Guide for Attorneys Recruited to Represent Plaintiffs in Section 1983 Cases

Adapted from the Guide Prepared by Staff Attorneys of the District Courts of the United States Court of Appeals for the Seventh Circuit
2017

Contents:

The Basics of Prisoner Litigation Under Section 1983

I. General Features of 42 U.S.C. § 1983 Claims

A. Elements of a Section 1983 Claim.

To succeed on a § 1983 claim, a plaintiff must prove "(1) the deprivation of a right secured by the Constitution or federal law and (2) that defendants were acting under color of state law." *Wilson v. Warren County, Ill.*, 830 F.3d 464, 468 (7th Cir. 2016). For an individual defendant to act "under color of state law" for § 1983 purposes, he must "misuse [ ] power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Burrell v. City of Mattoon*, 378 F.3d 642, 649 (7th Cir. 2004) (internal quotation omitted). Therefore, a § 1983 claim cannot be brought against a private citizen unless he acts under color of state law. *See London v. RBS Citizens, N.A.*, 600 F.3d 742, 746 (7th Cir. 2010) (Private persons "may not be sued [under § 1983] for merely private conduct, no matter how discriminatory or wrongful.") (internal quotation omitted).

B. Federal Violation Required.

Section 1983 creates "a federal cause of action for the deprivation, under color of [state] law, of a citizen's rights, privileges, or immunities secured by the Constitution and laws of the United States." *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994) (internal quotation omitted). Thus, no action lies under § 1983 unless a plaintiff has asserted the violation of a *federal* right. *See Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981); *Waubanascum v. Shawano County*, 416 F.3d 658, 670 (7th Cir. 2005) (Neither negligence nor a violation of state law provides a basis for liability under § 1983.); *J.H. ex rel. Higgin v. Johnson*, 346 F.3d 788, 793 (7th Cir. 2003) ("State law violations do not form the basis for imposing § 1983 liability."); *Juriss v. McGowan*, 957 F.2d 345, 349 n.1 (7th Cir. 1992) ("[W]ithout a predicate constitutional violation, one cannot make out a *prima facie* case under § 1983.").

C. Requirement of Personal Responsibility.

"It is well established that there is no *respondeat superior* liability under § 1983." *Gayton v. McCoy*, 593 F.3d 610, 622 (7th Cir. 2010). Without personal liability, there can be no recovery under § 1983. *Burks v. Raemisch*, 555 F.3d 592, 593-94 (7th Cir. 2009) ("Section 1983 does not establish a system of vicarious responsibility. Liability depends on each defendant's knowledge and actions, not on the knowledge or actions of persons they supervise.") (internal citation omitted). "To show personal involvement, the supervisor must know about the conduct and facilitate it, approve it, condone it, or turn

a blind eye for fear of what they might see." *Matthews v. City of East St. Louis*, 675 F.3d 703, 708 (7th Cir. 2012) (internal quotation omitted).

Although "an individual must be personally responsible for a constitutional deprivation in order to be liable, personal responsibility is not limited to those who participate in the offending act…." *Childress v. Walker*, 787 F.3d 433, 439-40 (7th Cir. 2015). "Liability extends to those who, having a duty under the Constitution to the plaintiff, act[ ] or fail[ ] to act with a deliberate or reckless disregard of plaintiff's constitutional rights." *Id.* at 440 (internal quotation omitted). "Liability can also attach if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge or consent." *Id.* (internal quotation omitted). For example, "[a]n inmate's correspondence to a prison administrator may ... establish a basis for personal liability under § 1983 where that correspondence provides sufficient knowledge of a constitutional deprivation." *Perez v. Fenoglio*, 792 F.3d 768, 781–82 (7th Cir. 2015).

Private corporations that contract with the State to perform a government function, such as providing medical care to correctional facilities, act under color of law. Employees of such entities act under color of law and can be sued for damages in their individual capacity. While entities such as Corizon Health, Inc. and Wexford Health Sources, Inc. are not vicariously liable for their employees' deprivations of inmates' civil rights, they are treated as a municipality or similar entity for purposes of § 1983 actions. *Jackson v. Illinois Medi-Car, Inc.*, 300 F.3d 760, 766 (7th Cir. 2002). This means that to maintain a viable § 1983 claim against such an entity, "a plaintiff must demonstrate that a constitutional deprivation occurred as the result of an express policy or custom of the government unit." *Id.* (citation omitted). "Unconstitutional policies for purposes of § 1983 liability fall into three categories: (1) an express policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority." *Estate of Moreland v. Dieter*, 395 F.3d 747, 758-59 (7th Cir. 2005) (internal quotation omitted).

II. Immunities

In prisoner suits, defendants are generally federal, state, or county employees. Different laws of sovereign immunity apply to each group. Generally, the following rules apply to each group:

A. Federal Officials.

Federal officials may not be sued for damages in their official capacity, except under the Federal Tort Claims Act. 28 U.S.C.A. § 2680 (West Supp. 2001). In all other actions they must be sued for damages in their individual capacity under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *see Glaus v. Anderson*, 408 F.3d 382, 389 (7th Cir. 2005). Federal officials must be sued in their official capacity for injunctive relief. Such relief is based on a district court's inherent power to enjoin an unconstitutional practice of depriving constitutional rights.

B. State Officials.

State officials may be sued under § 1983 only in their individual capacity for damages and in their official capacity for injunctive relief. *See Edelman v. Jordan*, 415 U.S. 651 (1974) (holding that the Eleventh Amendment bars suits for retrospective damages relief against a state).

C. City and County Officials.

City and county officials may be sued in both their official and individual capacities. In addition, cities may be sued directly for retrospective damages or prospective relief. Under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), however, *respondent superior* is not a basis for municipal liability. *But see Shields v. Illinois Dep't of Corr.*, 746 F.3d 782, 790 (7th Cir. 2014) (finding "substantial grounds to question the extension of the *Monell* holding for municipalities to private corporations"). Municipal liability is based on injury caused by a "policy or custom."

III. Exhaustion of Administrative Remedies

A. General Rule.

The Prison Litigation Reform Act ("PLRA") requires that a prisoner exhaust "such administrative remedies as are available" before bringing a suit "with respect to prison conditions under [§] 1983 … or any other Federal law…." 42 U.S.C. § 1997e(a). "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

B. Strict Compliance Required.

The Seventh Circuit requires "strict compliance" with the exhaustion requirements. *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006). This means that a "prisoner must comply with the specific procedures and deadlines established by the prison's policy." *King v. McCarty*, 781 F.3d 889, 893 (7th Cir. 2015); *see also Dale v. Lappin*, 376 F.3d 652, 655 (7th Cir. 2004) ("In order to properly exhaust, a prisoner must

submit inmate complaints and appeals 'in the place, and at the time, the prison's administrative rules require.'") (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002)). Even if the prisoner believes the administrative process will ultimately be futile, he must exhaust. *King*, 781 F.3d at 893. Even if the relief sought, such as monetary damages, cannot be granted through the administrative process, a prisoner must exhaust. *Woodford v. Ngo*, 548 U.S. 81, 85 (2006);

C. Burden of Proof.

Because exhaustion is an affirmative defense, "the burden of proof is on the prison officials." *Kaba v. Stepp*, 458 F.3d 678, 681 (7th Cir. 2006). If the defendant demonstrates that a plaintiff failed to complete the exhaustion process in accordance with prison policies, it might be because the process was not "available" to the plaintiff. "Prison officials may not take unfair advantage of the exhaustion requirement, … and a remedy becomes 'unavailable' if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting." *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006). For example, "[p]risoners are required to exhaust grievance procedures they have been told about, but not procedures they have not been told about." *King v. McCarty*, 781 F.3d 889, 896 (7th Cir. 2015). In addition, "exhaustion is not required when the prison officials responsible for providing grievance forms refuse to give a prisoner the forms necessary to file an administrative grievance." *Hill v. Snyder*, 817 F.3d 1037, 1041 (7th Cir. 2016). In those instances, the plaintiff prisoner is considered to have exhausted his available administrative remedies. *See Turley v. Rednour*, 729 F.3d 645, 650 n. 3 (7th Cir. 2013) (collecting cases of prison's failure to respond).

D. Scope of Exhaustion Rules.

"The 'applicable procedural rules' that a prisoner must properly exhaust are defined not by the PLRA, but by the prison grievance process itself." *Maddox v. Love*, 655 F.3d 709, 721 (7th Cir. 2011). If a prisoner fails to properly use the grievance process, prison officials "can refuse to hear the case, and the prisoner's claim can be indefinitely unexhausted." *Id.* (internal quotation omitted).

For state prisoners in Illinois, the Illinois Administrative Code sets forth the grievance procedures to be followed by committed persons. *See* ILL. ADMIN. CODE tit 20, § 504.800 *et seq*. An Illinois inmate first must take his complaint to a correctional counselor for informal resolution. If this does not resolve the problem, he is to file a written grievance on an institutional form within sixty days of the incident or occurrence complained of, and that grievance should be addressed to the Grievance Officer. Each institution has one or more designated Grievance Officers who review such grievances. Should the Grievance Officer determine that the grievance is without

merit, it may be denied, and returned to the inmate without need for further investigation. Where the grievance is with merit, the Grievance Officer reports his or her findings and recommendations to the Chief Administrative Officer, *i.e.*, the warden, and the warden is to advise the inmate of his or her decision within two months after receipt of the grievance, "where reasonably feasible under the circumstances."

The inmate may appeal the warden's disposition of the grievance in writing to the Director of the Department of Corrections within 30 days of the warden's decision. The Director reviews the grievance and the responses of the Grievance Officer and warden, and determines whether the grievance requires a hearing before the Administrative Review Board ("ARB"). If it is determined that the grievance is without merit or can be resolved without a hearing, the inmate is to be advised of this disposition in writing. Otherwise, the grievance is referred to the ARB, which may hold hearings and examine witnesses. The ARB submits a written report of its findings and recommendations to the Director, and the Director then makes a final determination within six months after receipt of the appealed grievance, "where reasonably feasible under the circumstances." ILL. ADMIN. CODE tit 20, §§ 504.810-850.

With respect to federal inmates, the Bureau of Prisons ("BOP") has promulgated an administrative remedy system which is codified in 28 C.F.R. § 542.10, *et seq.*, and BOP Program Statement 1330.18, Administrative Remedy Program. The administrative remedy process is a method by which an inmate may seek formal review of a complaint related to any aspect of his imprisonment. 28 C.F.R. § 542.10. To exhaust his remedies, an inmate must first file an informal remedy request through an appropriate institution staff member via a BP-8, prior to filing a formal administrative remedy request with the Warden (BP-9). If the issue is not resolved, the inmate must file an appeal with the Regional Director (BP-10) and then with General Counsel (BP-11).

In order to bring a claim against the United States under the Federal Tort Claims Act ("FTCA), 28 U.S.C. § 2671 *et seq.*, for injuries they sustain while incarcerated, inmates must first present the claim to the federal agency responsible for the injury. *See Palay v. United States*, 349 F.3d 418, 425 (7th Cir. 2003). Plaintiffs bringing claims under the FTCA generally show exhaustion by filing with their complaint a copy of the "final denial of claim" letter indicating that agency review has been completed and the individual may seek relief in court.

Inmates in county jails are also required to exhaust available administrative remedies before they file a § 1983 action. Each jail has its own policy for inmates to exhaust administrative remedies.

Conditions of Confinement Claims

I. General Law

A prisoner's claim of unconstitutional conditions of confinement is analyzed under the Eighth Amendment's cruel and unusual punishment clause. *See Farmer v. Brennan*, 511 U.S. 832, 834 (1994). A pretrial detainee's claim of unconstitutional conditions of confinement is analyzed under the Fourteenth Amendment's Due Process Clause. *Smith v. Dart*, 803 F.3d 304, 309 (7th Cir. 2015). However, given that the protections under the Fourteenth Amendment's Due Process Clause are at least as broad as those under the Eighth Amendment for convicted prisoners, the courts look to Eighth Amendment case law when addressing a pretrial detainee's claims. *Rice v. Corr. Med. Serv.*, 675 F.3d 650, 664 (7th Cir. 2012). A prisoner/pretrial detainee is entitled to live in conditions that do not amount to "punishment." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Detainees are entitled to be confined under humane conditions that provide for their "basic human needs." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). "The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones[.]" *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996). A prisoner need not have contracted a disease or suffered any physical pain for a jury to reasonably conclude that conditions constituted a constitutional violation. *See Thomas v. Illinois*, 697 F.3d 612, 614 (7th Cir. 2012) (discussing harms a prisoner may endure due to insect infestation, including actual disease, psychological and probabilistic harm).

To establish a constitutional violation with respect to an inmate's living conditions, he must be able to demonstrate both: (1) the conditions were objectively so adverse that they deprived him "of the minimal civilized measure of life's necessities," and (2) the defendants acted with deliberate indifference with respect to the conditions. *Townsend v. Fuchs,* 522 F.3d 765, 773 (7th Cir. 2008) (quoting *Farmer v. Brennan*, 511 U.S. 832, 834 (1994)). "Life's necessities include shelter, heat, clothing, sanitation, and hygiene items." *Woods v. Schmeltz*, No. 14-CV-1336, 2014 WL 7005094 at *1 (C.D. Ill. Dec. 11, 2014) (citing *Gillis v. Litscher*, 468 F.3d 488, 493 (7th Cir. 2006)); *see also Budd v. Motley*, 711 F.3d 840, 842-43 (7th Cir. 2013). The deprivation, however, must be sufficiently serious. The condition must create a serious risk to an inmate's health or safety or be sufficiently prolonged so as to cause significant pain or discomfort. *Thixton v. Berge*, No. 05-C-620-C, 2006 WL 167444 at *2 (W.D. Wis. Jan. 23, 2006) (citing *Leslie v. Doyle*, 125 F.3d 1132, 1137 (7th Cir. 1997) ("the Constitution does not create a cause of action for arbitrary and purposeless acts by officials per se [citation omitted]; it prohibits the abuse of power that effects a significant deprivation")). Furthermore, "conditions of confinement, even if not individually serious enough to work

constitutional violations, may violate the Constitution in combination when they have 'a mutually enforcing effect that produces the deprivation of a single, identifiable human need.'" *Budd v. Motley*, 711 F.3d 840, 842-43 (7th Cir. 2013) (quoting *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)).

"Deliberate indifference . . . means that the official knew that the inmate faced a substantial risk of serious harm, and yet disregarded that risk by failing to take reasonable measures to address it." *Townsend v. Fuchs*, 522 F.3d 765, 773 (7th Cir. 2008). Establishing that an official acted negligently does not suffice. "Instead, the inmate must show that the official received information from which the inference could be drawn that a substantial risk existed, and that the official actually drew the inference." *Id.*

II. Examples of Uninhabitable Conditions

A. Pest Infestation.

"[A] prolonged pest infestation, specifically a significant infestation of cockroaches and mice, may be considered a deprivation sufficient to constitute a due process violation." *Sain v. Wood*, 512 F.3d 886, 894 (7th Cir. 2008). "Depending on how extensive the infestation of a prisoner's cell is, what the infesting pests are, what odors or bites or risk of disease they create, what particular psychological sensitivities the prisoner was known to have . . . , and how long the infestation continues, a trier of fact might reasonably conclude that the prisoner had been subjected to harm sufficient to support a claim of cruel and unusual punishment." *Thomas v. Illinois*, 697 F.3d 612, 614 (7th Cir. 2012).

In *Antonelli v. Sheahan*, 81 F.3d 1422, 1431 (7th Cir. 1996), a Cook County Jail inmate alleged that cockroaches were "everywhere," "crawling on his body (along with mice)" and "constantly awaken[ing] him," the Seventh Circuit found that a prolonged exposure to a significant pest infestation, if true, was serious enough to support a constitutional violation at the initial review stage. *See also Gray v. Hardy*, 826 F.3d 1000, 1005-06 (7th Cir. 2016) (insect infestation along with lack of cleaning supplies and broken window in cell could constitute unconstitutional condition of confinement); *White v. Monohan*, 326 F. App'x 385, 388 (7th Cir. 2009) (unpublished) (allegations that over a five year period bugs, roaches, spiders, wasps and bees had bitten plaintiff so often as to leave scars, wounds and sores, was sufficient to state a claim of unconstitutional conditions of confinement). By contrast, allegations that an inmate "saw 'several' cockroaches crawling in his cell" over a six-year period and was twice bitten did not describe a sufficiently serious condition. *Sain v. Wood*, 512 F.3d 886, 894 (7th Cir. 2008); *see also Smith v. Dart*, 803 F.3d 304, 312 (7th Cir. 2015) ("We do not doubt

that there are rodents and insects in the Cook County Jail, however, alleging the mere presence of a laundry list of pests, without more, is not sufficient to state a constitutional claim."); *Moore v. Monahan*, No. 06 C 6088, 2009 WL 310963, at *7 (N.D. Ill. Feb. 9, 2009) (five and a half months of sleeplessness because he stayed up at night to kill insects, but never being sting or bitten by an insect, did not constitute an objectively serious constitutional deprivation).

In *Muithi v. Hardy*, evidence that the prisoner saw between ten and fifteen birds and mice and an occasional spider, ant, moth fly and mosquito over a four year period did not amount to a constitutional violation. *Murithi v. Hardy*, No. 13 C 0599, 2016 WL 890695, at *8 (N.D. Ill. March 9, 2016). In addition, the plaintiff failed to demonstrate any type of harm of the alleged pest infestation. *Id.* In contrast, in *White v. Monahan*, the inmate presented evidence to allow a jury to find that "his cells were infested with cockroaches, ants, wasps, bees, spiders, gnats, and mosquitoes" for a four-year period. *White v. Monahan*, No. 07 C 437, 2013 WL 587511, at *8 (N.D. Ill. Feb. 14, 2013). Additionally, the inmate often awoke with red welts from insect bites and estimated he had been treated ten times for infections related to insect bites. *Id.* In *Barbosa v. McCann*, evidence in the record indicated the inmate could prove that insects and cockroaches were "rampant," that there were so many that he could sleep only a few hours at night, and that bugs or mice crawled on him and bit him. *Barbosa v. McCann*, No. 08 C 5012, 2011 WL 4062469, at *6 (N.D. Ill. Sept. 12, 2011). Although the court ultimately determined that the extensive spraying established the absence of deliberate indifference, the infestation problem was sufficiently serious for the first element of the deliberate-indifference analysis. *Barbosa*, 2012 WL 4471218 at *3.

Even if the pest infestation rises to a constitutional violation, evidence of proper attempts to eliminate the pest infestation through an extermination company may demonstrate a lack of deliberate indifference. See e.g., *Sain v. Wood*, 512 F.3d 886, 895 (7th Cir. 2008) ("exterminations . . . made monthly and in response to plaintiff's requests[] certainly cannot support a claim of deliberate indifference here"); *Murithi v. Hardy*, No. 13 C 0599, 2016 WL 890695, at *9 (N.D. Ill. March 9, 2016). (lack of deliberate indifference when an extermination company sprayed prison on a monthly basis and warden investigated and remedies complaints of ineffectiveness of extermination procedure/process); *Barbosa v. McCann*, No. 08 C 5012, 2011 WL 4062469, at *1, 3 (N.D. Ill. Sept. 12, 2011). (evidence that exterminator visited Stateville eight times a month and sprayed the areas outside cells, including "in front of the cells," "on the front of [his cell] door" and "at the bottom [of the door]," sufficiently established the lack of deliberate indifference for summary judgment purposes); *Agnew v. Hardy*, No. 11 C 0043, 2012 WL 5412109, at *5 (N.D. Ill. Nov. 5, 2012) ("the once-a-month spraying by an exterminator, which Plaintiff does not dispute, demonstrates that he cannot establish

that Defendant consciously disregarded a pest infestation"); *cf. Antonelli v. Sheahan*, 81 F.3d 1422, 1431 (7th Cir. 1996) (only an occasional extermination, twice in sixteen months, does not, by itself, negate a showing of deliberate indifference); *Bentz v. Hardy*, 638 F. App'x 535, 538 (7th Cir. 2016) (evidence of a pest control contract that provided monthly spraying did not exculpate the defendants because an ineffective method of pest control may be evidence of deliberate indifference – evidence of ineffectiveness included allegations of constant infestation of cockroaches and the fact that a broken window would allow in insects).

B. Contaminated Water.

Deliberately supplying inmates with water containing carcinogens and contaminants can be considered cruel and unusual punishment. *See Smith v. Dart*, 803 F.3d 304, 313 (7th Cir. 2015). "But failing to provide a maximally safe environment, one completely free from pollution or safety hazards, is not." *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001). "Many Americans live under conditions of exposure to various contaminants. The Eighth Amendment does not require prisons to provide prisoners with more salubrious air, healthier food, or cleaner water than are enjoyed by substantial numbers of free Americans." *Id.*

As to claims that water is not drinkable because it comes out brown and smells bad, such a claim does not indicate a constitutional violation. Courts have held that "an inmate is not entitled to have running water in his cell." *Scruggs v. SinClair*, No. 3:16-CV-039 JD, 2016 WL 344534 at *2 (N.D. Ind. Jan. 27, 2016) (citing *Williams v. Collins*, No. 14 C 5275, 2015 WL 4572311 (N.D. Ill. July 29, 2015) (citing *Jelinek v. Roth*, No. 93-3316, 1994 WL 447266, at *2 (7th Cir. Aug. 19, 1994)); *see also Allen v. Hardy*, 11 C 4147, 2012 WL 5363415 at *8 (N.D. Ill. Oct. 26, 2012); *McNeal v. Ellerd*, 823 F. Supp. 627, 632 (E.D. Wisc. 1993) (although inmates have "a basic right to adequate drinking water," a "dysfunctional sink alone is not necessarily cruel and unusual punishment").

C. Adequate Ventilation.

Inadequate ventilation in a jail can rise to a constitutional violation. *See Board v. Farnham*, 394 F.3d 469, 485-86 (7th Cir. 2005). However, "[m]any Americans live under conditions of exposure to various contaminants. The Eighth Amendment does not require prisons to provide prisoners with more salubrious air, healthier food, or cleaner water than are enjoyed by substantial numbers of free Americans." *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001). In *McNeil v. Lane*, the Seventh Circuit noted that, if an inmate alleged he was forced to stay in a cell where "friable asbestos filled the air," he might state a claim of an unconstitutional condition, but "[e]xposure to moderate levels of asbestos is a common fact of contemporary life and cannot, under contemporary

standards, be considered cruel and unusual." *McNeil v. Lane*, 16 F.3d 123, 125 (7th Cir. 1993).

Allegations of a flow of fiberglass dust into cells that caused numerous nosebleeds and respiratory issues constitute a constitutional violation. *See Board v. Farnham*, 394 F.3d 469, 486 (7th Cir. 2005); *Cf. Dixon v. Godinez*, 114 F.3d 640, 645 (7th Cir. 1997) (alleged lack of proper air ventilation did not rise to a constitutional violation where cell had a window which opened and the cell door had a small chuckhole for ventilation); *Allen v. Hardy*, No. 11 C 4147, 2012 WL 5363415, at *6 (N.D. Ill. Oct. 26, 2012) (summary judgment granted for claim of inadequate ventilation where prisoner was able to request that a window be opened); *Murithi v. Hardy*, No. 13 C 0599, 2016 WL 890695, at *7 (N.D. Ill. March 9, 2016 (summary judgment granted as to claim of inadequate ventilation based alleged dusty vent in light of access to window for fresh air and access to fan for circulation).

D. Temperature in Cell.

As to determining whether cell temperatures amount to a constitutional deprivation, various factors are considered, including: the severity of the temperature, the duration of the high/low temperature, whether the inmate has other means to protect himself from the temperature, and whether the inmate had to endure other uncomfortable or harsh conditions. *See Dixon v. Godinez*, 114 F.3d 640, 644 (7th Cir. 1997); *see also Jones-El v. Berge*, 374 F.3d 541, 543 (7th Cir. 2004).

For example, conditions such as a temperature in his cell during the day and night that averaged around 40 degrees Fahrenheit for a four-day period constituted a constitutional violation. *See Dixon v. Godinez*, 114 F.3d 640, 643-44 (7th Cir. 1997); *see also, Del Raine v. Willford*, 32 F.3d 1024, 1035 (7th Cir. 1994) (temperature within cell that was near temperature outside, which was forty degrees below zero with wind chill, constituted unconstitutional living condition); *cf. Carreon v. Thomas*, No. 12 C 4779, 2014 WL 51368, at * 3 (N.D. Ill. Jan. 7, 2014) (cold cell two or three days a month for a four-month period, including being able to see one's breath, did not rise a to constitutional violation in light of the short duration and access to extra clothing and blankets); *Moore v. Monahan*, No. 06 C 6088, 2009 WL 310963, at *6 (N.D. Ill. Feb. 9, 2009) (routine temperatures in the summer of around 90 degrees Fahrenheit and maintenance staff not recalling any temperatures below 60 degrees Fahrenheit in the winter, along with extra clothing and blanket in winter and a fan in summer, did not rise to unconstitutional condition of confinement).

In a recent reversal of summary judgment, the Seventh Circuit found that prisoner's exposure to temperatures below 50 degrees and sometimes more than 90

degrees, along with a broken window in northern Illinois, where temperatures in the 30s are common in March and April, could constitute unconstitutional conditions of confinement. *Bentz v. Hardy*, 638 F. App'x 535, 538 (7th Cir. 2016). Furthermore, the fact that the prisoner had clothes and blankets did not negate the conditions, as the clothes and blankets were the same amount of clothes and blankets given to other inmates and the cold was in combination with other conditions (broken window, wet cell and mattress, and pests), such that the conditions could be found by a jury to constitute a constitutional violation. *Id*.

E. Cleaning Supplies.

The complete lack of cleaning supplies and seriously adverse conditions can demonstrate a constitutional violation. *Vinning–El v. Long*, 482 F.3d 923, 923–25 (7th Cir. 2007) (reversing summary judgment when prisoner was deprived of basic sanitation items while in a cell for six days with blood and feces were smeared on the walls and there was no running water to allow cleaning of the cell); *see also Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir. 1989) (allegations of similar conditions and no cleaning supplies stated a claim of unconstitutional conditions of confinement); *Budd v. Motley*, 711 F.3d 840, 842 (7th Cir. 2013) (45-day confinement in over-crowded cell with broken windows, no working sink, toilet covered in mold and spider webs, and no cleaning supplies stated unconstitutional conditions). But where inmates regularly had cleaning items available to them, no constitutional violation existed. *Allen v. Hardy*, 11 C 4147, 2012 WL 5363415 at *5 (N.D. Ill. Oct. 26, 2012); *see also Murithi v. Hardy*, No. 13 C 0599, 2016 WL 890695, at *7 (N.D. Ill. March 9, 2016) (complaints of dust, dirt and bird excrement did not rise to a constitutional violation and plaintiff was allowed to clean his cell twice per week using towels and shampoo he purchased through commissary); *Sanchez v. Walker*, No. 09 C 2289, 2010 WL 5313815, at * 9 (N.D. Ill. Dec. 17, 2010). The fact that Plaintiff was not given disinfectants as part of the cleaning supplies does not establish a constitutional violation. Disinfectants are not one of life's necessities and are not necessary to clean a cell. *Myrick v. Anglin*, 496 F. App'x 670, 676 (7th Cir. 2012) ("[a]lthough [inmate] did not receive the specific cleaning supplies he requested, [he] does not allege that he was unable to clean his cell with supplies available to him"); *see also Sanchez*, 2010 WL 5313814 at *9 (no constitutional violation existed where, in the absence of cleaning supplies, inmate could have used available water and clothing to clean his cell).

F. Mold.

Although courts have indicated that the presence of mold can establish an unconstitutional living condition, those courts found that the presence of mold was sufficiently serious such that it caused physical problems. *See Thomas v. Cox*, 10-CV-997-GPM, 2011 WL 3205660, at *4 (S.D. Ill. July 27, 2011) (citing *Munson v. Hulick*, No. 10–cv–

52–JPG, 2010 WL 2698279 (S.D. Ill. July 7, 2010)); *Mejia v. McCann*, No. 08–C–4534, 2010 WL 653536 (N.D. Ill. Feb. 22, 2010); *Moran v. Rogers*, No. 07–cv–171, 2008 WL 2095532 at *1–5 (N.D. Ind. May 15, 2008)); *see also Board v. Farnham*, 394 F.3d 469, 486 & n.10 (7th Cir. 2005) (prisoners' claim that their asthma was worsened by exposure to mold and other substances was allowed to proceed); *Cf. Striblin v. Buncich*, No. 2:13-CV-22 PS, 2015 WL 4724899 at *7 (N.D. Ind. Aug. 7, 2015) ("the mere presence of some dirt, mold, or mildew at the jail does not establish the type of severe deprivation needed to establish a constitutional violation"). In addition, allegations that the presence of mold caused a detainee to experience psychological harm and/or probabilistic harm may support a claim. *See Thomas v. Illinois*, 697 F.3d 612, 615 (7th Cir. 2012).

G. Plumbing Issues.

Courts have held that short-term breakdown of an inmate's in-cell plumbing where the inmate is otherwise provided with food, beverages, access to showers, and access to toilets, does not rise to the level of a constitutional violation. *See, e.g., Mims v. Hardy*, No. 11 C 6794, 2013 WL 2451149, at * 9 (N.D. Ill. June 5, 2013) (inability to get drinking water form sink in cell did not rise to a constitutional level because plaintiff had access to drinking water outside of cell and other beverages from commissary); *Muhammad v. Wilson*, No. 05 C 743, 2006 WL 2413710, at *2–3 (N.D. Ill. Aug.16, 2006) (broken plumbing for seven days where plaintiff was given three meals a day, including beverages with each meal, "was an inconvenience" and "did not amount to a constitutional violation"); *Easter v. Cooper*, No. 91 C 4520, 1995 WL 109343, at *3 (N.D. Ill. March 10, 1995) (no running water for seven days constitutes an inconvenience but does not violate the Constitution); *Tesch v. County of Lake*, 157 F.3d 465, 476 (7th Cir. 1998) (denial of drinking water for several days is not a constitutional violation when inmates receive beverages with each of his three daily meals); *Davis v. Biller*, No. 00 C 50261, 2003 WL 22764872, at *2 (N.D. Ill. Nov.19, 2003) (inmate has a basic right to drinking water, but a dysfunctional sink alone is not necessarily cruel and unusual punishment).

However, long term plumbing issues may rise to a constitutional violation. *See, e.g., Mims v. Hardy*, No. 11 C 6794, 2013 WL 2451149, at * 10 (N.D. Ill. June 5, 2013) (disputed material facts existed regarding a lack of access to a functioning toilet for a forty-five day period).

H. Noise Levels.

Although periodic or occasional noises are insufficient, *Lunsford v. Bennett*, 17 F.3d 1574, 1580 (7th Cir. 1994) ("Subjecting a prisoner to a few hours of periodic loud noises that merely annoy, rather than injure the prisoner does not demonstrate a disregard for the prisoner's welfare."), excessive or continuous noise, particularly where

it disrupts or prevents sleep, may violate the Constitution. *See Sanders v. Sheahan*, 19 F.3d 626, 628 (7th Cir. 1999) (holding that "allegation of continuous, excessive noise, states a claim under the due process clause"); *Antonelli v. Sheahan*, 81 F.3d 1422, 1433 (7th Cir. 1996) (holding that "noise occur[ring] every night, often all night, interrupting or preventing [] sleep" stated due process claim); *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996) (reversing summary judgment in favor of official who subjected prisoner to around-the-clock "screaming, wailing, crying, singing and yelling," along with constant banging noises, caused by other inmates). An official who knows of or disregards such conditions may be liable for deliberate indifference. *Townsend v. Fuchs*, 522 F.3d 765, 773 (7th Cir. 2008) (official acts with deliberate indifference when they know inmate faces substantial risk of harm but disregards that risk by not taking reasonable measures to address it). However, allegations regarding noise often are too "localized" to subject high-level officials to liability. *See Sanders*, 198 F.3d at 629 (holding that allegations of noise were "confined to conditions of [a] particular dormitory" and are too localized to state a claim against sheriff). Moreover, periodic or occasional noises may not rise to the level of a constitutional violation.

I. Combination of Conditions.

"Conditions of confinement, even if not individually serious enough to work constitutional violations, may violate the Constitution in combination when they have 'a mutually enforcing effect that produces the deprivation of a single, identifiable human need.'" *Budd v. Motley*, 711 F.3d 840, 842-43 (7th Cir. 2013) (quoting *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)).

Examples of finding unconstitutional conditions of confinement based on combined conditions include: *Gray v. Hardy*, 826 F.3d 1000, 1005-06 (7th Cir. 2016) (insect infestation along with lack of cleaning supplies and broken window in cell could constitute unconstitutional condition of confinement); *Vinning-El v. Long*, 482 F.3d 923, 924 (7th Cir. 2007) (prisoner housed in cell for six days where floor was covered with water, the sink and toilet did not function and the walls were smeared with blood and feces, constituted unconstitutional conditions of confinement); *Mims v. Hardy*, No. 11 C 6794, 2013 WL 2451149, at * 10 (N.D. Ill. June 5, 2013) (finding a jury could find that conditions including a non-functioning sink, broken toilet, smell of feces, temperatures at or close to 100 degrees Fahrenheit, and poor air circulation for a forty-five day period were sufficiently serious to deprive plaintiff of the minimal civilized measures of life's necessities); *Hicks v. Irvin*, No. 06 C 0645, 2012 WL 4092621, at *5 (N.D. Ill. Sept. 17, 2012) (where there was an indefinite number of bugs in the cell over a six-day period, the toilet would not flush and was backed up with feces, and plaintiff was provided only 12 to 18 ounces of water per day, a genuine issue of material fact existed as to whether Plaintiff was denied his basic needs).

Examples of finding combined conditions did not constitute a constitutional violation include: *Sain v. Wood*, 512 F.3d 886, 894 (7th Cir. 2008)(peeling paint, foul odor in cell, lack of air conditioning, inability to open window without letting bugs in, and seeing several cockroaches over a six-year period did not amount to a constitutional violation); *Murithi v. Hardy*, No. 13 C 0599, 2016 WL 890695, at *9 (N.D. Ill. March 9, 2016) (individual claims of lack of cleaning supplies, poor ventilation, and presence of birds, mice and other pests did not rise to constitutional violation in isolation or in combination – while claims described unpleasant conditions, they did not rise to the level of a deprivation of basic human necessities).

Inadequate Medical Care Claims

I. Who Must Provide the Prisoners With Medical Care

Prisoners are not able to obtain their own medical services, so the Constitution requires prison authorities to provide them with reasonably adequate medical care.

Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. . . . The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that '[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.'").

II. Who can the Prisoner Sue

A. Doctors and other medical personnel (including those of private corporations who contract with local/state governments) can be liable for the consequences of their own acts or omission that amount to deliberate indifference.

Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003) ("Because § 1983 does not allow actions against individuals merely for their supervisory role of others, individual liability under . . . § 1983 can only be based on a finding that the defendant caused the deprivation at issue.") (internal quotations and citations omitted).

B. Correctional personnel who fail to obtain help for a prisoner, keep the prisoner from seeing the medical staff, or interfere with prescribed treatment.

Dobbey v. Mitchell-Lawshea, 806 F.3d 938, 940 (7th Cir. 2015) ("[A] guard who is aware of complaints of pain and does nothing to help a suffering prisoner obtain treatment is likewise exhibiting deliberate indifference.").

C. Wardens and other supervisors are *not* deliberately indifferent when they rely on the judgment of qualified medical personnel. *But* they may be deliberately indifferent if they fail to provide adequate staff or qualified staff, if they maintain policies that interfere with adequate medical care, or if they fail to remedy unlawful conditions that they know about.

Arnett v. Webster, 658 F.3d 742, 755 (7th Cir. 2011) ("Non-medical defendants . . . can rely on the expertise of medical personnel. We have previously stated that if a prisoner is under the care of medical experts, a non-medical prison official will generally be justified in believing that the prisoner is in capable hands. . . . However, non-medical officials can be chargeable with deliberate indifference where they have a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner.") (internal quotations and citations omitted).

D. County or city governments if a prisoner's injury was caused by a city/county policy.

Davis v. Carter, 452 F.3d 686, 691 (7th Cir. 2006) ("To establish [County's] liability under . . . §1983, the plaintiff was required to show that [plaintiff] was deprived of a federal right, as a result of an express municipal policy, widespread custom, or deliberate act of a decision-maker for [County], which proximately caused his injury.") (citing *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 690-91 (1978)).

E. Private Medical Corporations and Employees if a prisoner's injury was caused by a corporate policy.

See Woodward v. Corr. Med. Serv. of Ill., Inc., 368 F.3d 917, 927 (7th Cir. 2004) (corporate entity violates an inmate's constitutional rights only when it has a policy that creates conditions that infringe upon an inmate's constitutional rights). *See also Jackson v. Ill. Medi-Car, Inc.*, 300 F.3d 760, 766 n.6 (7th Cir. 2002) (private corporation is treated as though it were a municipal entity in a § 1983 action).

Notably, while **federal prisoners** may bring *Bivens* actions for damages against prison employees or employees of a private corporation that contracts with the BOP,

they may not bring actions against the corporations that contract with the Federal Bureau of Prisons.

III. Which Amendment Applies

A. Arrestee/Pretrial Detainee (awaiting a probable cause determination): Fourth Amendment. "The relevant legal standard for arrestees who have been seized but who have not yet had their probable cause hearing . . . comes from the Fourth Amendment, not the Fourteenth, and certainly not the Eighth. The issue is whether the state actor's 'response to [the arrestee]'s medical needs was objectively unreasonable' and 'caused the harm of which [the arrestee] complains.'" *Currie v. Chhabra*, 728 F.3d 626, 631 (7th Cir. 2013).

Williams v. Rodriguez, 509 F.3d 392, 403 (7th Cir. 2007) (identifying four factors that are relevant for ascertaining whether a defendant's conduct was objectively unreasonable: (1) whether the officer is given notice of the arrestee's medical need, whether by word or through observation of the arrestee's physical symptoms; (2) the seriousness of the medical need, though the severity of the medical condition need not, on its own, rise to the level of objective seriousness required under the Eighth and Fourteenth Amendments; (3) the scope of the requested treatment; and (4) police interests, which is wide-ranging in scope and can include administrative, penological, or investigatory concerns) (citing *Sides v. City of Champaign*, 496 F.3d 820 (7th Cir. 2007)).

B. Pretrial Detainee (post determination of probable case) and Civil Detainee: Fourteenth Amendment (although Eighth Amendment standards apply). "We have held that there is little practical difference, if any, between the standards applicable to pretrial detainees and convicted inmates when it comes to conditions of confinement claims, and that such claims brought under the Fourteenth Amendment are appropriately analyzed under the Eighth Amendment test." *Smith v. Dart*, 803 F.3d 304, 310 (7th Cir. 2015) (citing *Smego v. Mitchell*, 723 F.3d 752, 756 (7th Cir. 2013), *Hart v. Sheahan*, 396 F.3d 887, 892 (7th Cir. 2005), *Weiss v. Cooley*, 230 F.3d 1027, 1032 (7th Cir. 2000)).

McGee v. Adams, 721 F.3d 474, 480 (7th Cir. 2013) ("Claims concerning the conditions of civil detainees are assessed under the due process clause of the Fourteenth Amendment. . . . For claims of deliberate indifference, like this one, this Court has previously found it convenient and entirely appropriate to apply the same standard to claims arising under the Fourteenth Amendment (detainees) and Eighth Amendment

(convicted prisoners) without differentiation.") (internal quotations and citations omitted).

C. Prisoner: Eighth Amendment. "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

IV. What Constitutes Deliberate Indifference Under the Eighth Amendment

A. Basic Rule.

The defendants must have had actual knowledge of an objectively serious medical need and they did not respond reasonably to the need.

Farmer v. Brennan, 511 U.S. 825, 837 (1994); *Greeno v. Daley*, 414 F.3d 645, 652-53 (7th Cir. 2005) ("A claim of deliberate indifference to a serious medical need contains both an objective and a subjective component. To satisfy the objective component, a prisoner must demonstrate that his medical condition is 'objectively, sufficiently serious.'. . . To satisfy the subjective component, a prisoner must demonstrate that prison officials acted with a 'sufficiently culpable state of mind.' The officials must know of and disregard an excessive risk to inmate health; indeed they must 'both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists' and 'must also draw the inference.'")

1. Actual Knowledge.

Statements that medical staff did not know about the condition when there is contrary evidence will be insufficient for summary judgment.

Conley v. Birch, 796 F3d 742, 747 (7th Cir. 2015) ("An official may not escape liability by 'refus[ing] to verify underlying facts that [s]he strongly suspect[s] to be true.'") (quoting *Farmer v. Brennan*, 511 U.S. 825, 843 n. 8 (1994)).

An official who has a sincere belief that an inmate is malingering will not be found to be deliberately indifferent. However, an official's statement that she believed a prisoner was malingering when there is evidence to the contrary will not prevail at summary judgment.

Townsend v. Cooper, 759 F.3d 678, 690 (7th Cir. 2014) (citing *Rice ex rel. Rice v. Correctional Med. Servs.*, 675 F.3d 650, 684 (7th Cir. 2012)); *Walker v. Benjamin*, 293 F.3d 1030, 1040 (7th Cir. 2002) (nurse and doctor's refusal to give prescribed pain medication could be deliberate indifference; their proffered excuse that they

thought prisoner was malingering in order to get narcotics was a question for the jury).

2. Objectively Serious Medical Need.

Not all medical conditions are sufficiently serious to implicate the Eighth Amendment.

Reed v. McBride, 178 F.3d 849, 852-53 (7th Cir. 1999) ("For example, a prison medical staff's refusal to 'dispense bromides for the sniffles or minor aches and pains or a tiny scratch or a mild headache or minor fatigue . . . does not violate the Constitution." (quoting *Cooper v. Casey*, 97 F.3d 914, 916 (7th Cir. 1996)).

A serious medical need is often defined as one that has been diagnosed by a doctor as requiring treatment or one that is so obvious that even a lay person would recognize the need for a doctor's attention. *Hayes v. Snyder*, 546 F.3d 516, 522 (7th Cir. 2008); *Greeno v. Daley*, 414 F.3d 645, 652-53 (7th Cir. 2005).

May also look to whether condition causes pain, disables a prisoner, interferes with daily activities, or is chronic (e.g., cluster headaches). *Edens v. Larson*, 110 F. App'x 710, 714 (7th Cir. 2004) (unpublished) (finding cluster headaches to be objectively serious because, if left untreated, they can be severely painful, even to the point of disability).

In cases where there is a delay of treatment or an interruption in treatment, the court will focus on the seriousness of the delay or interruption, not on the seriousness of the underlying condition. *Conley v. Birch*, 796 F.3d 742 (7th Cir. 2015) ("In cases where prison officials delayed rather than denied medical assistance to an inmate, the plaintiff must offer verifying medical evidence that the delay (rather than the inmate's underlying condition) caused some degree of harm.") (quoting *Jackson v. Pollion*, 733 F.3d 786, 790 (7th Cir. 2013)).

Includes serious dental needs (e.g., extraction of decayed teeth, need for dentures). *Wynn v. Southward*, 251 F.3d 588, 593 (7th Cir. 2001) (allegation of inability to chew, bleeding, headaches, and disfigurement from lack of dentures states a serious medical need).

3. Deliberate Indifference.

Deliberate indifference occurs when a defendant realizes that a substantial risk of serious harm to a prisoner exists, and then disregards that risk. *Perez v. Fenoglio*, 792 F.3d 768, 776 (7th Cir. 2015).

4. Common fact patterns giving rise to claim of deliberate indifference.

a. Direct Evidence of Deliberate Indifference.

Greeno v. Daley, 414 F.3d 645, 654 (7th Cir. 2005) (nurse told prisoner that if he did not stop "hassling" the medical staff he would be "locked up"); *Board v. Farnham*, 394 F.3d 469, 481-82 (7th Cir. 2005) (breaking off teeth rather than extracting them and denial of toothpaste for extended periods supports Eighth Amendment claim); *Murphy v. Walker*, 51 F.3d 714, 719 (7th Cir. 1995) (prisoner suffering pain after head injury who was told by guard to "stop being a baby" and learn to live with the pain could proceed with claim).

b. Denial or Delay of Access to Treatment.

May include interference with access to medical personnel or to a hospital, or failure of medical personnel to timely deal with a prisoner's serious condition. May also include persistence in an easier but ineffective course of treatment. Actionable only if delay results in substantial harm (met if pain and suffering is prolonged). Verifying medical evidence may be required to support a claim that delay has caused harm.

Ortiz v. Webster, 655 F.3d 731, 735 (7th Cir. 2011); *Berry v. Peterman*, 604 F.3d 435, 441 (7th Cir. 2010); *Dobbey v. Mitchell-Lawshea*, 806 F.3d 938 (7th Cir. 2015) ("A dentist demonstrates deliberate indifference by failing to treat the patient promptly, thus prolonging the patient's pain while knowing that the patient may well be in serious pain that is treatable."); *Rowe v. Gibson*, 798 F.3d 622 (7th Cir. 2015) (limiting the administration of heartburn medication to certain times of day could amount to deliberate indifference given prisoner's alleged severe pain, which could have been avoided if medication had been administered earlier).

c. Denial of Access to a Specialist or Qualified Medical Personnel.

Referral to a specialist may be required if prisoner's needs are beyond capacity of handling physician. *Hayes v. Snyder*, 546 F.3d 516, 526 (7th Cir. 2008) (refusal to refer to a specialist where doctor did not know cause of reported extreme pain made no sense and could support deliberate indifference finding); *Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005) (holding that refusal to refer prisoner to a specialist or order a colonoscopy despite intense abdominal pain could support deliberate indifference).

However, prisoners do not have a constitutional right to see the doctor of their choice. *Powell v. Shah*, 618 F. App'x 292 (7th Cir. 2015) (Doctors not deliberately indifferent when they decided not to refer prisoner to a specialist or PT because, after appropriate exams, they concluded his injury could be treated with a brace, pain meds, and exercise. Mere disagreement with doctors' treatment decisions is not actionable); *Pyles v. Fahim*, 771 F.3d 403 (7th Cir. 2014) (Prison physician's failure to refer prisoner to specialist after prisoner complained of back pain was not deliberate indifference to prisoner's serious medical needs; prisoner had common ailment, physician prescribed medications, and, after those medications did not appear to help, physician tried new medications or dosages).

d. Failure to Inquire into Essential Facts Necessary to Make a Professional Judgment.

May include failure to conduct an adequate examination, failure to ask necessary questions or take a history, or failure to conduct tests called for by the symptoms. *Rowe v. Gibson*, 798 F.3d 622, 627 (7th Cir. 2015) ("He opined with confidence about what Rowe needed or didn't need—yet never examined him—and offered no basis for his off-the-cuff medical opinion."); *Conley v. Birch*, 796 F3d 742, 747 (7th Cir. 2015) ("An official may not escape liability by 'refus[ing] to verify underlying facts that [s]he strongly suspect[s] to be true.'") (quoting *Farmer v. Brennan*, 511 U.S. 825, 843 n. 8 (1994)).

e. Systemic Deficiencies.

May include insufficient staffing, deficient facilities and/or procedures, overly restrictive rules or policies unrelated to prisoner's medical needs, or failure to stock prescribed medications. *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983) (deliberate indifference can be evidenced by "proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care." (quoting *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980))); *Gil v. Reed*, 381 F.3d 649, 663 n.3 (7th Cir. 2004).

f. Cost.

It is not permissible to deny a prisoner adequate medical care because it is too costly. *Ralston v. McGovern*, 167 F.3d 1160, 1162 (7th Cir. 1999) (the "civilized minimum" of medical care "is a function both of objective need and of cost. The lower the cost, the less need has to be shown, but the need must still be shown to be substantial."); *Luckett v. Heidorn*, 566 F. App'x 516, 520 (7th Cir. 2014) (unpublished) (prison officials can take into account the cost of alternative treatments so long as they do not choose a treatment that they know will be ineffective).

But, "Under the Eighth Amendment, [a plaintiff] is not entitled to demand specific care. She is not entitled to the best care possible. She is entitled to reasonable measures to meet a substantial risk of serious harm to her." *Forbes v Edgar*, 112 F.3d 262, 267 (7th Cir. 1997).

g. Failure to Carry out Medical Orders.

May include the failure to provide prescribed medication, the failure to act on medical recommendations for surgery or other specialized care (often not available in the prison), the failure to carry out a specialist's recommendations (from before or after incarceration). *Jones v. Simek*, 193 F.3d 485, 492 (7th Cir. 1999) (citing failure to follow specialist's recommendations as supporting claim of deliberate indifference); *Walker v. Benjamin*, 293 F.3d 1030, 1040 (7th Cir. 2002) (nurse and doctor's refusal to give prescribed pain medication could be deliberate indifference; their proffered excuse that they thought prisoner was malingering is a question for the jury).

The circumstances matter: prison officials are not necessarily required to continue treatments started or recommended by the prisoner's

own physician, nor must the necessarily follow the orders of a specialist if they can argue that failure to follow such recommendations merely represents a difference in opinion.

Prison officials must provide special diets that are medically ordered, but brief or harmless delays/interruptions are not unconstitutional. *Sellers v. Henman*, 41 F.3d 1100, 1102 (7th Cir. 1994).

h. Extreme Cases of Bad Judgment or Failure to Exercise Judgment.

A plaintiff can show that the professional disregarded the need only if the professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, that no minimally competent professional would have so responded under those circumstances. May include gross departures from accepted medical standards or failure to follow prison medical care protocols. *Pyles v. Fahim*, 771 F.3d 403, 409 (7th Cir. 2014); *Holloway v. Del. Cnty. Sheriff*, 700 F.3d 1063, 1073 (7th Cir. 2012); *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006); *Collignon v. Milwaukee County*, 163 F.3d 982, 989 (7th Cir. 1998).

i. Cursory Treatment that Essentially Equates to No Treatment.

"If all the Eighth Amendment required was that prison officials provide some immediate and ongoing attention, they could shield themselves from liability (and save considerable resources) by shuttling sick or injured inmates to perfunctory medical appointments wherein no meaningful treatment is dispensed. Needless to say, the responsibilities imposed by the Constitution are not so easily avoided." *Perez v. Fenoglio*, 792 F.3d 768, 777 (7th Cir. 2015).

Hughes v. Joliet Corr. Ctr., 931 F.2d 425, 428 (7th Cir. 1991) (evidence that medical staff treated the plaintiff "not as a patient, but as a nuisance," and "were insufficiently interested in his health to take even minimal steps to guard against the possibility that the injury was severe" could support a finding of deliberate indifference).

B. Excluded from Basic Rule: What Does *Not* State a Claim under the Eighth Amendment.

1. Negligence/medical malpractice.

To avoid malpractice, a doctor need only exercise ordinary knowledge, skill, and care ordinarily employed by members of the profession in good standing. The mere fact that treatment is unsuccessful or has a bad result does not mean there has been malpractice. *Burton v. Downey*, 805 F.3d 776, 786 (7th Cir. 2015) (holding that a two-day delay in distributing medication to a detainee did not amount to deliberate indifference because "[n]egligence, gross negligence, or even 'recklessness' as that term is used in tort cases, is not enough.") (quoting *Shockley v. Jones*, 823 F.2d 1068, 1072 (7th Cir. 1987)); *McGee v. Adams*, 721 F.3d 474, 481 (7th Cir. 2014) ("To establish deliberate indifference, [plaintiff] must meet essentially a criminal recklessness standard, that is, ignoring a known risk. Even gross negligence is insufficient to impose constitutional liability . . . .") (citations omitted).

2. Disagreements with Doctor's Exercise of Judgment.

The court will not take sides in disagreements with a medical provider's judgment regarding treatment. As long as there has been an exercise of professional judgment, the court will generally hold that the Constitution has been satisfied. *Duckworth v. Ahmad*, 532 F.3d 675, 681 (7th Cir. 2008) (failure to rule out cancer immediately in light of persistent bloody urine may have been malpractice but was not deliberate indifference); *Burton v. Downey*, 805 F.3d 776, 786 (7th Cir. 2015) ("evidence that another doctor would have followed a different course of treatment is insufficient to sustain a deliberate indifference claim").

Excessive Force and Failure to Intervene Claims

I. Applicability of Eighth Amendment

"In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 394 (1989). "In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which

are the two primary sources of constitutional protection against physically abusive governmental conduct." *Id.* When an excessive force claim arises in the context of an arrest, investigatory stop, or any other type of seizure, it is analyzed under the Fourth Amendment's reasonableness standard. *Stainback v. Dixon*, 569 F.3d 767, 771 (7th Cir. 2009).[1] However, the Eighth Amendment "applies to excessive force claims arising after conviction, and protects against the 'unnecessary and wanton infliction of pain.'" *Kinney v. Indiana Youth Center*, 950 F.2d 462, 465 (7th Cir. 1991) (quoting *Graham*, 490 U.S. at 395 n. 10).[2]

II. Excessive Force

The intentional use of excessive force by prison guards against an inmate without penological justification constitutes cruel and unusual punishment in violation of the Eighth Amendment and is actionable under § 1983. *See Wilkins v. Gaddy*, 559 U.S. 34 (2010); *DeWalt v. Carter*, 224 F.3d 607, 619 (7th Cir. 2000). In order to maintain a claim for excessive force, an inmate must show that an assault occurred, and that "it was carried out 'maliciously and sadistically' rather than as part of 'a good-faith effort to maintain or restore discipline.' " *Wilkins*, 559 U.S. at 40 (citing *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)). An inmate seeking damages for the use of excessive force need not establish serious bodily injury to make a claim, but not "every malevolent touch by a prison guard gives rise to a federal cause of action." *Wilkins*, 559 U.S. at 37-38 (the question is whether force was de minimis, not whether the injury suffered was de minimis); *see also Outlaw v. Newkirk*, 259 F.3d 833, 837-38 (7th Cir. 2001).

II. Failure to Intervene

A correctional officer may also be liable under the Eighth Amendment for failing to intervene if he or she has a realistic opportunity to step forward and protect a plaintiff from another officer's excessive force, but fails to do so. *Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005). However, a failure to intervene claim is only viable if there is an underlying constitutional violation. *Id*.

[1] Fourth Amendment claims are addressed separately below.

[2] The Due Process clause applies to prevent "punishment" of pretrial detainees. *See Kinney v. Indiana Youth Center*, 950 F.2d 462, 465 (7th Cir. 1991) ("In between arrest and conviction, the due process clause applies to preclude the use of force that amounts to punishment.").

Non-Prisoner Claims Arising Under the Fourth Amendment

I. Excessive Force

An excessive force claim involving an arrest or investigatory stop "originates from the Fourth Amendment's protection against unreasonable seizures." *Alicea v. Thomas*, 815 F.3d 283, 288 (7th Cir. 2016) (citing *Graham v. Connor*, 490 U.S. 386, 394 (1989)). The relevant question is whether the use of force was objectively reasonable in light of the totality of the circumstances. *Fitzgerald v. Santoro*, 707 F.3d 725, 733 (7th Cir. 2013) (citing *Graham*, 490 U.S. at 396). "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396; *Compare Flournoy v. City of Chicago*, 829 F.3d 869 (7th Cir. 2016) (affirming jury verdict finding no Fourth Amendment violation when SWAT team used flashbang grenade in executing search warrant for home of known armed drug dealer), *with Becker v. Elfreich*, 821 F.3d 920, 928 (7th Cir. 2016) (finding of excessive force when police officer continued to place knee in suspect's back, pulled him down three stairs, and allowed a police dog to continue to violently bite his leg after the suspect had surrendered).

The reasonableness of the force is judged from the perspective of a reasonable officer in the defendant's position, rather than with 20/20 hindsight. *Fitzgerald*, 707 F.3d at 733 (citing *Graham*, 490 U.S. at 396). "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Graham*, 490 U.S. at 397. "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Id*. at 396. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id*. at 397.

Summary judgment is often inappropriate in excessive force cases because the evidence surrounding the officer's use of force is susceptible to different interpretations, and the parties have different recollections of what occurred. *Cyrus v. Town of Mukwonago*, 624 F.3d 856, 862 (7th Cir. 2010). However, summary judgment is proper in an excessive force case when there is no genuine issue of material fact between the parties, and the moving party is entitled to judgment as a matter of law. *Catlin v. City of*

Wheaton, 574 F.3d 361, 367 (7th Cir. 2009). Even if there is a dispute between the parties regarding what happened, summary judgment is permissible if one story is "blatantly contradicted by the record, so that no reasonable jury would believe it . . . ." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that party's position was contradicted by videotape of incident, requiring court to reject party's position on what occurred and instead rely on videotape).

In addition to the federal constitutional excessive force claim, a plaintiff may also bring associated state law claims such as claims of battery and intentional infliction of emotional distress.

II. Failure to Intervene

"[I]n a section 1983 action alleging that police violated the plaintiff's Fourth Amendment rights by subjecting him to excessive force, a defendant police officer may be held to account both for his own use of excessive force on the plaintiff, as well as his failure to take reasonable steps to attempt to stop the use of excessive force used by his fellow officers." *Sanchez v. City of Chicago*, 700 F.3d 919, 925–26 (7th Cir. 2012). A claim requires a showing that the government official: (1) knew her fellow official was violating the constitution; and, (2) had a realistic opportunity to intervene to stop the violation. *Lewis v. Downey*, 581 F.3d 467, 472 (7th Cir. 2007).

For a second official to be held liable for failing to intervene, the underlying conduct of the first official must be unlawful. *Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005) ("In order for there to be a failure to intervene, it logically follows that there must exist an underlying constitutional violation. . . ."). Additionally, as with all civil rights based claims, a government official can only be held liable if her individual conduct violates the Constitution. The officer cannot be held liable under a vicarious liability theory. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (reiterating well established principle that there is no vicarious liability for government officials in civil rights litigation).

Additionally, the fact that a government official knows of a constitutional violation does not automatically mean she is liable for failing to intervene. The official instead, must have had a realistic opportunity to intervene to stop the violation. A governmental official cannot be held liable for failing to intervene when her governmental position does not give her a realistic opportunity to intervene. *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009) ("Public officials do not have a free-floating obligation to put things right, disregarding rules [] along the way.").

III. Unreasonable Restraint on Movement

A plaintiff may also allege an unlawful seizure through an unconstitutional restraint on movement.

A. *Terry* Stop.

A police officer may lawfully stop a person (be it on foot or in a vehicle) if there is proper justification to support the detention. The lowest level of necessary justification to support a stop is reasonable and articulable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1967). Law enforcement may stop a person if there is reasonable suspicion that criminal activity is afoot. *D.Z. v. Buell*, 796 F.3d 749, 754 (7th Cir. 2015). Reasonable suspicion must be based on specific facts to suggest that the stopped person has committed a crime --- it must be more than a mere hunch. *Id*. Although there must be more than a mere hunch, the required suspicion is less than probable cause or a preponderance of the evidence. *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014). The question of whether there was reasonable suspicion for the stop is viewed objectively, looking at the totality of the circumstances. *Id*.

B. False Arrest and False Imprisonment.

Unlike a *Terry* stop where the police officer detains a person for an investigative purpose, a false arrest claim challenges the legality of an arrest. A claim for false arrest asserts that there was no probable cause to support the arrest. *Neita v. City of Chicago*, 830 F.3d 494, 497 (7th Cir. 2016). Similarly, false imprisonment alleges an unlawful detention that is not supported by probable cause. *Hawkins v. Mitchell*, 756 F.3d 983, 994 (7th Cir. 2014). Thus, the existence of probable cause at the time of the arrest or detention defeats the claims. Furthermore, even if there was false arrest or false imprisonment, the claim ends upon the finding of valid cause to support the detention such as an appearance before a magistrate or arraignment on charges. *Wallace v. Kato*, 549 U.S. 384, 389 (2007).

Probable cause is established by viewing all the facts known to the officer at the time of the arrest and considering whether a reasonable person would believe the arrestee has committed or is committing a crime. *Hawkins*, 756 F.3d at 994. An arrest occurs when, viewing all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Fox v. Hayes*, 600 F.3d 819, 833 (7th Cir. 2010).

IV. Failure to Protect and Provide Care

"'[W]hen the State takes a person into its custody and holds her there against her will, the Constitution imposes upon it a corresponding duty to assume some

responsibility for her safety and general well-being.'" *Ortiz v. City of Chicago*, 656 F.3d 523, 531 (7th Cir. 2011) (quoting *DeShaney v. Winnebago Cnty. Dep't of Soc. Serv.*, 489 U.S. 189, 199-200 (1989)). Traditionally, detainees make two types of claims regarding their custody: failure to provide necessities (proper food, clothing, shelter, medical care, etc.), or failure to protect from assault from inmates or guards. The scope of the constitutional requirement is based on the plaintiff's status in the criminal justice system. The period between an arrest without a warrant and probable cause hearing is governed by the Fourth Amendment. *Currie v. Chhabra*, 728 F.3d 626, 629 (7th Cir. 2013). (Treatment after the probable cause hearing is discussed in later materials).

A common Fourth Amendment claim is failure to provide medical care following an arrest. As with all Fourth Amendment claims, the analysis considers all facts and circumstances under the objectively reasonable standard. *Ortiz*, 656 F.3d at 530. Facts that inform whether the denial of medical care was objectively unreasonable include: "(1) whether the officer has notice of the detainee's medical needs; (2) the seriousness of the medical need; (3) the scope of the requested treatment; and (4) police interests, including administrative, penological, or investigatory concerns." *Id*. at 530 (citing *Williams v. Rodriguez*, 509 F.3d 392, 403 (7th Cir. 2007)).

V. Unreasonable Searches

A. Introduction.

The Court considers the underlying Fourth Amendment jurisprudence when considering the legality of a challenged search in a civil rights lawsuit. As a general principle, the Fourth Amendment only prohibits unreasonable searches, and to answer whether the search is reasonable one must consider whether the search intrudes on a reasonable privacy expectation. *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015).

B. Reduced Fourth Amendment Protections.

There are certain times when the full scope of the Fourth Amendment will not apply regarding a search. For example, a search at an international border, or functional equivalent where a person or package first touched American soil such as an airport or package center, need not be supported by a warrant or even by any particularized suspicion. *Rahman v. Chertoff*, 530 F.3d 622, 624 (7th Cir. 2008) (citing *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004). Other examples include parolees and released sex offenders, *Samson v. California*, 547 U.S. 843 (2006) (upholding California requirement that parolee agree to be subject to search or seizure by parole officer for any time without the existence of proper cause as a condition of placement onto parole); *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016) (sex offender can be required to wear a GPS monitoring ankle bracelet for the rest of his life following his release from prison), the general public when being stopped at a highway sobriety checkpoint,

Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990), and students. *New Jersey v. T.L.O.*, 469 U.S. 325, 340-44 (1985).

C. Strip Searches.

Detainees may face strip search upon arrest by the police, and entry into jail. The constitutionality of a strip search is evaluated by balancing the need for the particular search against the invasion of personal rights that the search entails. *Campbell v. Miller*, 499 F.3d 711, 716 (7th Cir. 2007) (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). The Court must consider the scope the particular intrusion, the manner in which it was conducted, the justification for initiating it, and the place in which it is conducted. *Campbell*, 499 F.3d at 716.

An arrestee entering into jail as a pretrial detainee can be subjected to a routine visual strip search without individualized suspicion that the detainee is concealing contraband. *King v. McCarty*, 781 F.3d 889, 900 (7th Cir. 2015) (per curiam) (citing *Florence v. Bd of Chosen Freeholders of the County of Burlington*, 132 S. Ct. 1510, 1515, 1523 (2012)). However, a strip search cannot be conducted simply to harass, humiliate, or inflict psychological pain. *Calhoun v. DeTella*, 319 F.3d 936, 939 (7th Cir. 2003).

D. Destruction of Property during a Search.

An officer can be held liable for destruction of property during an otherwise proper search. When executing a search warrant, an officer is permitted to damage property to conduct the search. *Dalia v. United States*, 441 U.S. 238, 258 (1979). However, excessive or unnecessary destruction of property violates the Fourth Amendment. *United States v. Ramirez*, 523 U.S. 65, 71 (1998). As with all Fourth Amendment claims, the question of whether the destruction of the property is unlawful is evaluated by considering the totality of the circumstances under an objectively reasonableness standard. *Id*.

Statute of Limitations

A. State Law Controls

To determine the statute of limitations against state or local officials (under 42 U.S.C. § 1983), or against federal officials (under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)), the Court looks to the statute of limitations for personal injury actions in the state where the incident forming the basis of the claim occurred. *King v. One Unknown Federal Corr. Officer*, 201 F.3d 910, 913 (7th Cir. 2000). Claims from Illinois and Indiana have a two-year statute of limitations. *Wallace v. Kato*, 549 U.S. 384, 387 (2007) (Illinois); *King*, 201 F.3d at 913 (Indiana). Claims from Wisconsin are governed by a six-year statute of limitations. *Wudtke v. Davel*, 128 F.3d 1057, 1061 (7th Cir. 1997).

B. Accrual Date

1. Generally

Although the limitations period for § 1983 claims is based on state law, the "accrual date of a § 1983 cause of action is a question of federal law that is not resolved by state law." *Wallace v. Kato*, 549 U.S. 384, 388 (2007). Generally, a § 1983 claim begins to accrue when the plaintiff has a "complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Id*. (citation and quotation omitted). Ongoing violations of the plaintiff's constitutional rights may delay the accrual date of the plaintiff's claim under the continuing violation doctrine. *Heard v. Sheahan*, 253 F.3d 316, 319 (7th Cir. 2001). For continuing violations, "the two-year period starts to run (that is, the cause of action accrues) from the date of the last incidence of that violation, not the first." *Turley v. Rednour*, 729 F.3d 645, 651 (7th Cir.2013). Notably, a defendant's continuing violation of the plaintiff's rights can delay the start of the limitations period only "for as long as the defendant[ ] had the power to do something about [the plaintiff's] condition." *Heard,* 253 F.3d at 318.

2. Deliberate Indifference

"Deliberate indifference to a serious medical need is a continuing violation that accrues when the defendant has notice of the untreated condition," and typically "ends only when treatment is provided or the inmate is released." *Jervis v. Mitcheff*, 258 F. App'x 3, *5–6 (7th Cir. 2007). This is because "it would be unreasonable to require or even permit [a prisoner] to sue separately over every incident of the defendant's unlawful conduct." *Turley v. Rednour*, 729 F.3d 645, 651 (7th Cir. 2013) (quoting *Heard v. Sheahan*, 253 F.3d 316, 318 (7th Cir. 2001)) (internal quotation marks omitted).

3. Excessive Force and False Arrest

An excessive force claim accrues immediately at the time of the alleged incident, while a false arrest and false imprisonment claim accrues at the time the person is brought before a magistrate or arraigned on charges. *Wallace v. Kato*, 549 U.S. 384, 396 (2007); *Neita v. City of Chicago*, 830 F.3d 494, 498 (7th Cir. 2016); *Parish v. City of Elkhart*, 614 F.3d 677, 681 (7th Cir. 2010). Thus, there is little to no delay in the running of the statute of limitations after the occurrence of the challenged incident.

4. *Heck v. Humphrey*

Under *Heck v. Humphrey*, a claim that implies the invalidity of a conviction does not accrue until the conviction has been invalidated. 512 U.S. 477, 486–87

(1994). Thus, under Heck's deferred accrual rule, the statute of limitations is tolled for a *Heck*-barred claim until the conviction has been set aside. *See Moore v. Burge*, 771 F.3d 444, 446 (7th Cir. 2014). Fourth Amendment claims traditionally do not implicate a conviction or sentence. This is because a person can be lawfully convicted and sentenced despite a Fourth Amendment violation. *Wallace v. City of Chicago*, 440 F.3d 421, 426-28 (7th Cir. 2006). Thus, the rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), rarely applies to Fourth Amendment based claims. *Hill v. Murphy*, 785 F.3d 242, 245 (7th Cir. 2015). However, it is possible to implicate *Heck* based on the particular facts involved with the Fourth Amendment claim. *Evans v. Poskon*, 603 F.3d 362, 364 (7th Cir. 2010) (*Heck* applied when conviction is for resisting arrest); *Okoro v. Callaghan*, 324 F.3d 488, 489 (7th Cir. 2003) (*Heck* applied to claim for theft of gems when jury rejected his claim at criminal trial that he was trying to sell gems instead of selling drugs).

C. Unidentified Defendants

If a plaintiff does not know the identity of a defendant, she may initially name the defendant as a John Doe, and also name a supervisory official as a defendant for the purpose of conducting discovery to identify the John Doe. *Donald v. Cook County Sheriff's Dep't.*, 95 F.3d 548, 556 (7th Cir. 1996). For example, a plaintiff may name a John Doe police officer, and also the Chief of Police as a defendant for discovery purposes to identify the John Doe. However, the naming of the defendant as a John Doe is insufficient to satisfy the statute of limitations. Instead, the plaintiff must properly identify the officer defendant before the expiration of the statute of limitations. *Donald*, 95 F.3d at 561.

D. Tolling

The statute of limitations is tolled while the prisoner exhausts the administrative grievance process. *Johnson v. Rivera*, 272 F.3d 519, 521–22 (7th Cir. 2001). Further, the statute of limitations can be equitably tolled. With regard to equitable tolling, the court looks to the rules from the state where the alleged constitutional violation occurred. *Moore v. Burge*, 771 F.3d 444, 447-48 (7th Cir. 2014).