CHAPTER 8: LOUISIANA STATE LIBERTIES*

A. INTRODUCTION

This Supplement Chapter explains how civil liberties are treated in the Fifth Circuit and Louisiana. For the most part, both the Fifth Circuit and the Louisiana courts will follow the Supreme Court's rulings. However, there are times when the Fifth Circuit or a Louisiana court will interpret things differently, or may look at a certain issue in more detail than the Supreme Court has.

This Chapter will focus on procedural hurdles (court rules you have to follow) and substantive claims (why you're suing) for violations of civil liberties. Part B will focus on how the Fifth Circuit has interpreted 42 U.S.C. § 1983 ("Section 1983") of the Civil Rights Act. This Part will discuss procedural hurdles, such as immunities and the Prison Litigation Reform Act ("PLRA"). Next, this Part will discuss substantive claims. Part C will focus on bringing claims in Louisiana state courts and discuss procedural hurdles, such as immunities; the Louisiana Prison Litigation Reform Act; and the Administrative Remedy Procedure (ARP). This Part will also talk about substantive claims. Chapter 10, Appendix A contains a blank "*in forma pauperis*" form.

B. SECTION 1983 ACTIONS FOR VIOLATIONS OF FEDERAL LAW

Section 1983 is a law that allows you to sue state and local officials who have violated your rights under the U.S. Constitution and other federal laws. To sue federal officials, you must use a *Bivens* action. *See* Chapter 16, Part E, of the main *JLM* for information on how to file a *Bivens* action.

Section 1983 states:

> Every *person* who, *under color of* any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[1]

1. Procedural Hurdles (Court Rules)

This section will focus on the procedural issues involved in bringing a federal claim. Specifically, it will discuss immunities that might exist for your claim and requirements set out in the Prison Litigation Reform Act.

a. Immunities

When you sue a defendant, there are several defenses he or she might raise against your claim. This section will focus on the different types of immunities that are available under federal law. An immunity is a defense that protects certain individuals or agencies from being held legally responsible, even if they have done something wrong. This section mostly explains how the immunity rules work as interpreted in the Fifth Circuit, but you should also refer to Chapter 16 of the main *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," which explains the general federal standards of immunity. You should be aware of these immunities when deciding whom to name as defendants in your lawsuit and what actions to discuss.

i. *Eleventh Amendment Immunity*

The Eleventh Amendment to the U.S. Constitution protects states and their agencies from being

*This Supplement Chapter was written by Nathiya Nagendra.

[1] 42 U.S.C. § 1983 (2012) (emphasis added).

sued in Federal Court.[2] As a result, you cannot name the state of Louisiana or any of the Louisiana agencies as a defendant in your suit.[3] This is sometimes called "sovereign immunity." Eleventh Amendment immunity also covers the state's officers, agents, and employees.[4] This means the courts will not find a state liable (legally responsible) for the actions of its officers, agents or employees. Whether an entity (an individual, group, agency, etc.) is covered by Eleventh Amendment immunity depends on the entity's: (1) status under Louisiana statutes and case law, (2) funding, (3) local autonomy or independence, (4) concern with local or statewide problems, (5) ability to sue in its own name, and (6) right to hold and use property.[5] The second factor is the most important factor, because one of the reasons for the Eleventh Amendment is to protect state money.[6] This means that all Louisiana executive departments, including the Department of Public Safety and Corrections (DPSC), have immunity.[7] You also cannot sue individual prisons, such as Angola, because they fall under the supervision of the DPSC.[8]

There are two important situations where Eleventh Amendment immunity will not bar your action: (1) when you sue an officer of the state in their official capacity for *injunctive* (an order from the court to the person you sued to do something or to stop doing something) or *declaratory relief* (a court statement of what your rights are), not monetary damages;[9] and (2) when the state's legislature has granted you permission to sue the state through a general law or concurrent resolution (a legislative provision approved by both the Louisiana House of Representatives and the Louisiana Senate).[10] Even though Eleventh Amendment immunity protects state officials when sued in their *official capacity*, it does not protect them when they are sued in their *individual capacity*.[11] Therefore, if you are seeking monetary damages and suing a state official, you must sue them in their individual capacities.

Generally, if you bring a suit against a state official acting in their official capacity in order to prevent a state official from violating your rights, this action will not be barred by the state's Eleventh Amendment immunity. This type of action might arise in two different circumstances. The first situation occurs when a state official's actions are illegal or unauthorized by the state; in these cases, if you sue to

---

[2] U.S. CONST. amend. XI; Hans v. Louisiana, 134 U.S. 1, 15–17, 10 S. Ct. 504, 507–508, 33 L. Ed. 842, 847–848 (1890) (finding that a state could not be sued in federal court by its own citizen, because the state had not consented to such jurisdiction and therefore had sovereign immunity).

[3] La. CONST. art. XII, § 10; Ussery v. Louisiana, 150 F.3d 431, 434 (5th Cir. 1998) (citing Seminole Tribe v. Florida, 517 U.S. 44, 54, 116 S. Ct. 1114, 1122, 134 L. Ed. 2d 252, 265 (1996)) (stating that individuals are barred from suing a state for money damages in federal court).

[4] Edelman v. Jordan, 415 U.S. 651, 663, 94 S. Ct. 1347, 1355, 39 L. Ed. 2d 662, 672 (1974) (citing Ford Motor Co. v. Dep't. of Treasury, 323 U.S. 459, 464, 65 S. Ct. 347, 350, 89 L. Ed. 389, 394 (1945)) (finding that state officials may invoke 11th Amendment immunity when they are sued in their official capacities).

[5] Hudson v. City of New Orleans, 174 F.3d 677, 681, 1999 U.S. App. LEXIS 9184, at *9 (5th Cir. 1999) (citing Clark v. Tarrant County, 798 F.2d 736, 744 (5th Cir. 1986)) (reiterating six factors a court will consider when determining whether a suit against a government official is a suit against the state for the purpose of 11th Amendment immunity).

[6] Delahoussaye v. City of New Iberia, 937 F.2d 144, 147–148, 1991 U.S. App. LEXIS 15928, at *11 (5th Cir 1991) (citing McDonald v. Bd. of Miss. Levee Comm'rs, 832 F.2d 901, 907, 1987 U.S. App. LEXIS 15499, at *19 (5th Cir. 1987)) ("Because an important goal of the Eleventh Amendment is the protection of state treasuries, the most significant factor in assessing an entity's status is whether a judgment against it will be paid with state funds.").

[7] Champagne v. Jefferson Parish Sheriff's Office, 188 F.3d 312, 313–314, 1999 U.S. App. LEXIS 22865, at *1–4 (5th Cir. 1999) (per curiam) (citing Darlak v. Bobear, 814 F.2d 1055, 1060, 1987 U.S. App. LEXIS 5148, at *12 (5th Cir. 1987)) (denying plaintiff's motion to compel evidence and request subpoena on grounds that defendants Governor and state Department of Public Safety and Corrections each have 11th Amendment immunity).

[8] Kervin v. City of New Orleans, No. 06-3231, 2006 WL 2849861, at *4 (E.D. La. Sept. 28, 2006) (finding that Angola is considered property of the DCPS under Louisiana law and thus cannot be sued).

[9] Nelson v. Univ. of Tex. at Dallas, 535 F.3d 318, 321–322 (5th Cir. 1998) (finding that the 11th Amendment does not bar claims against prospective, or future, relief against state officials acting in their official capacity). *See also* Section 3(a) of Chapter 16 of the main *JLM*.

[10] Kervin v. City of New Orleans, 2006 WL 2849861, at *2 (E.D. La. 2006) (unpublished) (citing LA. REV. STAT. ANN. § 13:5106(A) (2017)) (finding that the Louisiana legislature had not granted the plaintiff permission to sue the state in § 1983 claims).

[11] See Hafer v. Melo, 502 U.S. 21, 31, 112 S. Ct. 358, 363, 116 L. Ed. 2d 301, 313 (1991) (holding that state officials, when sued in their individual capacities are "persons" within the meaning of § 1983 and therefore are not immune under the 11th Amendment).

protect your rights against that state official, your action will not be barred.[12] The second situation where Eleventh Amendment immunity does not bar your action is when you bring an action to seek a declaratory judgment that the state law itself, which the state's agents are following, is unconstitutional.[13]

The second major instance where Eleventh Amendment immunity will not bar your suit occurs when the legislature waives immunity or consents to be sued. In Louisiana, there is a constitutional waiver of sovereign immunity for state, state agencies, and political subdivisions in contract cases and in tort cases, or cases where there has been injury to a person or property.[14] This waiver is discussed below in Section C(1)(a) and only applies to contract and tort claims in state court since there is no express consent to allow suits against the state in federal court.[15]

Eleventh Amendment immunity does not cover Louisiana counties,[16] sheriffs,[17] or district attorneys.[18] This means that you can sue these individuals under federal law if other requirements are met and their actions do not fall under other types of immunity.

ii. *Qualified Immunity*

A state employee may be sued in one of two capacities. If you sue a state employee in his official capacity, they may raise the defense of sovereign immunity so long as this defense has not been waived by a statute. If you sue a state employee in their individual capacity, they will not be able to claim sovereign immunity as a defense; however, a state employee might be able to raise a defense of "qualified immunity." Qualified immunity is an affirmative defense (a defense that the person you sue can put on and that if they prove, will make them not liable) that protects government employees from having to stand trial, having to pay monetary damages, and from otherwise being held liable for acts committed in their personal capacity.[19] Unlike Eleventh Amendment immunity and absolute immunity, discussed in Parts (i) and (iii) of this section, qualified immunity focuses on specific actions that are protected, not particular government entities and individuals that are protected. You should refer to Chapter 16, Section 3(c) of the main *JLM* for more information on this topic.

It is important to remember that sovereign immunity is not the same as qualified immunity. This means that even though a state employee's sovereign immunity might be waived by a statute, their qualified immunity will not be affected. If the defendant does not plead qualified immunity as a defense against your suit or fails to show all the elements of qualified immunity, then that governmental employee will no longer be protected by this doctrine.[20] Qualified immunity only shields conduct that does not violate clearly established constitutional rights of which a reasonable person would have known.[21]

---

[12] Hafer v. Melo, 502 U.S. 21, 25, 112 S. Ct. 358, 361–362, 116 L. Ed. 2d 301, 309 (1991).

[13] Suits for injunctive relief against state officials in their official capacities are said to fall within the "*Ex parte Young* doctrine." *Ex parte Young* is the case where the Supreme Court said that state officials can be sued for an injunction in federal court, even though the state itself cannot be sued. Ex parte Young, 209 U.S. 123, 155–156, 28 S. Ct. 441, 452, 52 L. Ed. 714 (1908).

[14] LA. CONST. art. XII, § 10(A). For more information on tort claims, see Chapter 10 of the *Louisiana State Supplement*.

[15] LA. REV. STAT. ANN. § 13:5106(A) (2017) ("No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court."); *see also* Fairley v. Stalder, 294 F. App'x. 805, 811 (5th Cir. 2008) (per curiam) (unpublished) (finding that Louisiana and the DPSC had sovereign immunity in suit regarding treatment of prisoners during and after Hurricane Katrina).

[16] Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 694–695, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978).

[17] Porche v. St. Tammany Parish Sheriff's Office, 67 F. Supp. 2d 631, 636 (E.D. La. 1999).

[18] Hudson v. City of New Orleans, 174 F.3d 677, 682–683 (5th Cir. 1999) (finding that the Orleans Parish District Attorney's Office is not an arm of the state, even though the Louisiana constitution says otherwise, and thus does not have 11th Amendment immunity).

[19] Roberts v. City of Shreveport, 397 F.3d 287, 291–292 (5th Cir. 2005) (finding that Chief of Police has qualified immunity in claim of allegedly providing inadequate training).

[20] Gomez v. Toledo, 446 U.S. 635, 639, 100 S. Ct. 1920, 1923, 64 L. Ed. 2d. 572, 577–578 (1980).

[21] Austen v. Borel, 830 F.2d 1356, 1358 (5th Cir. 1987) (finding that Louisiana child protection workers are entitled to qualified immunity, not absolute immunity, for their conduct in filing an allegedly false verified complaint seeking the removal of two children from a home).

Qualified immunity generally applies to governors,[22] prison officials,[23] and police officers,[24] among others. If someone you are suing claims qualified immunity as a defense, you will have the burden of showing qualified immunity does not apply.[25] First you must claim that the official violated the Constitution.[26] Second, you must claim the official's actions were objectively unreasonable in light of the law that was clearly established at the time of the actions complained of.[27] *In other words, the law must be clear enough that a reasonable official would understand that what he is doing violates the law*.

Unlike government officials sued in their individual capacities, municipal (city or town) entities and local governing bodies do not have immunity, qualified or absolute, from suit.[28] This means that a municipality (a city or a town) can be sued under Section 1983, but it will not be held liable unless a municipal policy or custom caused the injury.[29] Thus, in order to sue a Louisiana municipality, you must show that a policy or custom of the municipality caused your rights to be violated and that someone who is a final policymaker for the municipality created that policy.[30] Generally, this means the policy or custom must be unconstitutional on its face. If there is no policy or custom causing your injury, then a municipality can be held "indirectly" liable when its failure to adequately train, supervise, or discipline employees results in a violation of your rights.[31] For more information, *see* Section (C)(2)(c), "Municipal or Local Government Liability" in Chapter 16 of the main *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 To Obtain Relief From Violations of Federal Law."

iii. *Absolute Immunity of Individuals*

There are certain types of individuals who are absolutely immune from suit for their actions within the scope of their official duties. If an official is absolutely immune, it means that they cannot be sued for monetary damages and sometimes cannot be sued for injunctive relief.[32] Judges[33] and prosecutors[34] are usually completely immune from liability for damages within the scope of their official duties.

The absolute immunity of judges is also referred to as "judicial immunity." Judicial immunity serves to protect all judicial acts that are performed within a judge's official duties.[35] The main policy reason for judicial immunity is to allow judges to make unbiased decisions on the issue at hand without having to

---

[22] *See* Champagne v. Jefferson Parish Sheriff's Office, 188 F.3d 312, 314 (5th Cir. 1999) (per curiam) (holding that the governor is entitled to qualified immunity).
[23] *See* Cleavinger v. Saxner, 474 U.S. 193, 193, 106 S. Ct. 496, 497, 88 L. Ed. 2d 507, 507 (holding that members of federal prison discipline committee are entitled to qualified, but not absolute, immunity); *see also* Procunier v. Navarette, 434 U.S. 555, 560–561, 98 S. Ct. 855, 859, 55 L. Ed. 2d 24, 30 (1978) (holding that state prison administrators are entitled only to qualified immunity).
[24] *See* Malley v. Briggs, 475 U.S. 335, 343, 106 S. Ct. 1092, 1097, 89 L. Ed. 2d 271, 279–280 (1986).
[25] McClendon v. City of Columbia, 305 F.3d 314, 323 (5th Cir. 2002).
[26] Atteberry v. Nocona Gen. Hosp., 430 F.3d 245, 252–253 (5th Cir. 2005).
[27] Atteberry v. Nocona Gen. Hosp., 430 F.3d 245, 253 (5th Cir. 2005).
[28] Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166, 113 S. Ct. 1160, 1162, 122 L. Ed. 2d 517, 523 (1993).
[29] Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166, 113 S. Ct. 1160, 1162, 122 L. Ed. 2d 517, 523 (1993).
[30] Pembaur v. Cincinnati, 475 U.S. 469, 481–482, 106 S. Ct. 1292, 1299–1300, 89 L. Ed. 2d 452, 464–465 (1986) (plurality) (noting that municipalities can only be held liable under § 1983 for policies made by officials who had final authority to make the challenged policy).
[31] *See* City of Canton v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412, 426 (1989) (noting that a city could be liable under § 1983 for failure to train its employees, if the failure amounted to deliberate indifference to the rights of people who come into contact with city employees).
[32] For more information on the federal standards of absolute immunity, you should refer to Section C(3)(b) of Chapter 16 of the main *JLM*.
[33] Malina v. Gonzales, 994 F.2d 1121, 1124 (5th Cir. 1993) (finding that a judge has judicial immunity when he takes action within his judicial capacity and has jurisdiction).
[34] Russell v. Millsap, 781 F.2d 381, 383 (5th Cir. 1985) (citing Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)); Knapper v. Connick, 96-0434, p. 10 (La. 10/15/96); 681 So. 2d 944, 950 (La. 1996).
[35] Adams v. McIlhany, 764 F.2d 294, 297 (5th Cir. 1985) (citing Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)).

worry about the possibility of future suits against the judge personally.[36] As a result, judicial immunity protects all judicial acts performed within a judge's jurisdiction, even when the judge is accused of acting corruptly, maliciously,[37] incorrectly, or in excess of his or her authority.[38] To figure out what constitutes a judicial act, the Fifth Circuit usually considers four factors:

1) Whether the acts complained of were normal judicial functions;
2) Whether the act occurred in a courtroom or other appropriate place, such as judge's chambers;
3) Whether the controversy involved a case pending before the judge; and
4) Whether the act arose out of a visit to the judge in his judicial capacity.[39]

Generally, a court will not limit itself to only looking at these four factors but will look broadly at the nature and purpose of the actions.[40]

Judicial immunity will also apply to *quasi-judicial officials*, who perform similar functions to judges, in a setting similar to a court, such as an administrative agency's process for settling disputes.[41] There are also instances where a non-judge will be protected by derived judicial immunity, which is a type of quasi-judicial immunity. In order to receive derived judicial immunity, the defendant must have exercised discretionary judgment (meaning the defendant had the freedom to make a choice among options) just like a judge. For example, when a judge authorizes or appoints another person to perform services for the court and that person exercises discretionary judgment, he will be protected by derived judicial immunity.[42]

Prosecutorial officials are also absolutely immune from claims for money damages brought for conduct performed in the role of prosecutor. This means that when a prosecutor is performing typical prosecutorial functions, they will enjoy absolute immunity from any claim for civil liability arising out of the performance of these duties.[43] Prosecutorial functions, for the purposes of absolute immunity, are those acts representing the government in filing and presenting cases, as well as other acts which are closely related with the judicial process.[44] This includes acts taken to prepare for or begin judicial proceedings or trial and acts that occur in the course of a prosecutor's role representing the state.[45] Therefore, a prosecutor will be protected by absolute immunity even if he knowingly uses false testimony, purposely withholds exculpatory information (information that shows the plaintiff is not guilty), or fails to make a full disclosure of the facts.

In general, it is important to keep in mind what actions will be protected by qualified immunity and which government entities or individuals will be protected by the Eleventh Amendment or absolute immunity when writing your claim. For more clarification on immunities, *see* **Figure 1** below:

Type of Defendant	Type of Immunity	Relief You Can Obtain
State or state agency	Eleventh Amendment (sovereign) immunity	None

[36] Forrester v. White, 484 U.S. 219, 223, 108 S. Ct. 538, 542, 98 L. Ed. 2d 555, 562—563 (1988).
[37] Moore v. Taylor, 541 So. 2d 378, 381 (La. Ct. App. 1989) (citing Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)).
[38] Severin v. Parish of Jefferson, 357 F. App'x. 601, 604–605 (5th Cir. 2009) (citing Stump v. Sparkman, 435 U.S. 349, 356, 98 S. Ct. 1099, 1105, 55 L. Ed. 2d 331, 339 (1978)).
[39] Ammons v. Baldwin, 705 F.2d 1445, 1447 (5th Cir. 1983) (finding a Mississippi State Justice Court Judge to have judicial immunity for issuing an arrest warrant and requiring the plaintiff to pay court costs for himself and others).
[40] Holloway v. Walker, 765 F.2d 517, 524 (5th Cir. 1985).
[41] Beck v. Tex. State Bd. of Dental Exam'rs, 204 F.3d 629, 635–636 (5th Cir. 2000) (applying quasi-judicial absolute immunity to state board of dental examiners when they acted in a quasi-judicial role in disciplinary proceedings).
[42] Davis v. Bayless, 70 F.3d 367, 374 (5th Cir. 1995) (finding that court-appointed receiver was entitled to derivative judicial immunity).
[43] Russell v. Millsap, 781 F.2d 381, 383 (5th Cir. 1985) (citing Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)).
[44] Cousin v. Small, 325 F.3d 627, 631–632 (5th Cir. 2003) (citing Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)).
[45] Buckley v. Fitzsimmons, 509 U.S. 259, 273, 113 S. Ct. 2606, 2615, 125 L. Ed. 2d 209, 226 (1993).

Any officials sued in their *individual* capacity	Qualified Immunity	- Declaratory judgment - Injunctive relief - Money damages, only if: a) The official does not raise the qualified immunity defense; or b) He does raise the defense, but you can demonstrate that a reasonable person would have known that his actions violated a clearly established right
State officials in their *official* capacity	Eleventh Amendment (sovereign) immunity from suit for money damages only	-Declaratory judgment -Injunctive relief
Non-state (local or municipal) officials in their official capacity	None	-Declaratory judgment -Injunctive relief -Money damages
Witnesses	Absolute immunity	None, unless you are alleging that the individual violated your rights at a time that he was not acting as a witness
Legislators and individuals authorized to perform legislative functions	Absolute immunity from any suit for actions performed within the scope of official legislative duties	None, unless you are alleging that the individual violated your rights while acting outside the scope of his official duties
Prosecutors	Absolute immunity from suit for money damages only, for actions performed within the scope of official prosecutorial duties	-Declaratory judgment -Injunctive relief
Judges (including administrative judges)	Absolute immunity from suit for damages, for actions performed within the scope of judicial duties, unless acting with a complete absence of jurisdiction	-Declaratory judgment -Injunctive relief, but only if a declaratory judgment has been violated or is not available
Municipalities	Immunity from punitive damages	-Declaratory judgment -Injunctive relief -Attorney's fees
Private parties acting under color of state law (such as prison guards at a privately run prison)	Qualified immunity in some circumstances	-Declaratory judgment -Injunctive relief -Money damages (see above)

b. The Prison Litigation Reform Act

The Prison Litigation Reform Act ("PLRA") makes it harder for prisoners to file lawsuits in federal court. It does this by changing some sections of the United States Code that address civil rights litigation and *in forma pauperis* proceedings. *In forma pauperis* proceedings are those where you file a lawsuit as a poor person and therefore avoid many of the regular fees and costs of filing a suit.

The purpose of this section is to keep you informed of the provisions of the PLRA, and to explain how the Fifth Circuit has interpreted certain sections of the PLRA so that you will know how to defend yourself in federal courts. This Chapter only addresses certain provisions of the PLRA and acts merely as a supplement to the information provided in the main *JLM*. Therefore, it is important that you also refer to Chapter 14 of the main *JLM*, "Prison Litigation Reform Act," for information on the general legal effects of the PLRA across the country.

This section will first focus on the "three strikes" provision, which states that if you have three cases dismissed as frivolous, malicious, or failing to state a valid legal claim, you can no longer use the *in forma pauperis* procedure and will have to pay the entire filing fee in advance. This section will then discuss the PLRA's requirement that you exhaust (use up) all administrative remedies before you will be allowed in court—it is very important to understand exactly what this requirement entails.

i. *The "Three Strikes" Provision*

The "three strikes" provision is one of the harshest provisions of the PLRA. It states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [*in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.[46]

This provision means that you will be barred from proceeding with a federal suit *in forma pauperis* if you have three civil actions or appeals dismissed for frivolousness, maliciousness, or failure to state a claim.[47] Once you have "three strikes," the only way that you will be able to proceed with your action without prepayment of fees is to demonstrate that you are subject to imminent (immediate) danger of serious physical injury.[48] Otherwise, once you have three strikes, you have to pay the full filing fee upfront.[49]

The Fifth Circuit has stated that because there is no absolute right to pursue a claim *in forma pauperis*, the application of the "three strikes" provision does not raise retroactivity concerns.[50] What this means is that even if one of your previous civil claims or appeals was dismissed for frivolousness, maliciousness, or failure to state a claim *before* the PLRA was enacted, it will still count as one of your "three strikes." It also means that if your claim was pending when the PLRA was enacted, the "three strikes" provision will also apply to that claim.

(a) Who is a "prisoner"?

The PLRA's "three strikes" provision only applies to suits filed by those who are prisoners at the time the suit is filed, and can only bar prisoners from proceeding *in forma pauperis* in a civil action or appeal of a civil action.[51] One question that the Fifth Circuit has addressed is how to define "prisoner" within the definition of the PLRA. In order to determine whether you will be considered a "prisoner," you need to consider two questions: (1) whether you are incarcerated or detained in any facility; and (2) if so, whether it is as a result of a criminal conviction.[52] In order to be considered a "prisoner" under the PLRA, you have to be able to answer "yes" to both these questions.

---

[46] 28 U.S.C. § 1915(g) (2012). This section does not apply to a person who is not a prisoner when he or she files suit. *See* Castillo v. Asparion, 109 F. App'x. 653, 654–655 (5th Cir. 2004) (per curiam) (stating that district court's dismissal of Castillo's failure to state a claim did not count as strike because he was not incarcerated when he filed that complaint).

[47] Carson v. Johnson, 112 F.3d 818, 821–822 (5th Cir. 1997) (holding that the three strikes section did not block prisoner's access to courts in a way that would violate due process).

[48] Bell v. Livingston, 356 F. App'x. 715, 716–717 (5th Cir. 2009) (per curiam) (stating that even if Bell's complaint passed the imminent danger requirement, he failed to state a claim upon which relief may be granted).

[49] Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996) (stating that this requirement to pay full fees merely puts prisoners who abuse a privilege on the same footing as everyone else).

[50] Adepegba v. Hammons, 103 F.3d 383, 385–386 (5th Cir. 1996) (holding that the PLRA could constitutionally apply to the current appeal, which had been filed before the PLRA was enacted).

[51] Jackson v. Johnson, 475 F.3d 261, 265–267 (5th Cir. 2007) (per curiam) (holding that Jackson, who had been released from prison and was residing in a halfway house, was considered a "prisoner" within the definition of the PLRA); Janes v. Hernandez 215 F.3d 541, 543 (5th Cir. 2000) (holding that the PLRA only applies to suits filed by prisoners).

[52] Jackson v. Johnson, 475 F.3d 261, 265 (5th Cir. 2007) (per curiam); *see also* 28 U.S.C. § 1915(g), (h) (2012).

As for the first issue, if you are in prison, then you will clearly be considered by the court to be incarcerated or detained. If you have not been released into the general public, but are being detained in a facility, such as a halfway house that you may leave for only limited purposes, then you will be considered by the Fifth Circuit to be "incarcerated or detained" under the definition of the PLRA.[53]

The second question asks whether or not your incarceration is the result of a *criminal conviction*. If it is not, then you will not be considered a "prisoner" within the definition of the PLRA. For example, if you are being detained for a violation of immigration law rather than criminal law, you will not be barred from suit under the PLRA.[54] It is similarly the case that prisoners in civil confinement, for example mental institutions, will not be considered "prisoners" under the PLRA.[55]

(b) What counts as a "strike"?

The statute states that you gain a "strike" when you bring an action or appeal to a court that gets dismissed for frivolousness, maliciousness, or failure to state a claim upon which relief may be granted.[56]

The Fifth Circuit has stated that when an appeals court merely affirms that the district court below did not err in dismissing a claim for one of the reasons stated in the PLRA, that appeal will not count as a separate strike.[57] However, if you decide to argue different issues in your appeal, which is then dismissed for one of the reasons stated in the PLRA, that appeal will count as a separate strike.[58] When an appeals court reverses a lower court's dismissal of a claim that was found to be malicious, frivolous, or without a proper claim, such reversal erases that "strike."[59]

The Fifth Circuit has also held that a district court's dismissal of a claim for the reasons stated in the PLRA will *not* count as a "strike" until you have exhausted (used up) or waived your appeals.[60] Therefore, if you receive a third strike in a district court decision, you will still be able to appeal that decision *in forma pauperis*.

The PLRA requirements do not apply to habeas actions because habeas proceeding are often outside the reach of the phrase "civil action," and because applying the "three strikes" provision to habeas proceedings would go against the long tradition of prisoners having access to federal habeas corpus.[61] In order to determine whether your suit is a civil action within the meaning of the PLRA or a habeas proceeding, you need to consider whether a favorable determination from the court would automatically entitle you to an earlier release; if it would, then your claim will be considered a habeas proceeding.[62]

---

[53] Jackson v. Johnson, 475 F.3d 261, 265–266 (5th Cir. 2007) (per curiam) (citing Kerr v. Puckett, 138 F.3d 321 (7th Cir. 1998)). Kerr v. Puckett held that a parolee is not a "prisoner" within the definition of the PLRA.

[54] Ojo v. INS, 106 F.3d 680, 682 (5th Cir. 1997) (holding that a detainee of the INS is not a "prisoner" within the PLRA).

[55] Jackson v. Johnson, 475 F.3d 261, 266 (5th Cir. 2007) (per curiam) (citing Kolocotronis v. Morgan, 247 F.3d 726, 728 (8th Cir. 2001)); Page v. Torrey, 201 F.3d 1136, 1139–1140 (9th Cir. 2000).

[56] 28 U.S.C. § 1915(g) (2012).

[57] Adepegba v. Hammons, 103 F.3d 383, 385 (5th Cir. 1996).

[58] Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996) (stating that when Adepegba's appeal raised the issue that the district court improperly dismissed his complaint without service of process and was later dismissed for frivolousness, such appeal counted as a separate strike from the district court dismissal).

[59] Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996).

[60] Adepegba v. Hammons, 103 F.3d 383, 387–388 (5th Cir. 1996) (stating that because Adepegba did not appeal previous dismissals at the district level within the deadline to file an appeal, he was considered to have waived his appeal and therefore the dismissals counted as strikes against him).

[61] Carson v. Johnson, 112 F.3d 818, 820 (5th Cir. 1997) (stating that Carson would be able to proceed *in forma pauperis* if his action was determined to be a habeas suit); *see also* United States v. Cole, 101 F.3d 1076, 1077 (5th Cir. 1996) (stating that PLRA requirements do not apply to habeas actions).

[62] Carson v. Johnson, 112 F.3d 818, 820–821 (5th Cir. 1997) (finding that because Carson did not allege that a reassignment from administrative segregation would automatically shorten his sentence or lead to immediate release, Carson's action was a § 1983 action to which the PLRA requirements applied).

ii. *Exhaustion of Administrative Remedies*

The PLRA exhaustion requirement states: No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] . . . 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.[63]

The exhaustion of remedies requirement is one of the most important sections of the PLRA because so many prisoners lose their cases because they do not pursue all available administrative remedies to the end. You should refer to Chapter 14, Part E, of the main *JLM*, "The Prison Litigation Reform Act," in order to learn about the general details of this requirement across the nation. This section will focus specifically on what the Fifth Circuit has held with regard to exhaustion of administrative remedies. Exhaustion of available administrative remedies is a threshold requirement for any Section 1983 action,[64] even if you are seeking monetary damages that would not be available in the prison grievance proceeding.[65]

When you file a complaint with the court, you do not immediately have to demonstrate that you have exhausted all possible administrative remedies.[66] Since failure to exhaust is an affirmative defense under the PLRA, it is up to the defendant to point out to the court that they believe you have not satisfied the exhaustion requirement.[67] Once the defendant has raised this defense, the Fifth Circuit has stated that the district court must give a prisoner an opportunity to show that he has either exhausted the available administrative remedies or that he should be excused from the requirement.[68]

The Fifth Circuit has held that the issue of exhaustion may be addressed by courts in summary judgment.[69] When a defendant claims that you have not exhausted your administrative remedies as an affirmative defense, the judge will usually resolve this dispute concerning exhaustion before discussing the merits of the case.[70] On appeal, the court will review rulings on exhaustion *de novo*, or as though the court is hearing it for the first time.[71]

(a) <u>What is Exhaustion?</u>

If a prison or jail has a grievance process that involves multiple steps, you must comply with all of the steps before your administrative remedies will be considered exhausted.[72] In Louisiana, the DPSC and each sheriff may adopt an administrative procedure at each of their correctional institutions for receiving, hearing, and disposing of any complaints.[73] When you are seeking administrative remedies regarding prison

---

[63] 42 U.S.C. § 1997e(a) (2012).
[64] Johnson v. Louisiana *ex rel.* La. Dep't. of Pub. Safety and Corr., 468 F.3d 278, 280 (5th Cir. 2006) (per curiam) (holding that the PLRA's exhaustion requirement applies to all § 1983 claims regardless of whether the inmate files his claim in state or federal court).
[65] Robinson v. Wheeler, 338 F. App'x. 437, 438 (5th Cir. 2009) (per curiam); *see also* Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001) (stating that an inmate must satisfy the exhaustion requirement regardless of the types of relief sought and offered through administrative sources).
[66] Samuels v. Huff, 344 F. App'x. 8, 10 (5th Cir. 2009) (per curiam) (finding that the district court erred in dismissing Samuels' claims for failure to provide proof that he had exhausted his administrative remedies as to the claims against the defendants).
[67] Samuels v. Huff, 344 F. App'x. 8, 10 (5th Cir. 2009); *see also* Torns v. Miss. Dep't. of Corr., 301 F. App'x. 386, 389–390 (5th Cir. 2008) (holding that where the complaint does not clearly show that the inmate fails to exhaust administrative remedies, it is the defendant's job to raise and prove such affirmative defense); Carbe v. Lappin, 492 F.3d 325, 328 (5th Cir. 2007) (holding that a district court *cannot* require prisoners to affirmatively plead exhaustion).
[68] Johnson v. Ford, 261 F. App'x. 752, 755 (5th Cir. 2008) (per curiam) (stating that one possible excuse could be that administrative remedies are inadequate because prison officials have ignored or interfered with prisoner's pursuit of an administrative remedy; another possible excuse would be where dismissal would be inefficient and would not further the interest of justice or the purposes of the exhaustion requirement).
[69] Dillon v. Rogers, 596 F.3d 260, 272 (5th Cir. 2010) (holding that the District Court did not err in addressing appellees' affirmative defense of failure to exhaust on summary judgment).
[70] Dillon v. Rogers, 596 F.3d 260, 273 (5th Cir. 2010).
[71] Powe v. Ennis, 177 F.3d 393, 394 (5th Cir. 1999) (per curiam).
[72] Hicks v. Tarrant Cty. Tex., 345 F. App'x. 911, 913 (5th Cir. 2009) (per curiam) (holding that Hicks' failure to comply with the second step in a two-step grievance procedure constituted a failure to exhaust his administrative remedies).
[73] LA. REV. STAT. ANN. §§ 15:1171–15:1178 (2017).

conditions, it is important for you do so in the proper form specified by the particular administration of your prison or you will not have satisfied the exhaustion requirement.[74] In general, you must use Louisiana's Administrative Remedy Procedure (ARP) before you can bring a case in federal court in Louisiana. ARP is discussed further in Section C(1)(c) of this Chapter.

The Fifth Circuit has held that if the named plaintiff in a class action has exhausted his administrative remedies, that is sufficient to satisfy the PLRA's exhaustion requirement.[75]

Available administrative remedies are considered to be exhausted when the time limits for the prison's response, stated in the grievance procedure rules, have expired.[76] After the time limit for the prison's response has expired, you should then proceed to the next step of the grievance process, if such grievance process has multiple steps.[77] Once you have reached the last step, if you do not receive a response from the prison within the time frame provided for by the grievance process, you may then file suit in court.[78]

(b) What administrative remedies are "available"?

In order to satisfy this exhaustion requirement, you need to know which administrative remedies are "available" to you. If you do not discover certain injuries until after you have left a certain prison, and that prison's administration lacks authority to hear your complaint after you have left, you will have no available administrative remedies to exhaust.[79]

The Fifth Circuit has acknowledged that one's personal inability to access the grievance system might make the system unavailable.[80] However, the court has not yet found any prisoner to be "unable" enough to make administrative remedies unavailable.[81] The Fifth Circuit has acknowledged a narrow set of facts where administrative remedies might be deemed "unavailable" due to physical injury: when (1) an prisoner's untimely filing of a grievance is because of a physical injury and (2) the grievance system rejects the prisoner's subsequent attempts to exhaust his remedies based on the untimely filing of the grievance.[82] Therefore, even if you are unable to file a complaint due to a physical injury, you are obligated to file one as

---

[74] Robinson v. Wheeler, 338 F. App'x. 437, 438 (5th Cir. 2009) (per curiam) (finding that Robinson failed to exhaust his remedies when he did not resubmit individual claims after being informed that his first attempt to use the grievance process had been rejected because it presented multiple claims); Randle v. Woods, 299 F. App'x. 466, 467 (5th Cir. 2008) (per curiam) (holding that Randle had not property exhausted his administrative remedies when he raised a specific complaint for the first time in step two of the grievance procedure, in violation of the requirement that each issue be filed at step one).

[75] Gates v. Cook, 376 F.3d 323, 329–330 (5th Cir. 2004).

[76] Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998) *overruled on other grounds by* Carbe v. Lappin, 492 F.3d 325 (5th Cir. 2007) (finding that when the Texas Department of Criminal Justice, in a three-step grievance process, stated that the Deputy Director was to render a final decision within twenty-six days of receipt of the grievance, Underwood would have satisfied the exhaustion requirement if he had waited until after the twenty-six days to file suit).

[77] Clifford v. Louisiana, 347 F. App'x. 21, 22 (5th Cir. 2009) (per curiam) (holding that the expiration of time limits enables an inmate to proceed to the next step in the grievance process); Hicks v. Tarrant Cty. Tex., 345 F. App'x. 911, 912–913 (5th Cir. 2009) (per curiam).

[78] Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998) *overruled on other grounds by* Carbe v. Lappin, 492 F.3d 325 (5th Cir. 2007).

[79] Allard v. Anderson, 260 F. App'x. 711, 714 (5th Cir. 2007) (per curiam) (finding that Allard did not discover certain injuries incurred until after he had been transferred and therefore any requirement that he exhaust available administrative remedies would be futile). *But see* Hill v. Epps, 169 F. App'x. 199, 200–201 (5th Cir. 2006) (per curiam) (holding that because Hill did not provide an explanation for failing to file a grievance complaint before he was transferred, he did not satisfy the exhaustion requirement).

[80] Days v. Johnson, 322 F.3d 863, 867 (5th Cir. 2003) (per curiam) *overruled by implication on other grounds by* Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007).

[81] Ferrington v. La. Dep't. of Corr., 315 F.3d 529, 532 (5th Cir. 2002) (per curiam) (finding that a prisoner's blindness did not make him unable to exhaust his available administrative remedies).

[82] Fontenot v. Global Expertise in Outsourcing, 232 F. App'x. 393, 394 (5th Cir. 2007) (per curiam) (stating that even if the administrative process was not available to the inmate while he could not find someone to assist him, he is not excused from the exhaustion requirement because he did not file a grievance after he found an inmate willing to assist him).

soon as you are able to.

2. Examples of Substantive Claims That Can Be Brought Under Section 1983

In the section above we have described some of the procedural hurdles that may affect your ability to bring a lawsuit for civil rights violations under federal law. In this section, we discuss some of the substantive claims that can be made in lawsuits complaining about a violation of federal law. The discussion in this section will focus on how the Fifth Circuit has decided cases brought under Section 1983.

In order to bring a lawsuit under Section 1983, you need to show that you have met the three essential requirements in your pleadings: (1) that a "person" violated your constitutional or federal statutory rights; (2) that that person acted "under color of" state law; and (3) that that person deprived you of a right, privilege, or immunity you have under the Constitution or federal law. For general information on Section 1983 claims across the country, you should refer to Chapter 16 of the main *JLM*. This section will focus on specific interpretations of the Fifth Circuit in order to supplement the information already supplied in the *JLM*. Therefore, it is very important that you look at Chapter 16 of the main *JLM* in order to gather information about your own Section 1983 claim.

This Chapter will primarily address rights under the Eighth and Fourteenth Amendments. For other constitutional rights, see the table below to identify which main *JLM* or *Louisiana State Supplement* Chapters you should consult:

Type of Prisoner Rights	Source of Constitutional Right	*JLM* Chapter	Louisiana Supplement Chapter
Mail, visitation, telephone use, and other communications	First Amendment	Chapter 19, "Your Right to Communicate with the Outside World"	Chapter 13
Religious practices	First Amendment	Chapter 27, "Religious Freedom in Prison"	Chapter 15
Searches and seizures of pretrial detainees; body searches	Fourth Amendment	Chapter 25, "Your Right to Be Free From Illegal Body Searches"	Chapter 24
Prison conditions: overcrowding, cleanliness, etc.	Eighth Amendment	Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law"	This Chapter, Chapter 6
Medical care	Eighth Amendment	Chapter 23, "Your Right to Adequate Medical Care"	Chapter 14
Assault/failure to protect	Eighth Amendment	Chapter 24, "Your Right to Be Free From Assault by Prison Guards and Other Prisoners"	Chapter 7
Informational privacy	Fourteenth Amendment	Chapter 26, "Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prison," and Chapter 23, "Your Right to Adequate Medical Care"	Chapter 23, Chapter 14
Due Process in disciplinary hearings	Due Process Clause of the Fifth &	Chapter 18, "Your Rights at Prison Disciplinary Proceedings"	Chapter 11

	Fourteenth Amendments		
Discrimination on the basis of race, ethnicity, etc.	Equal Protection Clause of the Fourteenth Amendment	Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law"	This Chapter, Chapter 6
Discrimination on the basis of gender	Equal Protection Clause of the Fourteenth Amendment	Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law"	This Chapter, Chapter 6
Rights of prisoners with mental illness	Eighth and Fourteenth Amendments	Chapter 29, "Special Issues for Prisoners with Mental Illness"	Chapter 16
Discrimination on the basis of disability	Equal Protection Clause of the Fourteenth Amendment	Chapter 28, "Rights of Prisoners with Disabilities"	This Chapter, Chapter 6
Discrimination on the basis of sexual orientation or gender identity	Equal Protection Clause of the Fourteenth Amendment	Chapter 30, "Special Information for Lesbian, Gay, Bisexual, and Transgender Prisoners"	This Chapter, Chapter 6
Access to courts—law libraries or legal assistance	First, Sixth, & Fourteenth Amendments	Chapter 3, "Your Right to Learn the Law and Go to Court"	

a. Stating a Claim

To state a Section 1983 claim, you must show two things: (1) You must allege a violation of rights secured by the Constitution or a federal statute and (2) you must demonstrate that the alleged deprivation was committed by a person acting under color of law.[83] The Fifth Circuit has stated that "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of" state law.'"[84] This means that when an official misuses his power and violates your rights, this counts as acting "under color" of law. Whether an official is acting "under color" of law does not depend on his duty status at the time of the alleged violation.[85] Thus, it does not matter whether the official was actually working on duty when he violated your rights.

Congress did not provide a statute of limitations for Section 1983 cases, and so federal courts borrow from the state's statute of limitations for similar situations.[86] In Louisiana, the statutory limitation period for tort claims is one year from the day that the action accrues (happens), and the Fifth Circuit has held that the statute of limitations for torts applies to Section 1983 actions.[87] What this means is that you have

[83] Piotrowski v. City of Houston, 51 F.3d 512, 515–516 (5th Cir. 1995) (holding that the plaintiff failed to allege facts supporting a § 1983 claim against the city).
[84] Townsend v. Moya, 291 F.3d 859, 861 (5th Cir. 2002) (per curiam) (quoting United States v. Causey, 185 F.3d 407, 415 (5th Cir. 1999)) (finding that when an inmate engaged in horseplay with the defendant and the defendant stabbed the inmate in the process, the defendant was not acting "under color" of law).
[85] United States v. Tarpley, 945 F.2d 806, 809 (5th Cir. 1991) (finding that a police officer was acting "under color" of law when he assaulted his wife's former lover since he claimed during the assault to have special authority for his actions by virtue of his official stature and that he could kill the victim because he was an officer of the law).
[86] Bourdais v. New Orleans City, 485 F.3d 294, 298 (5th Cir. 2007) (citing Pegues v. Morehouse Parish Sch. Bd., 632 F.2d 1279, 1280–1281 (5th Cir. 1980)).
[87] Bourdais v. New Orleans City, 485 F.3d 294, 298 (5th Cir. 2007) (citing Pegues v. Morehouse Parish Sch. Bd., 632 F.2d 1279, 1280–1281 (5th Cir. 1980)); LA. CIV. CODE ANN. art. 3492 (2017).

one year to file the claim from the moment the injury or damage occurs.[88] There can be an exception to the time limit if: 1) there was some legal cause that prevented the court from taking action on your case, 2) there was some condition along with a contract or some connection to your claim that prevented you from suing, 3) the defendant has done some act to prevent you from bringing a case, or 4) you do not have sufficient information to know or reasonably know that you have been injured, even if this is not the defendant's fault.[89] If your injury is related to a violation of a contract, the limitation period will be 10 years from the day that the injury occurs.[90]

As stated above, in order to state a Section 1983 claim, you have to demonstrate that a violation of your constitutional or statutory rights has occurred. The Fifth Circuit has discussed several rights in particular, which are listed below.

b. Eighth Amendment

The Eighth Amendment of the Constitution prohibits "cruel and unusual punishments."[91] There are several types of claims courts will consider under the cruel and unusual punishment part of the Eighth Amendment. These claims include harm resulting from prison conditions, inadequate medical care, and assault. To state a viable Eighth Amendment claim, you must allege an injury in your complaint.[92] This means that you must describe how you have been harmed by the poor prison conditions. Claims of strip searches or body cavity searches should be brought under the Fourth Amendment, not the Eighth Amendment.[93] For more information, see Chapter 24 of the *Louisiana State Supplement*.

You should read Chapter 14 of the main *JLM*, "The Prison Litigation Reform Act" ("PLRA"), if you plan to file a claim for cruel and unusual punishment under the Eighth Amendment. The PLRA prohibits federal lawsuits by prisoners for compensatory damages[94] for mental or emotional injury without accompanying physical injury or sexual acts.[95]

To make a Section 1983 claim under the Eighth Amendment, the Fifth Circuit requires that you classify your challenge either as an attack on a condition of confinement or as a complaint against an episodic act or omission.[96] You cannot bring both claims and they each have a different standard of review, so it is important to know which claim fits your situation better. A condition-of-confinement claim is a constitutional attack on the general conditions, practices, rules, or restrictions of confinement.[97] An episodic-act-or-omission claim occurs when the complained-of harm is a particular act or omission of one or more

---

[88] LA. CIV. CODE ANN. art. 3492 (2017).
[89] Terrebonne Parish School Bd. v. Mobil Oil Corp., 310 F.3d 870, 884 n.37 (5th Cir. 2002).
[90] LA. CIV. CODE ANN. art. 3499 (2017).
[91] U.S. CONST. amend. VIII.
[92] Johnson v. Tex. Bd. of Criminal Justice, 281 F. App'x. 319, 321 (5th Cir. 2008).
[93] Waddleton v. Jackson, 445 F. App'x. 808, 808 (5th Cir. 2011) (per curiam) ("In this circuit, such claims are properly considered under the Fourth Amendment.") (citing Moore v. Carwell, 168 F.3d 234, 235 (5th Cir. 1999)); Elliott v. Lynn, 38 F.3d 188, 191 n.3 (5th Cir. 1994) (citing United States v. Lilly, 576 F.2d 1240, 1244 (5th Cir. 1978) (noting that "*Lilly* is still the law of this circuit concerning the Fourth Amendment's application to visual body cavity searches in the prison setting").
[94] Compensatory damages repay you for damages you have already sustained, like the cost of medical bills. Compensatory damages do not include punitive damages, which are meant to punish the wrongdoer rather than to compensate you for your injuries.
[95] 42 U.S.C. § 1997e(e) (2012). The statue states that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." Courts have held that the statute only prohibits compensatory damages for mental or emotional injury, so prisoners can still claim injunctive relief or other forms of damages for emotional injuries.
[96] Anderson v. Dallas Cty. Tex., 286 F. App'x. 850, 857 (5th Cir. 2008) (per curiam) (citing Flores v. Cty. of Hardeman, 124 F.3d 736, 738 (5th Cir. 1997)).
[97] Anderson v. Dallas Cty. Tex., 286 F. App'x. 850, 857 (5th Cir. 2008) (per curiam) (citing Bradley v. Puckett, 157 F.3d 1022, 1025 (5th Cir. 1998) as an example of a condition-of-confinement case because a disabled prisoner complained that he was unable to bathe for over two months, as the prison did not accommodate his disability).

officials.[98] In the episodic-act-or-omission cases, you will usually complain first about a particular act or omission of an officer and then point to a policy, custom, or rule of the municipality that permitted or caused the action.[99] The reason that you need to distinguish between these two different types of claims is that the Fifth Circuit will not allow you to proceed with your case under both theories.[100] It is also important to include as many details as possible in your complaint. If your allegations are "too vague and conclusory," the claim will be dismissed.[101]

i. *Condition of Confinement*

In condition-of-confinement cases, the Fifth Circuit has held that a prisoner must satisfy two requirements to demonstrate that a prison official has violated the Eighth Amendment: (1) the prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities," and (2) the prison official must have been deliberately indifferent to the prisoner's health or safety.[102] The "minimal civilized measure" requirement is an *objective* test; the "deliberate indifference" requirement is a *subjective* test.

(a) Minimal Civilized Measure

The Fifth Circuit has defined what constitutes "the minimal civilized measure of life's necessities." The court has also phrased the requirement as "[c]onditions posing a substantial risk of serious harm to the inmate."[103] In *Palmer v. Johnson,*[104] the Fifth Circuit discussed this objective requirement for prison conditions at length. The Court stated that missing the occasional meal or two and enduring insect bites without immediate medical attention did not rise to the level of constitutional injury.[105] However, if you are denied the basic elements of hygiene, then your prison conditions will be considered so base and inhumane that they violate the Eighth Amendment.[106] In *Palmer*, the plaintiff was deprived of toilets along with forty-eight other prisoners in a small area. This was considered to be a deprivation of basic requirements of hygiene, and therefore a violation of constitutional rights under the Eighth Amendment.[107] In *Palmer*, the Fifth Circuit emphasized that the court must consider the totality of the specific circumstances, even where the challenged conduct only lasted for seventeen hours.[108]

In Eighth Amendment cases such as *Palmer*, where the claim does not involve "significant risks to the rights of inmates and prison staffs," you will also need to demonstrate that the infliction of pain was

---

[98] Anderson, 286 F. App'x. 850, 859 (5th Cir. 2008) (per curiam) (finding that this case was an episodic-act-or-omission case because the plaintiff admitted that the defendant had policies in place that would have prevented the prisoner's suicide if they had been followed).
[99] Anderson, 286 F. App'x. 850, 859 (5th Cir. 2008) (per curiam) (citing Scott v. Moore, 114 F.3d 51, 53 (5th Cir. 1997)).
[100] Anderson, 286 F. App'x. 850, 857–858 (5th Cir. 2008) (per curiam); Flores v. Cty. of Hardeman, Tex., 124 F.3d 736, 738 (5th Cir. 1997).
[101] Johnson v. Tex. Bd. of Criminal Justice, 281 F. App'x. 319, 321 (5th Cir. 2008).
[102] Gates v. Cook, 376 F.3d 323, 332 (5th Cir. 2004) (quoting Davis v. Scott, 157 F.3d 1003, 1006 (5th Cir. 1998)); *see* Helling v. McKinney, 509 U.S. 25, 31 (1993) ("The treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.").
[103] Gates v. Cook, 376 F.3d 323, 333 (5th Cir. 2004).
[104] Palmer v. Johnson, 193 F.3d 346, 351–352 (5th Cir. 1999).
[105] Palmer v. Johnson, 193 F.3d 346, 352 (5th Cir. 1999) (citing Talib v. Gilley, 138 F.3d 211, 214 n.3 (5th Cir. 1998)). ("[M]issing a mere one out of every nine meals is hardly more than that missed by many working citizens over the same period.").
[106] Novak v. Beto, 453 F.2d 661, 665–666 (5th Cir. 1971) (finding that where the solitary confinement cells were scrubbed each time the prisoner left to bathe and contained flush toilets, a drinking fountain, and a bunk, there was no Eighth Amendment violation).
[107] Palmer v. Johnson, 193 F.3d 346, 352 (5th Cir. 1999).
[108] Palmer v. Johnson, 193 F.3d 346, 353 (5th Cir. 1999) (finding that "the totality of the specific circumstances presented by Palmer's claim—his overnight outdoor confinement with no shelter, jacket, blanket, or source of heat as the temperature dropped and the wind blew along with the total lack of bathroom facilities for forty-nine inmates sharing a small bounded area—constituted a denial of 'the minimal civilized measure of life's necessities'") (quoting Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994)).

"unnecessary and wanton."[109] This means that the court will ask whether the officer's actions were applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm.[110] This can often be difficult to prove.

The Fifth Circuit has found "the minimal civilized measure of life's necessities" to include "food, clothing, shelter, medical care, and reasonable safety."[111] It also includes protection from things like excessive heat,[112] excessive cold,[113] and filthy prison conditions.[114] It is important to note that comfort alone is not protected by the Eighth Amendment. For example, the "[l]ack of space alone does not constitute cruel and unusual punishment, save perhaps in the most aggravated circumstances."[115] However, lack of space or lack of comfort can be considered in light of other conditions, including "sanitation, provision of security, protection against prisoner violence, and time and facilities available for work and exercise."[116]

Medical conditions may also provide grounds for a claim under the Eighth Amendment. For example, inappropriate work requirements in light of medical conditions may provide the basis for a claim, but only if the deliberate indifference element is proved.[117] In some circumstances, inadequate medical treatment or neglect can violate the Eighth Amendment.[118] An incorrect diagnosis by prison officials, however, does not violate the Eighth Amendment.[119] For more information, *see* Chapter 23 of the main *JLM*, "Your Right to Adequate Medical Care."

In "condition-of-confinement" cases, you can combine conditions to prove an Eighth Amendment violation, but only where each of the conditions affect a "single, identifiable human need."[120] For example, cold cell temperatures combined with failure to issue blankets might combine to reach an Eighth Amendment violation, because they both affect the same need—warmth.

(b) Deliberate Indifference

Deliberate indifference happens when prison officials "(1) [are] aware of facts from which an inference of an excessive risk to the prisoner's health or safety could be drawn and (2) . . . actually [draw] an inference that such potential for harm existed."[121] Thus, you need to show that (1) prison officials knew of conditions that were highly risky to health or safety. After you do that, you also must show that (2) the officials knew the risky conditions could cause you harm.

---

[109] Beck v. Lynaugh, 842 F.2d 759, 761 (5th Cir. 1988) (quoting Foulds v. Corley, 833 F.2d 52, 54–55 (5th Cir. 1987)) (finding that the standard of malicious and sadistic intent was not the proper standard in cases where there is no imminent danger) (internal quotation marks omitted).

[110] Petta v. Rivera, 143 F.3d 895, 901 (5th Cir. 1998). In this case, the plaintiffs had to prove "that [the officer's] actions caused them any injury, were grossly disproportionate to the need for action under the circumstances and were inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience." Petta v. Rivera, 143 F.3d 895, 902 (5th Cir. 1998).

[111] Shepherd v. Dallas Cty., 591 F.3d 445, 454 (5th Cir. 2009) (quoting Hare v. City of Corinth, 74 F.3d 633, 639 (5th Cir. 1996)).

[112] Valigura v. Mendoza, 265 F. App'x. 232, 235 (5th Cir. 2008) (per curiam); Gates v. Cook, 376 F.3d 323, 339 (5th Cir. 2004).

[113] Taylor v. Woods, 211 F. App'x. 240, 241 (5th Cir. 2006) (per curiam).

[114] Gates v. Cook, 376 F.3d 323, 338 (5th Cir. 2004); Harper v. Showers, 174 F.3d 716, 720 (5th Cir. 1999).

[115] Ruiz v. Estelle, 666 F.2d 854, 858 (5th Cir. 1982).

[116] Ruiz v. Estelle, 666 F.2d 854, 858 (5th Cir. 1982).

[117] Hicks v. Shaw, 39 F.3d 319 (5th Cir. 1994) (per curiam) (unpublished).

[118] Estelle v. Gamble, 429 U.S. 97, 104–106, 97 S. Ct. 285, 291–292, 50 L. Ed. 2d 251, 260–261 (1976) (holding that deliberate indifference to a prisoner's serious medical needs constitutes an Eighth Amendment violation).

[119] Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985); *see also* Norton v. Dimazana, 122 F.3d 286, 292 (5th Cir. 1997) ("Disagreement with medical treatment does not state a claim for Eighth Amendment indifference to medical needs.").

[120] Wilson v. Seiter, 501 U.S. 294, 304, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 283 (1991) ("*Some* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need . . . .").

[121] Bradley v. Puckett, 157 F.3d 1022, 1025 (5th Cir. 1998); *see also* Farmer v. Brennan, 511 U.S. 825, 829, 834–837, 114 S. Ct. 1970, 1974, 1977–1979, 128 L. Ed. 2d 811, 820, 824–827 (1994) (requiring "a showing that the official was subjectively aware of the risk [of serious harm to the prisoner]").

Deliberate indifference is an "extremely high" standard to meet.[122] You must show that prison officials (1) "refused to treat [you]," (2) "ignored [your] complaints," (3) "intentionally treated [you] incorrectly," or (4) "engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs."[123] "Wanton disregard" means that officials were more than just careless. Mere negligence does not amount to deliberate indifference.[124] In other words, even if the official was careless in his actions or should have known better, that does not mean the official was acting with deliberate indifference. When your complaint is about medical care, unsuccessful medical treatment or medical malpractice does not amount to deliberate indifference.[125] Therefore, even if your doctor or medical official did not follow the rules of their profession and you were injured as a result, your claim still does not necessarily reach the level of deliberate indifference.

ii. *Episodic-Act-or-Omission*

There are two steps to episodic-act-or-omission cases. You must show that the prison employee "(1) violated [your] clearly established constitutional rights with subjective deliberate indifference." You also must show that, "(2) the violation resulted from a municipal policy or custom adopted or maintained with objective deliberate indifference."[126] The core of this requirement is that "the prison official had knowledge of the risk faced by inmates and responded unreasonably."[127]

First, you must demonstrate that the prison employee acted with deliberate indifference, as discussed above.[128] After you have proven subjective deliberate indifference, you must still show that the employee's act resulted from a policy adopted or maintained with objective deliberate indifference to your rights.[129] That means that the city or county must have a policy (or lack of policy) that it knew or should have known would lead to an Eighth Amendment violation.[130] There must be a causal link between the municipal policy and the act/omission of the official. The policy or custom must have been the "moving force" behind the constitutional violation.[131]

If prison officials fail to protect you from assault by other prisoners, you may also make a claim that your Eighth Amendment rights have been violated. For more information on your right to be free from assault generally, see Chapter 24 of the main *JLM*, "Your Right to Be Free from Assault by Prison Guards and Other Prisoners," and Chapter 7 of the *Louisiana State Supplement*.

c. Fourteenth Amendment—Due Process Clause

The Due Process Clause of the Fourteenth Amendment says that the state cannot "deprive any person of life, liberty, or property without due process of law."[132] Courts have said that this creates two

---

[122] Gobert v. Caldwell, 463 F.3d 339, 346 (5th Cir. 2006) (quoting Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985) (internal quotation marks omitted)).
[123] Domino v. Tex. Dep't. of Criminal Justice, 239 F.3d 752, 756 (5th Cir. 2001) (quoting Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985)).
[124] Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991) (per curiam).
[125] Gobert v. Caldwell, 463 F.3d 339, 346 (5th Cir. 2006).
[126] Flores v. Cty. of Hardeman, Tex., 124 F.3d 736, 738 (5th Cir. 1997); *see also* Scott v. Moore, 114 F.3d 51, 54 (5th Cir. 1997) (finding that a city was not liable for sexual assaults by a jailer even though different staffing policies could have prevented the assaults because the city did not have actual knowledge of the risk their policies posed).
[127] Morgan v. Hubert, 459 F. App'x. 321, 326 (5th Cir. 2012).
[128] Anderson v. Dallas Cty. Tex., 286 F. App'x. 850, 860 (5th Cir. 2008) (citing Scott v. Moore, 114 F.3d 51, 54 (5th Cir. 1997)).
[129] Anderson v. Dallas Cty. Tex., 286 F. App'x. 850, 860 (5th Cir. 2008).
[130] "A county acts with objective deliberate indifference if it promulgates (or fails to promulgate) a policy or custom despite 'the 'known or obvious consequences' that constitutional violations would result.'" Anderson v. Dallas Cty. Tex., 286 F. App'x. 850, 860 (5th Cir. 2008) (quoting Piotrowski v. City of Houston, 237 F.3d 567, 579 (5th Cir. 2001)).
[131] Forgan v. Howard Cty. Tex., 494 F.3d 518, 522 (5th Cir. 2007) (citing Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 690–691, 98 S. Ct. 2018, 2044–2045, 56 L. Ed. 2d 611, 635–636 (1978)).
[132] U.S. CONST. amend. XIV, § 1. The 14th Amendment applies to state government action. The 5th Amendment contains an identical prohibition: "No person shall be . . . deprived of life, liberty, or property, without due process of

separate types of protections: "substantive due process" and "procedural due process."

i. *Substantive Due Process*

The substantive aspect of the Due Process Clause prevents the government from interfering with your fundamental individual rights in a way that is not "reasonably related to legitimate penological interests."[133] These fundamental rights include the right to bodily privacy, the right to informational privacy and confidentiality, the right to get married, and the right to refuse medical or psychiatric treatment. The protection has limits, however. In order to show your right has been violated, you must show that the government did not act in a way that is reasonably related to a legitimate goal. For example, the Fifth Circuit has held that a prison's interest in preventing the spread of tuberculosis, a highly contagious and dangerous disease, was compelling and thus a prisoner being forcibly medicated against tuberculosis was constitutional.[134] If you are challenging a "specific act of a governmental officer," you must show that the behavior of the governmental officer is so outrageous that it is "conscience shocking."[135] For more information on substantive due process violations see Chapter 16 of the main *JLM,* Part B(2)(e).

ii. *Procedural Due Process*

You have a right to procedural due process under the Fourteenth Amendment. This means that the government cannot deprive you of life, liberty, or property without going through certain procedures ("due process"). In order to argue that your procedural due process rights were violated, you must show two things. First, you must show that you have been deprived of either liberty or property. Second, you must show that the deprivation happened without procedural protection.[136]

Showing that you were deprived of liberty or property means showing that either your property or your liberty was taken from you *in a way that is not typical of prison life*.[137] You must also show that the prison officials' action was not accidental or simply careless.[138]

The Fifth Circuit has observed that the liberty interests protected by the Due Process Clause are "generally limited to state created regulations or statutes which affect the *quantity of time* rather than

---

law" and applies to the federal government. U.S. CONST. amend. V. Federal prisoners therefore usually use the 5th Amendment instead of the 14th Amendment to challenge due process violations.

[133] Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (finding that prison regulations that affect constitutional rights can only be upheld if they have a rational connection to a legitimate government interest); *see also* Washington v. Harper, 494 U.S. 210, 224–225, 110 S. Ct. 1028, 1038–1039, 108 L. Ed. 2d 178, 200–201 (1990) (reasoning that the right to be free of psychotropic medication had to be balanced against the state's duty to treat mentally-ill prisoners and run a safe prison).

[134] McCormick v. Stalder, 105 F.3d 1059, 1061–1062 (5th Cir. 1997).

[135] Cty. of Sacramento v. Lewis, 523 U.S. 833, 847, 118 S. Ct. 1708, 1717, 140 L. Ed. 2d 1043, 1058 (1998); McClendon v. City of Columbia, 305 F.3d 314, 326 (5th Cir. 2002).

[136] Procedural protection refers to the requirements and safeguards of adequate due process. These safeguards include the right to a hearing, the right to counsel, and an opportunity to speak in one's own defense, all of which serve to protect the prisoner or the accused. *See, e.g.*, Sandin v. Connor, 515 U.S. 472, 487, 115 S. Ct. 2293, 2302, 132 L. Ed. 2d 418, 432 (1995) (holding that a parole hearing to explain the circumstances behind a prisoner's misconduct record sufficed to afford "procedural protection" for a parole board's decision not to grant parole); Wolff v. McDonnell, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L. Ed. 2d 935, 952 (1974) (holding that the determination of prisoners' guilt of "serious misconduct," for which they could lose "good-time credits," requires some sort of hearing to safeguard the minimum requirements of procedural due process). You should be aware that the Court's discussion of due process requirements for solitary confinement in *Wolff* is *not* good law. *See* Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995) (holding that solitary confinement "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest").

[137] *See* Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (finding that due process liberty interests created by prison regulations will generally be limited to freedom from restraints that impose an atypical and significant hardship on the prisoner in relation to the ordinary incidents of prison life).

[138] *See* Daniels v. Williams, 474 U.S. 327, 331–332, 106 S. Ct. 662, 664–665, 88 L. Ed. 2d 662, 668 (1986) (finding that negligently leaving a pillowcase on the stairs which caused an inmate to trip was not enough to constitute a violation under the Due Process Clause).

the *quality of time* served by a prisoner."[139] Thus, if you have a complaint about a rule that will affect how long you are incarcerated, then you may have a procedural due process claim, but if the rule only concerns issues within prison, you will likely not have a claim. The Due Process clause does not, by itself, give you a protected liberty interest in the location of your confinement.[140] Additionally, you have no liberty interest in being housed in any particular facility.[141] Classification of inmates in Louisiana is a duty of the DPSC and you do not have a right to a particular classification under state law.[142] The Fifth Circuit has also held that you do not have a liberty interest entitled to due process protection in whether or not you can participate in Louisiana's work-release program.[143]

d. Fourteenth Amendment—Equal Protection Clause

Under the Equal Protection Clause of the Fourteenth Amendment, all persons in the United States, including prisoners, are guaranteed "the equal protection of the laws."[144] This means that the state may not treat you differently or discriminate against you because you belong to a particular group or "class" of people. In general, for a prisoner to make a claim under the Equal Protection Clause, the claim has to meet two requirements. First, your claim must state that you were treated differently from other prisoners who were in a similar situation or similar circumstances. Second, it must state that the unequal treatment resulted from intentional or purposeful discrimination.[145] You are most likely to be able to make an equal protection claim if you have been discriminated against because of your race,[146] gender,[147] ethnicity, or disability.[148]

To state an equal protection claim, you must allege that "similarly situated" individuals have been treated differently.[149] However, if legitimate penological (prison-related) goals can rationally be said to support the decision to treat a particular group of prisoners differently, then that group is not considered "similarly situated" for Equal Protection purposes.[150] Like other constitutional rights, the right to equal protection is balanced against the state's legitimate interests. One of these legitimate interests is keeping prisons safe and orderly.[151]

---

[139] Madison v. Parker, 104 F.3d 765, 767 (5th Cir. 1997) (emphasis added).
[140] *See* Meachum v. Fano, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976).
[141] Olim v. Wakinekona, 461 U.S. 238, 244–245, 103 S. Ct. 1741, 1745, 75 L. Ed. 2d 813, 819–820 (1983); Tighe v. Wall, 100 F.3d 41, 42 (5th Cir. 1996) (per curiam).
[142] Woods v. Edwards, 51 F.3d 577, 581–582 (5th Cir. 1995) (per curiam) (quoting Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983)).
[143] James v. Hertzhog, 415 F. App'x. 530, 532 (5th Cir. 2011) (per curiam) (finding the work release program grants administrative discretion and where there is administrative discretion, the government has not conferred a right on the prisoner).
[144] U.S. CONST. amend. XIV, § 1.
[145] McCleskey v. Kemp, 481 U.S. 279, 292, 107 S. Ct. 1756, 1767, 95 L. Ed. 2d 262, 278 (1987) (noting that a successful equal protection claim must prove that there was purposeful discrimination); *see* Lavernia v. Lynaugh, 845 F.2d 493, 496 (5th Cir. 1988) ("Discriminatory purpose . . . implies that the decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for *the purpose* of causing its adverse effect on an identifiable group." (internal quotation marks omitted)). This means that it is not enough to argue that you received different treatment, but that you must also argue that you were intentionally treated differently (on purpose).
[146] *See* Johnson v. California, 543 U.S. 499, 512, 125 S. Ct. 1141, 1150, 160 L. Ed. 2d 949, 963 (2005) (finding that a prisoner's 14th Amendment rights to equal protection are violated if the prison discriminates on the basis of race, unless the prison can demonstrate that such discrimination is necessary in order to achieve a compelling government interest); Sockwell v. Phelps, 20 F.3d 187, 191 (5th Cir. 1994) (finding equal protection violation where prisoners were segregated by race in their cells, because a general fear of racial violence could not justify segregation).
[147] See Chapter 41 of the main *JLM*, "Special Issues of Women Prisoners," for more information on and cases regarding equal protection violations based on gender.
[148] *See, e.g.*, Green v. McKaskle, 788 F.2d 1116, 1125 (5th Cir. 1986) (noting restrictions on movement and access based on disability may violate equal protection if no possible justification is shown). *See* Chapter 28 of the main *JLM*, "Rights of Prisoners with Disabilities," for more information on disability discrimination.
[149] *See* Muhammad v. Lynaugh, 966 F.2d 901, 903 (5th Cir. 1992) (comparing the treatment of a prisoner in a special housing unit with the treatment of other prisoners in that unit, rather than with prisoners in different units with different rules).
[150] Yates v. Stalder, 217 F.3d 332, 334–335 (5th Cir. 2000) (per curiam) (finding that male and female prisoners may be treated differently if rationally related to legitimate penological goal).
[151] Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

You may also have an equal protection claim if you are discriminated against because of your custodial status (the type of custody you are in, such as protective custody, general population, etc.). However, in practice, equal protection claims for discrimination based on custodial status are difficult to win. This is because treating different types of prisoners in different ways is allowed as long as the prison has some reasonable explanation.

To state an equal protection claim using Section 1983, you must claim that a state actor intentionally discriminated against you because you are a member of a protected class.[152] The Supreme Court has not recognized sexual orientation as a suspect class. Thus, in the Fifth Circuit, if the state violates the Equal Protection Clause by creating a disadvantage for you because of your sexual orientation, the state's conduct must have a "rational relationship to legitimate governmental aims."[153] The Supreme Court has also recognized that it may be possible to make an equal protection claim if you are singled out as an individual for arbitrary and irrational treatment, even if you are not being discriminated against as a member of a certain group.[154]

C. ACTIONS FOR VIOLATIONS OF LOUISIANA STATE LAW

1. Procedural Hurdles

This section discusses several procedural hurdles that you must be aware of before you bring a suit in Louisiana state court. It focuses on state immunities, the Louisiana Prison Litigation Reform Act, and the Louisiana Administrative Review Procedure.

a. Immunities

Under the Louisiana Constitution, there is a waiver of sovereign immunity in certain situations.[155] Section 10(A) of the Louisiana Constitution waives immunity for the state, state agencies, and political subdivisions in contract cases and in tort cases (cases where there has been injury to a person or property).[156] Section 10(B) also allows the legislature to authorize suits, and thus waive immunity, against the state, state agencies, and political subdivisions.[157] However, Section 10(C) limits the constitutional waiver by saying the legislature can limit the state's liability in any case and that no public property or funds can be taken as damages in a case against the state.[158]

Qualified immunity for public entities and employees is codified in Section 2798.1 of the Louisiana Revised Statutes.[159] Under this statute, public entities and employees are not liable when they exercise policymaking or discretionary acts within the scope of their lawful powers and duties.[160] Thus, first the court will determine whether a statute, regulation, or policy specifically lays out the course of action for the employee or the entity to take.[161] If there is such a guideline, then the employee or entity does not have to use their own judgement and thus there is no immunity.[162] However, there is immunity when there is a discretionary act, or an officer or employee of the public entity in question is exercising a policy making

---

[152] Williams v. Bramer, 180 F.3d 699, 705 (5th Cir. 1999).
[153] Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004). For more information on discrimination based on sexual orientation, *see* Chapter 30 of the main *JLM*, "Special Issues for Lesbian, Gay, Bisexual, and Transgender Prisoners."
[154] Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074–1075, 145 L. Ed. 2d 1060, 1063 (2000) (per curiam) (finding that equal protection claims can be made by a "class of one" if the plaintiff has been arbitrarily and irrationally singled out and treated differently from others in similar situations and there is no rational basis for the difference in treatment). But note, however, that a "class-of-one" claim is subject only to rational basis scrutiny, unless you are a member of a protected class. *See* Unruh v. Moore, 326 F. App'x. 770, 772 (5th Cir. 2009) (per curiam).
[155] LA. CONST. art. XII, § 10.
[156] LA. CONST. art. XII, § 10(A). For more information on tort claims, *see* Chapter 10 of the *Louisiana State Supplement*—"Tort Actions."
[157] LA. CONST. art. XII, § 10(B).
[158] LA. CONST. art. XII, § 10(C).
[159] LA. REV. STAT. ANN. § 9:2798.1 (2017).
[160] LA. REV. STAT. ANN. § 9:2798.1(B) (2017).
[161] Simeon v. Doe, 618 So. 2d 848, 852–853 (La. 1993).
[162] Simeon v. Doe, 618 So. 2d 848, 852–853 (La. 1993).

function. In such cases, 2798.1 orders that the public entity be immune from liability related to those acts particularly where "[n]o statutes, regulations, or other legal requirements directed" the actions of the entity's agent.[163] Discretionary acts may include a broad range of conduct that is not strictly limited to acts grounded in social, economic, or political policy concerns.[164]

Louisiana follows the principles of judicial immunity set out by the United States Supreme Court.[165] In deciding whether or not to apply quasi-judicial immunity ("judge-like"), Louisiana courts apply a functional test. Instead of focusing on the identity of the official, they consider whether that official's conduct is similar to that of the delegating or appointing judge.[166] If the courts find that the conduct *is* similar to the judge, the official will have "derived judicial immunity." This means that every action taken with respect to that judicial conduct will be protected from liability—whether good or bad, honest or dishonest.[167]

b. Louisiana Prison Litigation Reform Act

This section addresses Louisiana's Prison Litigation Reform Act and *in forma pauperis* suits.[168] The Louisiana Prison Litigation Reform Act requires exhaustion (using up) of administrative remedies,[169] includes a three strikes provision,[170] and limits the type of relief a prisoner can seek.[171]

In Louisiana, *in forma pauperis* is contained in Articles 5181 through 5188 of the Louisiana Civil Code of Procedure.[172] You can proceed *in forma pauperis* if you are "unable to pay the costs of court because of [your] poverty and lack of means."[173] If you wish to bring a claim *in forma pauperis*, you must apply for permission from the court and you must complete the "In Forma Pauperis Affidavit" to your pleading or motion. For a blank copy of this form, *see* Chapter 10, Appendix A. The "In Forma Pauperis Affidavit" includes two parts: (1) an affidavit stating that you are unable to pay court costs and supporting documents and (2) an affidavit from a third person, other than your lawyer, who knows you and your financial situation and believes you are unable to pay court costs.

If you bring a claim in state court without exhausting (using up) your administrative remedies, it will be dismissed without prejudice (meaning you can bring it again after you have exhausted).[174] Also, you cannot bring a claim *in forma pauperis* if on three or more prior occasions you have brought an action or appeal in a state court that was dismissed because it was frivolous, malicious, failed to state a cause of action, or failed to state a claim upon which relief can be granted.[175] Further, a prisoner cannot bring a claim under state law for mental or emotional injury without a showing a physical injury.[176] Further, the Louisiana Prison Litigation Reform Act does not allow prisoners to bring together their claims so that there

---

[163] Smith v. Lafayette Parish Sheriff's Office, 03-517, p. 7 (La. App. 4 Cir. 4/21/03); 874 So. 2d 863, 867–868.
[164] Gregor v. Argenot Great Cent. Ins. Co., 2002-1138, p. 12 (La. 7/14/03); 851 So. 2d 959, 967 (overruling Fowler v. Roberts, 556 So. 2d 1, 15 (La. 1989)). *See also* Smith v. Lafayette Parish Sheriff's Office, 2003-517, pp. 6–7, (La. App. 4 Cir. 4/21/03); 874 So. 2d 863, 867–868 (holding that Sheriff's hiring policy was policymaking or discretionary act, for which the Sheriff could not be held liable).
[165] Moore v. Taylor, 541 So. 2d 378, 381 (La. App. 2 Cir. 1989) (citing Cleveland v. State, 380 So. 2d 105 (La. App. 1 Cir. 1979)) (noting that Louisiana judicial immunity mirrors the federal doctrine).
[166] Amato v. Office of La. Comm'r of Sec., 94-0082, p. 9 (La. App. 4 Cir. 10/3/94); 644 So. 2d 412, 418 (citing Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)).
[167] Durousseau v. La. State Racing Comm'n, 98-0442, p.4 (La. App. 4 Cir. 12/9/98); 724 So. 2d 844, 846 (noting "it has become common to recognize quasi-judicial immunity, equivalent to judicial immunity").
[168] LA. REV. STAT. ANN. §§ 15:1181–15:1191 (2017).
[169] LA. REV. STAT. ANN. § 15:1184(A)(2) (2017) ("No prisoner suit shall assert a claim under state law until such administrative remedies as are available are exhausted.").
[170] LA. REV. STAT. ANN. § 15:1187 (2017).
[171] LA. REV. STAT. ANN. § 15:1182 (2017).
[172] LA. CODE CIV. PROC. ANN. arts. 5181–5188 (2017).
[173] LA. CODE CIV. PROC. ANN. art. 5181(A) (2017).
[174] LA. REV. STAT. ANN. § 15:1184(A)(2) (2017). Administrative remedies are defined as "written policies adopted by governmental entities responsible for the operation of prisons which establish an internal procedure for receiving, addressing, and resolving claims by prisoners with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison." LA. REV. STAT. ANN. § 15:1184(A)(1)(a) (2017).
[175] LA. REV. STAT. ANN. § 15:1187 (2017).
[176] LA. REV. STAT. ANN. § 15:1184(E) (2017).

are multiple plaintiffs.[177] Additionally, if prisoners file a suit *pro se* (without a lawyer) they cannot file a class action.[178]

It is important to understand that many of the restrictions the federal PLRA puts on prisoners bringing civil liberties claims also will exist if you try to bring a claim in state court. One difference between the Louisiana Prison Litigation Reform Act and the PLRA is that in Louisiana state court, your case will be dismissed after three years if you do not pay the filing fees for an *in forma pauperis* suit.[179] Under the PLRA, your motion will not be dismissed simply because you are unable to pay the filing fees.[180]

c. Louisiana's Administrative Remedy Procedure (ARP)

Under Louisiana state law, prisoners filing claims in state court must exhaust (use up) all available remedies—such as grievance procedures and appeals—*before* you go to court.[181] In Louisiana, you are required to use the two-step Administrative Remedy Procedure to fully exhaust all available remedies before filing in state or federal court.[182] First, you must write a letter to your prison's warden that briefly explains your claim and what relief you seek.[183] You should write the grievance letter within 90 days of the incident that is the subject of your claim.[184] The warden then has 40 days to respond to your claim.[185] If you are unsatisfied with your response, then you can move to the second step and appeal to the Secretary of the DPSC within 5 days of receiving a response.[186] You will be notified within 45 days of the Secretary's final decision.[187]

You might believe that your complaint is sensitive in nature and you would be negatively impacted if your complaint became known at your prison. If so, you can skip the first step and file your complaint directly with Louisiana's Secretary of Adult Services through the Chief of Operations of the Office of Adult Services.[188] If the Chief of Operations determines that it is not sensitive, however, you will receive written notice, and you will have 5 days to file the complaint the normal way, from the first step.[189]

If you are unsatisfied with the response to your appeal, then you can file a case in court.[190] In addition to setting requirements for Louisiana state court actions, the ARP also counts as an "available administrative remedy" under the federal PLRA. Therefore, you must go through the ARP to have exhausted all available remedies under the PLRA and Louisiana law. For more information on the Louisiana ARP, *see* Chapter 9 of the *Louisiana State Supplement*, "Inmate Grievance Procedures."

2. **Substantive Claims**

The section above describes some of the procedural hurdles that may affect your ability to bring a lawsuit for civil rights violations under state law. This section gives a brief overview of what claims you can bring in state court. You can bring a Section 1983 claim in state court as well as federal court. For the most part, the Louisiana courts follow the Fifth Circuit's and the Supreme Court's interpretation of Section 1983

---

177 LA. REV. STAT. ANN. § 15:1184(G) (2017).
178 LA. REV. STAT. ANN. § 15:1184(G) (2017).
179 Clifford v. Louisiana, 347 F. App'x. 21, 23 (5th Cir. 2009) ("If the prisoner does not pay the full court costs or fees within three years from when they are incurred, the suit shall be abandoned and dismissed without prejudice.") (quoting LA. REV. STAT. ANN. § 15:1186 (2009)).
180 28 U.S.C. § 1915(b)(4) (2017) ("In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.").
181 LA. REV. STAT. ANN. § 15:1184(A)(2) (2017).
182 LA. ADMIN. CODE tit. 22, § 325 (2017).
183 LA. ADMIN. CODE tit. 22, § 325(G)(1)(a) (2017).
184 LA. ADMIN. CODE tit. 22, § 325(G)(1) (2017).
185 LA. ADMIN. CODE tit. 22, § 325(J)(1)(a)(2) (2017).
186 LA. ADMIN. CODE tit. 22, § 325(J)(1)(b)(i) (2017).
187 LA. ADMIN. CODE tit. 22, § 325(J)(1)(b)(ii) (2017).
188 LA. ADMIN. CODE tit. 22, § 325(H)(1)(b) (2017).
189 LA. ADMIN. CODE tit. 22, § 325(H)(1)(b)(i) (2017).
190 LA. ADMIN. CODE tit. 22, § 325(J)(1)(b)(iv) (2017).

claims. Thus, this section will focus on non-Section 1983 claims you can bring in state court if your civil rights are violated.

Many state law claims involve violations of the Louisiana constitution. For prisoners, Louisiana courts have emphasized that constitutional rights are not unqualified, especially when prison security is concerned.[191] Nonetheless, the Louisiana constitution provides protections for several important rights for prisoners:

1) Right to Due Process[192]
2) Right to Individual Dignity (equal protection)[193]
3) Right to Privacy (including unreasonable searches and seizures)[194]
4) Freedom of Expression[195]
5) Freedom of Religion[196]
6) Right of Assembly[197]
7) Freedom from Discrimination[198]
8) Right to Humane Treatment (protects against cruel, excessive, or unusual punishment)[199]
9) Access to Courts[200]

Prisoners have also brought constitutional challenges to the rules governing suits, such as immunity for sheriffs and parish governments for negligence claims and the rule dismissing *in forma pauperis* claims if fees are not filed within three years.[201] To challenge the constitutionality of a statute, Louisiana courts have held that: 1) you must plead unconstitutionality in the trial court, 2) you must make a specific plea, and 3) you must state particular grounds outlining the basis of unconstitutionality.[202] Outside of constitutional claims, prisoners have brought several tort claims such as personal injury suits against the DPSC,[203] medical malpractice suits,[204] and negligence suits for inadequate facilities and insufficient personnel to protect prisoners in custody.[205] Note that you do not need to exhaust administrative remedies through the ARP for tort claims.[206] For more information on tort claims, *see* Chapter 10 of the *Louisiana State Supplement*, "Tort Actions." Remember, under state law, prisoners cannot bring claims for mental or emotional injury they suffered while in custody without showing physical injury.[207]

D. CONCLUSION

This Chapter has discussed how Section 1983 claims are treated under the Fifth Circuit and how state civil liberties claims can be brought in Louisiana state court. If your constitutional rights have been

---

[191] Rochon v. Maggio, 517 So. 2d 213, 216 (La. App. 1 Cir. 1987) (citing Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977)).
[192] LA. CONST. art. I, § 2.
[193] LA. CONST. art. I, § 3. Generally, prisoners bring equal protection claims under Article 1, Section 3 of the constitution because it prohibits discrimination on the basis of race, religion, birth, age, sex, culture, physical condition, and political ideas or affiliations.
[194] LA. CONST. art. I, § 5.
[195] LA. CONST. art. I, § 7.
[196] LA. CONST. art. I, § 8.
[197] LA. CONST. art. I, § 9.
[198] LA. CONST. art. I, § 12 (prohibiting discrimination "based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition").
[199] LA. CONST. art. I, § 20.
[200] LA. CONST. art. I, § 22.
[201] Rhone v. Ward, 45,008, pp. 1–2 (La. App. 2 Cir. 2/3/10); 31 So. 3d 591, 594.
[202] Ceasar v. Hebert, 2005-1195, p. 2 (La. App. 3 Cir. 4/5/06); 926 So. 2d 139, 141–142 (involving a claim of injuries sustained while in custody of DPSC).
[203] *See* Cheron v. LCS Corr. Servs., Inc., 2004-0703, pp. 1–2 (La. 1/19/05); 891 So. 2d 1250.
[204] *See* Medford v. State *ex. rel.* Charity Hosp. at New Orleans, 2002-0750, p. 1 (La. App. 1 Cir. 5/15/02); 825 So. 2d 1213.
[205] *See* Betsch v. State, 353 So. 2d 358, 359 (La. App. 1 Cir. 1977).
[206] LA. REV. STAT. ANN. § 15:1177(C) (2017) ("Delictual actions for injury or damages shall be filed separately as original civil actions.").
[207] LA. REV. STAT. ANN. § 15:1184(E) (2017).

violated, you may be able to get monetary or injunctive relief by suing state and local officials. Unfortunately, the Prison Litigation Reform Act and the Louisiana Prison Litigation Reform Act impose harsh restrictions on your ability to file lawsuits in federal and state court. That is why it is extremely important to read this Chapter in addition to Chapters 14 and 16 of the main *JLM* to make sure that your claim will be heard in court.