PRISONER SELF-HELP PACKET

CIVIL RIGHTS COMPLAINTS -- 42 U.S.C. § 1983

(Federal Court)

Prison or Detention Center Resources:

42 U.S.C. § 1983
Federal Rules of Civil Procedure
Local Rules for the United States District Court for the Eastern District of California
Black's Law Dictionary
Shepherd's Rights of Prisoners

This Packet Contains the Following:

1. Instructions for filing a Complaint under 42 U.S.C. § 1983;

2. Prisoner Civil Rights Complaint;

3. Application for In Forma Pauperis Status;

4. Statement of Trust Fund Account. **You will need to send this to your institution's accounting office as soon as possible, so it can be completed and returned to you.**

PRISONER CIVIL RIGHTS COMPLAINTS – 42 U.S.C. § 1983
LEGAL STANDARDS

I. INTRODUCTION

A **civil rights** case involves a claim seeking relief for the violation of a person's constitutional rights. To state a claim under § 1983, a plaintiff must allege a violation of rights protected by the Constitution or created by federal statute proximately caused by conduct of a person acting under color of state law. *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Under this law, a person who acts under color of state law to violate another's constitutional rights may be liable for damages and injunctive relief.

A. Bringing the Action

To begin an action, you must file an original copy of the Prisoner Civil Rights Complaint form (complaint). You should also keep a copy for your own records. There is a filing fee of $350.00. If you cannot pay the filing fee, you must file an *Application for In Forma Pauperis Status* which includes a statement of your assets. You must also submit a certified copy of your prisoner trust fund balance for a six-month period. 28 U.S.C. § 1915 (b)(1). Based on the information in your application, the Court will grant the request and direct the appropriate agency to periodically collect the filing fee from your trust fund and forward it to the Clerk of Court. The full fee will typically be collected, even if the court dismisses your case because it is found to be frivolous or malicious.

Your complaint must be legibly handwritten or typed. The complaint must contain a summary of the facts and your signature with a declaration under penalty of perjury that the facts in the complaint are true. The Court does not expect pro se prisoner litigants to argue legal authority in their complaints or motions.

In the section of the complaint entitled "Cause of Action" tell the court which of your constitutional rights were violated. In the supporting facts section give a complete but plain narrative of the incident(s), which violated your rights. Include time and place details. Be specific about what each defendant did. **It is not enough to merely list the defendants at the beginning of the complaint. The complaint must clearly describe how you were injured by the action or omission of each defendant**. This is the most important section of the complaint. Without a detailed and clear "facts" section, the court will be unable to determine if you have a valid claim.

B. Jurisdiction

Jurisdiction is the authority given a court to hear and decide certain cases. For a court to render a valid judgment, it must have jurisdiction both over the subject matter of your lawsuit and over the persons or entities involved. Section 1983 lawsuits fall within the federal court's jurisdiction to hear matters arising under the United States Constitution and federal laws.

The Court must also have jurisdiction over the persons or entities being sued. The basic due process requirement for personal jurisdiction is whether the defendant has minimum contacts with the State of California "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Plaintiff bears the

burden of proving that the Court has personal jurisdiction over the defendants. *Rano v. Sipa Press, Inc.,* 987 F.2d 580, 588 (9th Cir. 1995).

Supplemental jurisdiction allows the Court to hear state law claims when they are "so related" to the federal claims "that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367. In other words, the supplemental jurisdiction power extends to all state and federal claims which one would ordinarily expect to be tried in one judicial proceeding. *Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 563-64 (1st Cir.1997); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp*., 79 F.3d 182, 190 (1st Cir.1996). However, if a plaintiff's federal claims are dismissed, the Court may decline to exercise supplemental jurisdiction over plaintiff's state claims. 28 U.S.C. § 1367(c)(3).

II. PRELIMINARY CONSIDERATIONS IN FILING A COMPLAINT

A. Initial Review Process

When a prisoner asks for *in forma pauperis* filing status or seeks relief against a governmental entity or an employee of that entity, the Court must authorize the lawsuit to proceed before defendants can be served. The Court reviews each complaint to determine whether summary dismissal is appropriate. 28 U.S.C. § 1915. The Court is required to dismiss a complaint or any portion thereof which states a claim that is frivolous or malicious, that fails to state a claim upon which relief can be granted, or that seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). Therefore, it is important to consider the validity of your claims prior to filing a civil rights complaint. In the event the Court determines that three or more of a prisoner's lawsuits are malicious or fail to state legally cognizable claims, the prisoner will not be allowed to file a new civil action or appeal a judgment in a civil action *in forma pauperis*. 28 U.S.C. § 1915 (g). The only exception to this is if the prisoner can show that he is in imminent danger of serious physical injury. *Id*.

If a prisoner pays the Court's filing fee, the complaint will still be reviewed if the lawsuit is brought against a governmental entity or an employee of that entity. Prisoners who pay the filing fee are responsible for serving the complaint.

Due to the large number of prisoner civil rights complaints filed with the Court, the review process may take several months. Plaintiffs cannot serve defendants, pursue discovery, or request entry of a default judgment prior to the time their complaint has been reviewed.

B. Exhaustion of Prison or Detention Center Grievance System

The Prison Litigation Reform Act provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). In *Porter v. Nussle*, 534 U.S. 516, 122 S.Ct. 983 (2002), the Supreme Court confirmed that "the 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." *Id.*, 122 S.Ct. at 992.

The Supreme Court has recently held that the PLRA requires the "proper exhaustion of administrative remedies." *Woodford v. Ngo*, 126 S. Ct. 2378, 2382 (2006). "Proper exhaustion requires a prisoner to 'complete the prison administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to suit in federal court.'" *Cain v. Texas Department of Criminal Justice–Correctional Institutions Division*, 2007 WL 917377 *1 (S.D. Tex.) (*quoting Woodford*, 126 S. Ct. at 2384).

The *Woodford* opinion also makes clear that exhaustion is mandatory and that prisoners "must now exhaust all available remedies, not just those that meet federal standards." *Woodford* 126 S.Ct. at 2384. This includes inmates who seek money damages even where the prison administrative process does not provide for money damages. *Booth v. Churner*, 532 U.S. 731, 121 S.Ct. 1819, 1821 (2001). The prison administrative process is sufficient if it "could provide some sort of relief on the complaint." *Id.* The exhaustion requirement also applies to actions such as those filed under Title II of the Americans with Disabilities Act. *O'Guinn v. Lovelock Correctional Center,* 502 F.3d 1056, 1060 (9th Cir. 2007).

The Supreme Court confirmed that the exhaustion requirement "gives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors." *Woodford* at 2387. Thus, one purpose behind exhaustion is to give the agency an opportunity to correct its own mistakes before it is brought before a court. *Id.* at 2385.

Failure to exhaust remedies is an affirmative defense under the PLRA. *Jones v. Bock*, 127 S. Ct. 910, 921 (2007). This means that "inmates are not required to specially plead or demonstrate exhaustion in their complaints." Id. In the Ninth Circuit, the affirmative defense must be brought as an unenumerated 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003). In deciding a motion to dismiss for failure to exhaust administrative remedies, a court may look beyond the pleadings and decide disputed issues of fact. *Wyatt*, 315 F.3d at 1119-20. As with other affirmative defenses, the exhaustion requirement may be subject to the defenses of waiver, estoppel, or equitable tolling. *Days v. Johnson*, 322 F.3d 863, 866 (5th Cir. 2003); s*ee also Marcial UCIN v. SS Galicia,* 723 F.2d 994, 997 (1st Cir. 1983) (right to assert personal jurisdiction and other threshold defenses may be waived by failure to assert in a timely manner); *Frietsch v. Refco, Inc.* 56 F.3d 825, 830 (7th Cir. 1995)(delay in raising improper venue resulted in waiver). *But see Cain v. Texas Department of Criminal Justice–Correctional Institutions Division*, 2007 WL 917377 *2 (S.D. Tex.)(waiver must be intentional; inadvertent delay did not result in waiver).

The Supreme Court in *Jones v. Bock* outlined the level of specificity required for exhaustion. The Court "conclude[d] that exhaustion is not *per se* inadequate simply because an individual later sued was not named in the grievances." *Jones v. Bock*, 127 S. Ct. 910, 923 (2007). In addition the Court provided direction as to "complaints in which the prisoner has failed to exhaust some, but not all, of the claims asserted in the complaint" by indicating that courts are to proceed with those claims which have been exhausted and dismiss only those which have not, rather than dismissing the complaint in its entirety. *Id.* at 923-24.

In sum, you must proceed through all levels of the administrative grievance system at the facility in which you are incarcerated. For example, if the correctional institution requires you to attempt an informal resolution of the problem prior to filing a grievance, you must follow each step in accordance with the required deadlines, up through and including an appeal to the warden.

C. Immunity from the Lawsuit

Plaintiffs often name defendants in the lawsuit who are immune from prosecution. When this happens, the defendants are dismissed from the lawsuit. The following legal rules regarding immunity should be considered.

1. The State of California

The Eleventh Amendment to the United States Constitution generally prohibits litigants from bringing suits against states, state agencies, and state officials acting in their official capacity. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 113 S.Ct. 684 (1993). An exception to this rule is a request for prospective injunctive relief against a government official. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908). Where there is no claimed continuing violation of federal law, a federal court may not issue declaratory or injunctive relief. *Green v. Mansour*, 474 U.S. 64, 71, 106 S.Ct. 423, 427 (1985).

(A) Official and Individual Capacity

As a result of Eleventh Amendment immunity, states are not considered "persons" under the provisions of § 1983. *Hafer v. Malo*, 502 U.S. 21, 26, 112 S.Ct. 358, 362 (1991). Accordingly, suits against state actors "acting in their official capacities" are actually suits against the state, and are barred by the Eleventh Amendment. When a plaintiff seeks damages against a state official, the Court construes the complaint as an individual capacity suit because an official capacity suit for damages would be barred. *Cerrato v. San Francisco Community College Dist*., 26 F.3d 968, 973 n.16 (9th Cir. 1994).

Individual capacity suits "seek to impose personal liability upon a government official for actions he takes under color of state law." *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3009, 3105 (1985). "A victory in such a suit is a 'victory against the individual defendant, rather than against the entity that employs him,'" and "[t]hus, the Eleventh Amendment prohibition against monetary damages imposed on a state does not apply. . . ." *Cerrato*, 26 F.3d at 973.

There are two theories under which a state official may be held liable for actions or omissions in his or her individual capacity: (1) personal involvement in the act or omission which caused the injury; or (2) sufficient causal connection between the official's act or omission and the injury. There is no respondeat superior liability under § 1983. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). If the state official did not have personal involvement in the alleged constitutional deprivation, then plaintiff must show that the official "implement[ed] a policy so deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving force of the constitutional violation.'" *Redman v. County of San Diego,* 942 F.2d 1435, 1446 (9th Cir. 1991). A supervisor may also be held liable for the constitutional violations of subordinates if the supervisor "directed the violations, or knew of the violations and failed to act to prevent them." *Taylor v. List*, 880 F.2d at 1045.

2. United States Government

The United States government is immune from lawsuits unless it specifically consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769-70 (1941) (citations omitted); *Arnsberg*

v. United States, 757 F.2d 971, 977-78 (9th Cir. 1985) (no right to money damages against United States without sovereign immunity waiver). A waiver of sovereign immunity must be unequivocally expressed by Congress. *Doe v. Attorney General of the United States*, 941 F.2d 780, 788 (9th Cir. 1991) (quoting *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1503 (1969).

3. Judges

Under the doctrine of absolute judicial immunity, a judge is not liable for monetary damages for acts performed in the exercise of his judicial functions. *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 1102 (1978). Judicial officers are also generally entitled to absolute immunity from claims for injunctive relief. *Kampfer v. Scullin*, 989 F.Supp. 194, 201 (D.N.Y. 1997).

4. Parole Board Members and Officers

Parole board members are entitled to absolute judicial immunity for the imposition of parole conditions. *Anderson v. Boyd*, 714 F.2d 906, 909 (9th Cir. 1983). Parole officers are typically protected by absolute immunity when their activities are connected with the execution of parole revocation procedures. *Wilson v. Kelkhoff*, 86 F.3d 1438, 1444 (7th Cir. 1996); *King v. Simpson*, 189 F.3d 284, 287 (2nd Cir. 1999) (parole officers receive absolute immunity for their actions in initiating parole revocation proceedings and in presenting the case for revocation).

5. County Prosecutors and Attorneys General

A prosecutor is entitled to quasi-judicial immunity from liability for damages under 42 U.S.C. § 1983 when the alleged wrongful acts were committed by the prosecutor in the performance of an integral part of the *criminal* judicial process. *Robichaud v. Ronan*, 351 F.2d 533, 536 (9th Cir. 1965); *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984 (1976). Such quasi-judicial immunity has been extended to a *special assistant* to the Attorney General of the United States for actions related to criminal actions in which he participated as a prosecuting attorney, *Yaseli v. Goff*, 12 F.2d 396 (2d Cir. 1926) and to *federal government attorneys* who were involved in a prior *civil* taxpayer litigation. *Flood v. Harrington*, 532 F.2d 1248 (9th Cir. 1976); *Bly-Magee v. California*, 236 F.3d 1014 (9th Cir. 2001) (plaintiff could not sue deputy attorneys general for conduct related to their state litigation duties, including the defense of the plaintiff's prior and present lawsuits).

6. Qualified Immunity Defense for Other State Actors

Qualified immunity can also provide a defense against money damages for certain defendants. In § 1983 actions, the doctrine of qualified immunity protects state officials from personal liability for on-the-job conduct so long as the conduct is objectively reasonable and does not violate an inmate's clearly-established federal rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982) (citations omitted). Contrarily, a state official may be held personally liable in a § 1983 action if he knew or should have known that he was violating a plaintiff's clearly-established federal rights. *Id*. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [defendant] that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156 (2001) (citing *Wilson v. Layne*, 526 U.S. 603, 615, 119 S.Ct. 1692, 1699-1700 (1999)). Dismissal is appropriate where "the law did not put the [defendant] on notice that his conduct would be clearly unlawful." *Id.*, 121 S.Ct. at 2156-57.

Rulings on the qualified immunity defense "should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive, " inasmuch as the defense is "an immunity from suit rather than a mere defense to liability." *Saucier v. Katz*, 121 S.Ct. at 2155-56 (2001). The immunity extends only to money damages against defendants, and not to requests for injunctive relief.

D. Statute of Limitations

Your complaint must set forth the dates on which the constitutional rights violations occurred. A statute of limitations is a law that sets a particular period of time within which a suit must be filed. It begins to run when the injury occurs or the constitutional right is violated. The statute of limitations period for filing a civil rights suit is the same as the limitation period for personal injuries in the state where the claim arose. *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938 (1985). In California, the statute of limitations period for personal injury actions is two years. Cal.Civ.Pro. § 335.1. The Court will determine whether the alleged violations occurred within the statute of limitations.

E. Heck v. Humphrey

Prisoners often bring § 1983 lawsuits seeking monetary damages, reversal of their convictions, and release from prison. In *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827 (1973), the Supreme Court held that habeas corpus was the sole remedy for a prisoner seeking a release from punishment. Also, in *Heck v. Humphrey*, 512 U.S. 477, 486-87, 114 S.Ct. 2364, 2372 (1994), the Supreme Court held that, "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been **reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254**." As a result, "a claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983." *Id*.

A § 1983 action alleging illegal search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction has been overturned. *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir.2000) (relying on *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994)).

Heck v. Humphrey also bars § 1983 lawsuits challenging the validity of an arrest and pending criminal charges. *Harvey v. Waldron*, 210 F.3d 1008, 1014 (9th Cir.2000); *Alvarez-Machain v. United States*, 107 F.3d 696, 700-01 (9th Cir.1997); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir.1998) (holding *Heck* barred plaintiff's false arrest and imprisonment claims until conviction was invalidated); *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir.1996) (holding *Heck* barred plaintiff's claims that defendants lacked probable cause to arrest him and brought unfounded criminal charges against him). Additionally, plaintiffs are barred from challenging the denial of good-time credits because it would imply the validity of their convictions. *Edwards v. Balisok*, 520 U.S. 641, 648, 117 S.Ct. 1584, 1589 (1997). The *Heck* bar also applies to a lawsuit against parole officials where a plaintiff was found ineligible for parole. *Butterfield v. Bail*, 120 F.3d 1023 (9th Cir. 1996). Certain types of parole claims may be brought as § 1983 claims; others must be asserted in habeas corpus actions. In *Wilkinson v.*

Dotson, 544 U.S. 74 (2005), the Court determined that an inmate may initiate a § 1983 action to seek invalidation of "state procedures used to deny parole eligibility . . . and parole suitability," but he may not seek "an injunction ordering his immediate or speedier release into the community." *Id*. at 82. At most, an inmate can seek as a remedy "consideration of a new parole application" or "a new parole hearing," which may or may not result in an actual grant of parole. *Id*. When a state prisoner seeks "a determination that he is entitled to immediate release or a speedier release from . . . imprisonment, his sole federal remedy is a writ of habeas corpus." *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973).

Generally, these types of actions are barred until the plaintiff's criminal charges have been dismissed or any resulting conviction is overturned either on direct review or by way of a writ of habeas corpus after he has fully exhausted his state court remedies under 28 U.S.C. §§ 2254(b), (c).

III. ALLEGING SPECIFIC CONSTITUTIONAL RIGHTS VIOLATIONS

A. Eighth Amendment Medical Claims

To prevail on an Eighth Amendment claim regarding prison medical care, a plaintiff must show that prison officials' "acts or omissions [were] sufficiently harmful to evidence deliberate indifference to serious medical needs." *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S.Ct. 995, 1000 (1992) (citing *Estelle v. Gamble*, 429 U.S. 97, 103-04, 97 S.Ct. 285, 290-91 (1976)). "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.'" *Id.* The definition of serious medical need includes the following:

> failure to treat a prisoner's condition [that] could result in further significant injury or the unnecessary and wanton infliction of pain; . . . [t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.

McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled on other grounds*, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997).

Deliberate indifference exists when an official knows of and disregards a serious medical condition or when an official is "aware of facts from which the inference could be drawn that a substantial risk of harm exists," and actually draws such an inference. *Farmer v. Brennan,* 511 U.S. 825, 838, 114 S.Ct. 1970, 1979 (1994). Differences in judgment between an inmate and prison medical personnel regarding appropriate medical diagnosis and treatment are not enough to establish a deliberate indifference claim. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). Mere indifference, medical malpractice, or negligence also will not support a cause of action under the Eighth Amendment. *Broughton v. Cutter Lab*, 622 F.2d 458, 460 (9th Cir. 1980). Also, a mere delay in treatment does not constitute a violation of the Eighth Amendment, unless the delay causes serious harm. *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990).

B. Eighth Amendment Non-Medical Claims

To state a claim asserting cruel and unusual punishment under the Eighth Amendment, a plaintiff

must show that he is incarcerated under conditions posing a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 1977 (1994). A plaintiff must also show that Defendants were deliberately indifferent to the substantial risk of serious harm. Deliberate indifference exists when an official knows of and disregards a condition posing a substantial risk of serious harm or when the official is "aware of facts from which the inference could be drawn that a substantial risk of harm exists," and actually draws the inference. *Id.,* 511 U.S. at 837, 114 S.Ct. at 1979.

Verbal harassment, abuse and threats, without more, are not sufficient to state a constitutional deprivation under § 1983. *Oltarzewski v. Ruggiero*, 830 F.2d 136 (9th Cir. 1987) (allegations that correctional counselor told plaintiff that he would transfer him to a higher custody status unit if he tried to go to the law library and that he would be sorry if he filed a class action suit were not actionable under § 1983); *Freeman v. Arpaio*, 125 F.3d 732 (9th Cir. 1997) (abusive language directed at prisoner's religious and ethnic background not actionable); (*Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985) (allegations that defendant "verbally abused and threatened him for filing grievances" did not constitute a constitutional violation); *McFadden v. Lucas*, 713 F.2d 143, 147((5th Cir. 1983) ("While twenty-two officers armed with sticks and threatening demeanor may arguably be excessive, we must, in the absence of physical abuse, concur with the lower court's dismissal. The alleged conduct, absent more, cannot be said to rise to the level of conduct which 'shocks the conscience'").

C. First Amendment Access to Courts Claims

Inmates have a constitutional right to access the courts. *Bounds v. Smith*, 430 U.S. 817, 817, 821, 828, 97 S.Ct. 1491,1492-93, 1494, 1498 (1977). A plaintiff must show that he suffered an actual injury as a result of the alleged denial to access in order to prevail on this First Amendment claim. *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174 (1996). Actual injury may be shown if the denial "hindered his efforts to pursue a legal claim," such as having his complaint dismissed for "for failure to satisfy some technical requirements" caused by the denial, or if he "suffered arguably actionable harm that he wished to bring before the courts, but was so stymied [by the denial] that he was unable even to file a complaint." *Id.*, 518 U.S. at 351, 116 S.Ct. at 2180. The *Lewis* Court noted that the right to access courts claims covered by the *Bounds* line of cases covers only a limited type of cases: direct appeals from convictions for which the inmates are incarcerated, habeas petitions, and civil rights actions regarding prison conditions. Id.518 U.S. at 354, 116 S.Ct. at 2180-81. "Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Id*., 518 U.S. at 355, 116 S.Ct. at 2182.

D. Prison Employment Claims

Plaintiffs often allege that they were denied the right to employment within the prison. Inmates do not have a protected liberty interest in prison employment. *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

E. 42 U.S.C. § 1985, 1986 Claims

Plaintiffs often assert claims under 42 U.S.C. § 1986. A prerequisite to stating a Section 1986 claim is stating a Section 1985 claim. *McCalden v. California Library Association*, 955 F.2d 1214, 1223 (9th Cir. 1992). Section 1985 governs conspiracies to interfere with civil rights. In order to state a claim under either Section 1985(2) or (3), a plaintiff must allege a racial or class-based

discriminatory motive behind the conspirators' actions. *Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989); *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 676 F.2d 1330, 1333 (9th Cir. 1982) (claims under sections 1985(2) and 1985(3) require the element of class-based animus).

F. Retaliation Claims

A retaliation claim must allege the following: "(1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005). A "chilling effect on First Amendment rights" is enough to state an injury. *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001). Plaintiff's allegations state a colorable retaliation claim under the First Amendment upon which he may proceed.

The law is also clear that where there is "some evidence" to support a prisoner's reclassification under the standard set forth in *Superintendent v. Hill*, 472 U.S. 445, 455-56 (1985), and where reclassification served a legitimate penological purpose, a prisoner's retaliation claim fails. *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994).

G. Transfer, Classification, and Due Process Claims

Inmates do not have a liberty interest in being classified at a particular level or in a particular institution within the prison system. *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (prisoners generally have no constitutionally-protected liberty interest in being held at, or remaining at, a given facility); *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985).

A classification change assigning an inmate to administrative segregation requires only minimal Due Process. The Ninth Circuit has held that when prison officials determine whether a prisoner is to be placed in administrative segregation, the following due process protections are applicable: (1) the prisoner be informed of the charges against him or the reasons segregation is considered; (2) prison officials must hold an informal non-adversary hearing within a reasonable time after the prisoner is segregated; and (3) the prisoner must be allowed to present his views to the "official charged with deciding whether to transfer him to administrative segregation." *Toussaint v. McCarthy*, 926 F.2d 800, 803 (9th Cir. 1990) (internal citation omitted).

While in administrative segregation, a prisoner must receive a periodic review of his confinement. *Hewitt v. Helms*, 459 U.S. 460, 477, 103 S.Ct. 864 (1983). A review every 120 days satisfies due process, and the timing of the reviews is subject to administrative discretion. *Toussaint*, 926 F.2d at 803. The periodic reviews must be "more than 'meaningless gestures'" in order to satisfy Due Process. *Toussaint v. Rowland*, 711 F.Supp. 536, (D. Cal. 1989) (quoting *Toussaint v. McCarthy*, 801 F.2d 1080, 1102 (9th Cir. 1986).

Due Process requires that an inmate's placement and retention in administrative segregation be supported by "some evidence." *Superintendent v. Hill*, 472 U.S. 445, 454, 105 S.Ct. 2768 (1985). Due Process is satisfied if statements by unidentified inmate informants provide some evidence of the reasons for the segregation, so long as the record contains "some indicia of reliability," *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987), and so long as prison officials aver that safety considerations prevented

disclosure of the informant's name. *Zimmerlee v. Keeney*, 831 F.2d 183, 186 (9th Cir. 1997).

The Ninth Circuit has determined that Due Process does not require any of the following: (1) detailed written notice of charges; (2) representation by counsel or counsel-substitute; (3) an opportunity to present witnesses; (4) a written decision describing the reasons for placing the prisoner in administrative segregation; or (5) the disclosure of the identity of any person providing information leading to the placement of the prisoner in administrative segregation. *Toussaint v. McCarthy*, 801 F.2d at 1100-01.

The Supreme Court has also recently confirmed that "[a]n essential tool of prison administration . . . is the authority to offer inmates various incentives to behave." *McKune v. Lile*, 122 S. Ct. 2017, 2028 (2002)(as a consequence of an inmate's refusal to admit his guilt to a sex offense crime as part of a rehabilitation program, he was reclassified and transferred to a maximum security prison. This did not constitute an atypical and significant hardship in relation to ordinary incidents of prison life). Prison officials are given wide latitude to bestow or revoke the various privileges accorded to inmates. *Id*. "[B]y virtue of their convictions, inmates must expect significant restrictions, inherent in prison life, on rights and privileges free citizens take for granted." *Id.*

H. Destruction of Personal Property

The random negligent or intentional unauthorized deprivation of property by state officials does not state a cognizable cause of action under § 1983 if the plaintiff has an adequate state post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194 (1984); *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), *overruled on other grounds; Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986); *Taylor v. Knapp*, 871 F.2d 803, 805-06 (9th Cir.1989). An adequate state post-deprivation remedy is available for such claims in this state under the California Tort Claims Act, I.C. § 6-901, *et seq*., enacted to provide redress for citizens injured by the tortious acts of governmental entities, officials, and employees.

However, deprivations of property which have occurred as a result of "an affirmatively established or de facto policy, procedure, or custom, [and] which the state had the power to control," are actionable under the Due Process clause. *Abbott v. McCotter*, 13 F.3d 1439, 1443 (10th Cir. 1994) (internal citation omitted); *San Bernardino Physicians' Services Medical Group, Inc. v. San Bernardino County*, 825 F.2d 1404, 1410 (9th Cir. 1987) (where there has been alleged "planned, non-random behavior on the part of the state . . . a section 1983 case for violation of due process may lie without regard to, or use of, the state's postdeprivation remedies.").

IV. ALLEGING AMERICANS WITH DISABILITIES ACT CLAIMS

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Title II has recently been upheld as a valid abrogation of state sovereignty "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment." *United States v. Georgia*, 126 S. Ct. 877, 882 (2006)(emphasis in original).

Public entities, which include "any department, agency, special purpose district, or other

instrumentality of a State or States or local government." i*d*., 118 S. Ct. at 1954-55, are required to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7). The Supreme Court has held that the plain language of Title II of the ADA extends to prison inmates who are deprived of the benefits of participation in prison programs, services, or activities because of a physical disability. *See Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 211, 118 S. Ct. 1952, 1955 (1998). In addition, the Ninth Circuit has held that a private physician and non-profit health care corporation's provision of health care to the county detention facility could be construed as actions of the state. *Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2000); *see also McNally v. Prison Health Services*, 46 F. Supp. 2d 49, 58 (D. Me. 1999)(holding that Title II ADA claim could go forward to trial against a private, for-profit prison medical provider).

In order to proceed with an ADA claim, under Title II, Plaintiff must show (1) that he has a disability; (2) that he is otherwise qualified to participate in or receive the benefit of a public entity's services, programs or activities; (3) that he was either excluded from participation in or denied the benefits of the services, programs or activities, or was otherwise discriminated against by the public entity; and (4) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability. *O'Guinn v. Lovelock Correctional Center,* 502 F.3d 1056, 1060 (9th Cir. 2007).

A "disability" must fit one of three definitions under 42 U.S.C. § 12102(2) to be actionable under the ADA: there must be "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; [or] (B) a record of such an impairment; or (C) being regarded as having such an impairment." The cases brought under Title II of the ADA use the disability definitions found in federal regulations promulgated for Title I governing disability discrimination in the employment area. *Colwell v. Suffolk County Police Department*, 158 F.3d 635, 641 (2d Cir. 1998). Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Cooper v. Neiman Marcus Group*, 125 F.3d 786, 790 (9th Cir. 1997)(quoting 29 C.F.R. § 1630.2(i)(emphasis omitted).

Under the federal regulations, "[t]he term substantially limits means (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same life activity." 29 C.F.R. § 1630.2(j)(1)(i-ii); *see also Talk v. Delta Airlines, Inc.*, 165 F.3d 1021, 1025 (5th Cir. 1999)(although plaintiff wore corrective shoes for a deformity in her leg and foot, she was not substantially limited in the major life activity of walking); *Penny v. United Parcel Service*, 128 F.3d 408, 415 (6th Cir. 1997)(moderate difficulty or pain experienced while walking does not substantially limit the life activity of walking).

Under Title II of the ADA, plaintiffs may not sue individual defendants in their individual capacities, but must instead sue the state or state entities. *See Lollar v. Baker,* 196 F.3d 603, 610 (5th Cir. 1999) (citing *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010-11 (8th Cir.1999) (the ADA's comprehensive remedial scheme bars the plaintiff's claims against the commissioners in their individual capacities); *Baird v. Rose,* 192 F.3d 462, 471 (4th Cir. 1999) (Title II of the ADA does not recognize a cause of action for discrimination by private individuals, only public entities); *compare Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1188-87 (9th Cir. 2003)(holding that Title II's statutory language does not prohibit a plaintiff from requesting injunctive action against state officials in their official capacities).

V. ALLEGING VIOLATIONS OF RLUIPA

To state a claim under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), a plaintiff must show that the government has imposed a substantial burden on the religious exercise of a person residing in or confined to an institution. 42 U.S.C. § 2000cc-1(a). A 'religious exercise' is "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). The RLUIPA applies to entities receiving federal financial assistance. *Id*. at (b) (1). The United States Supreme Court recently upheld the constitutionality of RLUIPA. *See Cutter v. Wilkinson*, 544 U.S.709 (2005).

RLUIPA does not confer any "privileged status on any particular religion" and "does permit inquiry into the sincerity of a prisoner's religious beliefs." *Washington v. Klem*, 497 F.3d 272, 277 (3rd Cir.2007); *see also Cutter,* 544 U.S. at 725 n. 13. The defendant's interference must be a substantial burden on the individual's particular religious exercise. *Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir.2008)(holding that the inmate's religious exercise included the opportunity to worship with a group). Forcing an inmate to choose between modifying his religious beliefs and being denied an important benefit amounts to a substantial pressure on an adherent. *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir.2005) (holding that failure to create a hair-length exemption for a Native American inmate created a substantial burden on the exercise of his religion).

Once the plaintiff has made the requisite showing that a sincere religious belief has been substantially interfered with, the plaintiff will not prevail if the defendant is able to establish that the burden furthers a "compelling governmental interest" and does so by "the least restrictive means." *Greene*, 513 F.3d at 988; 42 U.S.C. § 2000cc-1(a)(1)-(2). "Prison security is a compelling governmental interest." *Greene*, 513 F.3d at 988; *accord Warsoldier*, 418 F.3d at 998. In order for the defendant to show that the burden was imposed by the least restrictive means, the defendant must show that he "actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier*, 418 F.3d at 999.

VI.
DISCOVERY

A. General Considerations

The purpose of discovery is to enable parties to obtain the evidence necessary to evaluate and resolve the case before trial. Some prisoners mistakenly believe that they can withhold their evidence until trial, but all relevant, non-privileged evidence is subject to discovery early in the case. In most cases, the Court will order both parties to disclose all witnesses and documents that support the parties' claims and defenses once the prisoner has been authorized to proceed with his or her case. The Court has broad discretion to limit the frequency and extent of any discovery method. Fed. R. Civ. Proc. 16(b) and 26 (b)(2).

The main discovery methods utilized in prisoner litigation are written interrogatories (Fed. R. Civ. Proc. 33), production of documents (Fed. R. Civ. Proc. 34), and requests for admission (Fed. R. Civ. Proc. 36). An interrogatory is a written question served by one party to another party, who must answer under oath and in writing. A written document request is used to compel the other party to produce

records or other evidence in their possession or under their control. Parties may be compelled to produce documents through the document request, without the necessity of serving a subpoena. A request for admission is the procedure whereby one party can request that the other party admit or deny the truth of any relevant fact or the genuineness of any relevant document.

The party answering, responding, or objecting to interrogatories, document requests, and requests for admission must quote each interrogatory or request in full immediately preceding the answer or objection thereto. D. California L. Civ. R. 26.1. Interrogatories are limited to no more than twenty-five (25), including subparts. Additional interrogatories can only be served if the parties stipulate to a greater number or the Court grants leave to serve more.

Interrogatories, document requests, and requests for admission can only be served on the parties to the lawsuit, namely the plaintiff and defendant. If items are held by a non-party, prisoners may request the items from the third party by informal request or by subpoena duces tecum. Fed. R. Civ. Proc. 45.

B. Bringing Discovery Motions

A party will not be allowed to bring discovery disputes before the Court until after properly served discovery requests have been sent to the other party. Fed. R. Civ. Proc. 34. If a party failed to answer the discovery appropriately or within the time allowed by the rules, a motion to compel the responses can then be filed. The motion to compel must include "in the motion itself or in an attached memorandum, a verbatim recitation of each interrogatory, request, answer, response, and objection which is the subject of the motion or a copy of the actual discovery document which is the subject of the motion." D. California L. Civ. R. 37.2. In addition, the motion must "specify separately and with particularity each issue that remains to be determined at the hearing and the contentions and points and authorities of each party as to each issue." *Id.* Thereafter, the party must be given the opportunity to respond to such a motion.

C. Discovery Stayed for Qualified Immunity Defense Ruling

If defendants in your lawsuit claim they are entitled to qualified immunity against your claims, then discovery will not proceed until the threshold issue of qualified immunity is determined by the Court. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S.Ct. 2727, 2738 (1982) (discovery is foreclosed in order to avoid burdening public officials with costly and time-consuming litigation). The Ninth Circuit has also affirmed the propriety of a stay of discovery pending the outcome of a motion on absolute immunity, where a stay furthers the goal of efficiency for the court and litigants and the discovery could not have affected the immunity decision. *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). The Court will grant a protective order against discovery in a case until the issue of qualified immunity has been determined.

VII. APPOINTMENT OF COUNSEL

Prisoners should be aware that unlike criminal defendants, prisoners and indigents in civil actions have no constitutional right to counsel unless their physical liberty is at stake. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25, 101 S.Ct. 2153, 2158 (1981). Whether a court appoints counsel for indigent litigants is within the court's discretion. *Wilborn v. Escalderon*, 789 F.2d 1328, 1330-31 (9th

Cir. 1986). If you believe there are special circumstances warranting appointment of counsel in your case, please indicate the need on the prisoner civil rights complaint form.

The federal court has no authority to require attorneys to represent indigent litigants in civil cases under 28 U.S.C. § 1915(d). *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 298, 109 S.Ct. 1814, 1816 (1989). Rather, when a Court "appoints" an attorney, it can only do so if the attorney voluntarily accepts the assignment. *Id.* The Court has no funds to pay for attorney's fees in civil matters, such as this one. Therefore, it is often difficult to find attorneys willing to work on a case without payment, especially in prisoner cases, where contact with the client is especially difficult. For these reasons, plaintiffs should attempt to procure their own counsel on a contingency or other basis, if at all possible.

VIII. DISPOSITIVE MOTIONS

Section 1983 lawsuits are often resolved by *dispositive motions*. A dispositive motion is a motion that has the potential to "dispose of" or end the case. Two common dispositive motions are the motion to dismiss and the motion for summary judgment.

A *motion to dismiss* is brought under Rule 12 of the Federal Rules of Civil Procedure or pursuant to the Court's duty to dismiss claims under 28 U.S.C. § 1915 and 1915A. For example, a motion to dismiss may be brought if it appears from the complaint that your claims are barred by the statute of limitations.

A *motion for summary judgment* is brought under Rule 56 of the Federal Rules of Civil Procedure. This motion asserts that there are no genuine issues of material fact for the Court to resolve, and that the Court may decide the disputed issues as a matter of law. To oppose a motion for summary judgment which challenges the merits of your claims, you should file a *response*, outlining the important facts which support your opposition, and argue any applicable law to which you have access. If the respondent files a *statement of undisputed material facts*, you should file a statement of disputed material facts in response for those facts you dispute. These facts should be submitted in the form of an affidavit.

After you have filed your response to a dispositive motion, the respondent may or may not file a reply. If a reply is filed, you are not entitled to file a "response" to the reply.

The court will take the motion under advisement and consider everything in the record which is properly before it. After consideration, the Court will issue a written Order. If the dispositive motion is granted, the case usually will be dismissed.

VIX. APPEAL RIGHTS AND PROCEDURES

A. Post-Judgment Motions and Proceedings

Motions to alter or amend the judgment in your case must be filed within ten (10) days after entry of the judgment. Fed. R. Civ. Proc. 59(e). Therefore, in order to file a timely motion under this rule, the prisoner must deliver the motion to the prison or jail officials within ten days of the date the judgment is entered. A motion seeking relief from a judgment or order may also be filed under Fed. R.

Civ. Proc. 60 within a reasonable time or not more than one year from the entry of judgment. Typically, these motions are not granted unless the district court is presented with newly discovered evidence, committed clear error, or there is an intervening change in the controlling law. *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Filing a motion for reconsideration within ten days of entry of the judgment tolls or stops the time within which an appeal must be filed.

B. Notice of Appeal

An appeal of your § 1983 action must be filed within thirty (30) days of entry of judgment. The notice is timely if you deposit the notice of appeal in the prison mail system on or before the last day for filing. Fed. R. App. Proc. 4 (a) (1) and (c). The district court will file, process, and transmit your appeal to the Ninth Circuit Court of Appeals located in San Francisco.

C. In Forma Pauperis Filing Status

If you were granted *in forma pauperis* status in the district court, the status automatically continues for the appeal, unless the district court certifies that the appeal is taken in bad faith or is frivolous. Do not file an additional motion requesting *in forma pauperis* status for the appeal.

If you were not previously granted *in forma pauperis* status in the district court, you may file a motion with your notice of appeal. If the motion is granted, you will automatically proceed *in forma pauperis* in the appellate court. If the district court denies your request, you may re-file a motion in the court of appeal.

D. Transcripts and Counsel on Appeal

An appellant proceeding *in forma pauperis* may request the production of transcripts. The request should first be made in the district court. If the district court denies the request, the appellant may file the request with the court of appeal.

Requests for appointment of counsel should be filed with the court of appeal. It is not necessary to first make the request in the district court.

X. CONCLUSION

Case law interpreting 42 U.S.C. § 1983 is constantly changing. The purpose of this prisoner self-help packet is to provide general guidance regarding your civil rights under § 1983. The packet is not intended to be an exhaustive recitation of the law governing the topics covered herein, but it will provide a starting point. The packet should not be construed as a substitute for legal advice from an attorney.

It is always best to consult an attorney to determine whether any subsequent changes to the foregoing law have occurred. The best results will be achieved when an attorney helps you prepare and pursue your civil rights case. The prison or jail resource center has a list of all attorneys whose telephone numbers are programmed into the institutional telephone system. These calls are not monitored. If your attorney is not on the list, you may request that his or her telephone number be added to the non-monitored list.