conduct was unpreventable, undetectable, and incapable of giving rise to municipal liability. Nor was the jury compelled to conclude that the sexual abuse had only one cause. The law allowed the jury to consider the evidence in its entirety, use its common sense, and draw inferences to decide for itself. The jury was furnished with sufficient evidence to hold the county liable on the basis of the county's own deliberate choice to stand idly by while the female inmates under its care were exposed to an unmistakable risk that they would be sexually assaulted. *J.K.J. v. Polk County*, #18-2177, 2020 U.S. App. Lexis 15620 (7th Cir.).

Medical Care

A pretrial detainee at a county jail died of a drug overdose. Her family filed a lawsuit claiming Eighth and Fourteenth Amendment violations, as well as a claim under the Texas Tort Claims Act. A federal appeals court previously upheld summary judgment for the county in part, and ordered the trial court to evaluate the plaintiffs' conditions-of-confinement theory of liability. The trial court also granted summary judgment on that theory to the county.

The appeals court has now upheld the dismissal of the plaintiffs' claims based on a failure to train based on the law-of-the-case doctrine. The appeals court further ruled that the trial court erred in dismissing claims based on a failure to monitor because the plaintiffs' evidence, viewed in the light most favorable to them, created several disputes of material fact about whether the jail had a de facto policy of inadequately monitoring detainees. Further, the plaintiffs offered sufficient evidence to create fact issues over whether the county failed to assess pretrial detainees' medical needs and whether this caused the decedent to be denied needed medical care. *Sanchez v. Young County*, #19-10222, 956 F.3d 785 (5th Cir. 2020).

Medical Care: Mental Health

The Wisconsin Supreme Court ruled that Wis. Stat. 51.61(1)(g), which permits the involuntary medication of an incompetent but non-dangerous inmate, is facially unconstitutional for any inmate who is involuntarily committed based on determinations that he was mentally ill and in need of treatment when the inmate is involuntarily medicated based merely on a determination that the inmate is incompetent to refuse medication. A prisoner who suffered from schizophrenia was committed while he was an inmate.

Because he was determined incompetent to refuse medication under the statute, he was the subject of multiple involuntary medication court orders. He was not committed based upon a determination of dangerousness but, rather, on determinations that he was mentally ill and in need of treatment. He argued that the statute section is unconstitutional when it permits the involuntary medication of any inmate committed without a determination that the inmate is dangerous. The Wisconsin Supreme Court agreed, holding that incompetence to refuse medication alone is not an essential or overriding state interest and cannot justify involuntary medication. *Winnebago County v. C.S.*, #2016AP001982, 2020 WI 33, 391 Wis. 2d 35, 940 N.E. 2d 875, 2020 Wisc. Lexis 110

Prison Litigation Reform Act: Exhaustion of Remedies

A prisoner was in urgent need of medical care when incarcerated. He had previously had part of his leg amputated due to diabetes and had developed an infected open wound. He was immediately taken to the infirmary. He was not given the inmate handbook, but was told it would be in his prison block, and signed a form acknowledging supposed receipt of the handbook. When he arrived at his block, the handbook was not there. His efforts to obtain the handbook or the Inmate Grievance System Policy manual issued to corrections staff were fruitless. As a result, he did not know that exhausting the grievance process required two levels of appeals.

When his wound festered, he filed a grievance asserting that a medical provider refused to give him bandages and antibiotic ointment. That grievance was rejected because it was not presented in "a courteous manner." His next grievance was rejected as lacking "information that there were any issues not addressed during [his] sick call visit." He filed a grievance detailing the medical staff's alleged failure to properly treat his leg wound, including declining to follow a doctor's recommendation to transfer him to a medical facility, and his fear that more of his

leg would need to be amputated. The grievance coordinator read the rules to require separate grievances for mental and physical harms. The prisoner asked his counselor how he should respond. His counselor told him to "fill out another one." Unaware of the appeal requirement, he submitted eight new grievances, which were rejected as time-barred. His last grievance, requesting transfer to a medical facility, was deemed "frivolous." More of his leg was amputated.

A federal appeals court reinstated his civil rights claim, previously rejected for failure to exhaust available administrative remedies as required by the Prison Litigation Reform Act. Under these circumstances, the court ruled, together with the failure to receive the handbook, the counselor's misrepresentation rendered the grievance process "unavailable" under the Prison Litigation Reform Act. *Hardy v. Shaikh*, #19-1929, 2020 U.S. App. Lexis 16093 (3d Cir.).

Prisoner Assault: By Inmates

A prisoner claimed that his Eighth Amendment rights were violated when he was violently assaulted by a fellow inmate, and that defendant prison personnel acted with deliberate indifference to his safety. A federal appeals court found that the prisoner presented sufficient evidence to raise a question of material fact as to whether a substantial risk of inmate attacks was longstanding, pervasive well-documented, or expressly noted by prison officials in the past against the captain and the warden. The inmate request forms the captain and the warden received were detailed and explicit regarding the threat that the plaintiff believed another inmate posed. Furthermore, the plaintiff orally conveyed his concerns regarding the threat to both of them. *Morgan v. Dzurenda*, #18-2888, 956 F.3d 84 (2d Cir. 2020).

Prisoner Assault: By Officers

When a prisoner engages in willful misconduct, a correctional officer may use reasonable force to restrain him—but after the inmate submits, there is no need or justification for the further use of force. Under *Heck v. Humphrey*, 512 U.S. 477 (1994), a convicted criminal may not bring a federal civil rights lawsuit if success on their claim would necessarily imply the invalidity of a prior criminal conviction. An inmate cannot bring a claim for excessive use of force by a correctional officer

if they have already been found guilty for misconduct that justified that use of force. However, *Heck* does not bar a claim for a correctional officer's excessive use of force after the prisoner has submitted and ceased engaging in the alleged misconduct. In this case, a federal appeals court ruled that *Heck* barred the plaintiff's claim as to the alleged use of force in his cell—but not as to the alleged use of force again later in the prison lobby and shower after he had allegedly surrendered. *Aucoin v. Cupil*, #19-30779, 958 F.3d 379 (5th Cir. 2020).

Prisoner Suicide

Police arrested a woman for physically attacking her boyfriend. The boyfriend later brought her medications to the jail, where a "Keep on Person" (KOP) policy allows inmates to keep certain drugs for self-administration. During an intake interview, the woman admitted to attempting to harm herself or commit suicide in the past but said she was not thinking of harming herself or having suicidal thoughts now. A nurse later evaluated her for nearly two hours, reported that her chief complaints were "anxiety and depression," and contacted a pharmacy to verify her prescriptions. The R.N. claimed that the woman did not exhibit any psychotic behavior, suicidal ideation, or psychiatric distress but ordered further evaluation.

The next day, the detainee was found on the floor with vomit on her face. She stated repeatedly that she took too many pills. The next day, she died in the hospital. The cause of death was Verapamil toxicity. A federal appeals court upheld the rejection of a federal civil rights lawsuit. The court stated that a pretrial detainee does not have an automatic right to a suicide screening. The court rejected an argument that the KOP Policy was deficient because it allows inmates in need of a psychological evaluation to participate before a psychiatrist's assessment of proper housing. The county had no history of suicides relative to the program, so any purported failure to train its employees in suicide risk assessment did not cause the decedent's death. *Andrews v. Wayne County*, #19-1992, 957 F.3d 714 (6th Cir. 2020).

U.S. Supreme Court Actions

****Editor's Case Alert****

The Prison Litigation Reform Act of 1995 (PLRA) established a "three-strikes

rule" in 28 U.S.C. 1915(g), under which prisoners are generally prevented from bringing lawsuits as paupers if they have had three or more prior suits dismissed on the grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted. A Colorado inmate sued prison officials to challenge his expulsion from the facility's sex-offender treatment program and moved for pauper status. He had already brought three unsuccessful lawsuits while incarcerated.

Lower courts rejected his argument that two of the dismissals should not count as strikes because they were without prejudice, leaving open the possibility that the plaintiff could attempt to refile the lawsuit. The U.S. Supreme Court upheld this result. Section 1915(g)'s three-strikes provision refers to any dismissal for failure to state a claim, whether with prejudice or without. A Section 1915(g) strike-call depends exclusively on the basis for the dismissal, regardless of the decision's prejudicial effect. Courts can and sometimes do dismiss frivolous actions without prejudice. The Court held that the dismissal of a suit for failure to state a claim counted as a strike, under 28 U.S.C.S. § 1915(g), whether or not with prejudice because a prisoner accrued a strike for any action dismissed on the ground that it failed to state a claim upon which relief may be granted, and that broad language covered all such dismissals. It applied to those issued both with and without prejudice to a plaintiff's ability to reassert his claim in a later action. *Lomax v. Ortiz-Marquez*, #18-8369, 2020 U.S. Lexis 3145.

Resources

COVID-19: Law in the Time of COVID-19, Columbia Law School (2020). Includes a chapter on prisons.

Prison Rape: Prison Rape Elimination Act (PREA) Data-Collection Activities, 2020, by Amy Lauger, Bureau of Justice Statistics *(*June 11, 2020 NCJ 254764).

Reference:

- Abbreviations of Law Reports, laws and agencies used in our publications.
- AELE's list of recently-noted jail and prisoner law resources.

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Cross References

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