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### Your Responsibility When Using the Information Provided Below:

When putting this material together, we did our best to give you useful and accurate information because we know that prisoners often have trouble getting legal information and we cannot give specific advice to all prisoners who ask for it. The laws change often and can be looked at in different ways. We do not always have the resources to make changes to this material every time the law changes. If you use this pamphlet, it is your responsibility to make sure that the law has not changed and still applies to your situation. Most of the materials you need should be available in your institution's law library.

## INFORMATION RE: IMPROPER OR UNLAWFUL USE OF FORCE BY CDCR STAFF (revised June 2017)

We received your letter regarding use of force by correctional officers or other staff working for the California Department of Corrections and Rehabilitation (CDCR). Improper and unlawful use of force is a serious concern in California's prisons. Unfortunately, this office has limited resources and cannot provide individual advice or assistance to all of the prisoners who request help. The information in this letter should help you understand the laws and rules regarding the use of force, and what you might be able to do about violations of those laws and rules. If you are suffering from sexual abuse by staff, note that the Prison Law Office has a separate letter on that topic; you can get the letter by writing to the Prison Law Office or on the Resources page at [www.prisonlaw.com](http://www.prisonlaw.com).

### **Use of Excessive Force by Prison Staff – U.S. Constitutional Rights**

Under the Eighth Amendment to the U.S. Constitution, use of excessive force against a prisoner may amount to cruel and unusual punishment. In deciding whether the use of force was unconstitutional, courts consider both the degree of force used and the mental state of the officer or staff person who applied the force.

For the first factor, the amount of force must be more than “de minimis” or minor; a simple push or shove that causes no injury almost certainly is not unconstitutional.<sup>1</sup> Also, verbal harassment does not violate the Constitution.<sup>2</sup> A prisoner does not necessarily have to suffer a serious injury to

<sup>1</sup> *Hudson v. McMillan* (1992) 503 U.S. 1, 9-10 [112 S.Ct. 995; 117 L.Ed.2d 156]. Examples of cases raising viable excessive force claims include *Wilkins v. Gaddy* (2010) 559 U.S. 34 [130 S.Ct. 1175; 175 L.Ed.2d 995] (slamming to floor, punching, kicking); *Furnace v. Sullivan* (9th Cir. 2013) 705 F.3d 1021 (prolonged pepper spraying); *Watts v. McKinney* (9th Cir. 2005) 394 F.3d 710, 712 (kicking in genitals); *Robins v. Meecham* (9th Cir. 1995) 60 F.3d 1436, 1440 (shooting with bird shot); *Felix v. McCarthy* (9th Cir. 1991) 939 F.2d 699, 701-702 (throwing prisoner into wall multiple times); *Gaut v. Sunn* (9th Cir. 1987) 810 F.2d 923, 924-925 (beating, kicking, choking, and throwing against wall); *Spain v. Procunier* (9th Cir. 1979) 600 F.2d 189, 193-196 (tear gas in cell extractions).

<sup>2</sup> *Oltarzewski v. Ruggiero* (9th Cir. 1987) 830 F.2d 136, 139.

show that the use of force was excessive, but the extent of injury can be relevant in determining the amount of force that was applied.<sup>3</sup>

For the second factor, a prisoner must show that the prison officials “acted maliciously and sadistically for the purpose of causing harm,” and not in a good-faith effort to maintain or restore order.<sup>4</sup> The deliberate indifference standard that applies to most other types of Eighth Amendment claims applies to use of force claims only when prison officials are being sued for permitting a pattern of excessive force through their policies or by failing to establish adequate training and procedures.<sup>5</sup> Force that is applied recklessly or negligently does not violate the Constitution.<sup>6</sup>

Excessive force may also violate a prisoner’s Fourteenth Amendment substantive due process right “to be secure in one’s person.” The Fourteenth Amendment analysis considers both objective and subjective factors -- the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.<sup>7</sup>

#### **Use of Excessive Force by Prison Staff – California Statutes**

The California Constitution prohibits cruel or unusual punishment.<sup>8</sup> So do state statutes prohibiting punishment that is cruel, corporal, or unusual, or that is not “authorized by the Director of Corrections.”<sup>9</sup>

Assaultive conduct by prison staff may violate state tort laws, even if it does not rise to the level of unconstitutional cruel and unusual punishment.<sup>10</sup> Also, prison staff who abuse prisoners can be charged with committing crimes such as assault or battery.

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<sup>3</sup> *Wilkins v. Gaddy* (2010) 559 U.S. 34, 36-37 [130 S.Ct. 1175; 175 L.Ed.2d 995]; *Hudson v. McMillan* (1992) 503 U.S. 1, 9 [112 S.Ct. 995; 117 L.Ed.2d 156].

<sup>4</sup> *Whitley v. Albers* (1986) 475 U.S. 312, 320-321 [106 S.Ct. 1078; 89 L.Ed.2d 251].

<sup>5</sup> *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1247-1255 (allowing pattern of use of excessive force violated Eighth Amendment); *Coleman v. Wilson* (E.D. Cal. 1995) 912 F.Supp. 1282, 1322-1323 (policy allowing use of tasers and 37 mm guns on mentally ill prisoners in non-emergency circumstances violated Eighth Amendment); see also *Coleman v. Brown* (E.D. Cal. 2014) 28 F.Supp.3d 1068 (policies and processes for use of pepper spray and baton on mentally ill prisoners still insufficient to remedy Eighth Amendment violation); *Jeffers v. Gomez* (9th Cir. 2001) 267 F.3d 895, 913 (CDCR use of force policies and training did not violate Eighth Amendment).

<sup>6</sup> *Jeffers v. Gomez* (9th Cir. 2001) 267 F.3d 895, 912 (officers trying to stop a stabbing during a large melee fired bullet that inadvertently struck prisoner who was being stabbed).

<sup>7</sup> *McRorie v. Shimoda* (9th Cir. 1986) 795 F.2d 780, 785.

<sup>8</sup> California Constitution, article 1, § 17.

<sup>9</sup> Penal Code §§ 2650-2652.

<sup>10</sup> See, e.g., *Giraldo v. CDCR* (2008) 168 Cal.App.4th 231, 245-253[85 Cal.Rptr.3d 371] (challenging policies that put transgender prisoners at risk of sexual assault on claims of negligence and intentional infliction of emotional distress).

### **Use of Excessive Force by Prison Staff – CDCR Rules**

The CDCR has statewide policies and staff training programs on the use of force and restraining devices.<sup>11</sup> The rules describe the circumstances in which prisoners may be placed in physical restraints and set limits on what type of restraints may be used.<sup>12</sup> The regulations define reasonable force, unnecessary force, and excessive force, and describe the force options authorized in various situations.<sup>13</sup> The DOM includes specific policies regarding immediate use of force, including in response to in-cell assaults, and controlled uses of force, including extractions (involuntary removal of a prisoner from an area)<sup>14</sup> The DOM also sets policies on the use of less lethal weapons, chemical agents, and deadly force.<sup>15</sup>

The policies direct staff to consider a prisoner’s mental health status, medical concerns, and ability to understand and comply with orders when determining the best course of action for resolving a situation.<sup>16</sup> More specifically, before undertaking a “controlled use of force,” there must be a “cool down” period during which mental health staff (and possibly custody staff as well) try to persuade the prisoner to voluntarily exit the area. During the cool down period, licensed nursing staff must review a prisoner’s health records to determine whether the prisoner has disabilities and/or mental health issues such that the use of chemical agents or physical force would pose a particular risk to the prisoner. Nursing staff must then be physically present during any ensuing controlled use of force.<sup>17</sup> Also, the use of chemical agents such as pepper spray inside mental health units is prohibited in controlled use of force situations unless authorized on a case-by-case basis by the warden.<sup>18</sup>

In addition, the rules establish procedures for reporting and reviewing incidents involving the use of force.<sup>19</sup> Staff must write a report every time force is used and supervisors must review every use of force to make sure the rules were followed.<sup>20</sup> All controlled uses of force must be videotaped; also a video recording of the prisoner must be made following any use of force resulting in serious bodily injury or great bodily injury to a prisoner.<sup>21</sup> If a prisoner claims that unnecessary or excessive force was used, staff must conduct a videotaped interview with the prisoner within 48 hours of the injury or allegation.<sup>22</sup>

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<sup>11</sup> 15 CCR §§ 3268-3268.3, 3278; DOM §§ 51020.1-51020.24.

<sup>12</sup> 15 CCR § 3268.2; DOM §§ 51020.6 (restraints), 51020.15 (spit hoods or masks).

<sup>13</sup> 15 CCR § 3268; DOM §§ 51020.5, 51020.7-51020.7.10.

<sup>14</sup> DOM §§ 51020.11 (immediate use of force), 51020.11.1-51020.11.3 (immediate use of force in cells and responses to in-cell assaults), 51020.12-51020.12.1-51020.5 (controlled uses of force, including extractions).

<sup>15</sup> DOM §§ 51020.7-51020.7.1 (deadly force), 51020.14-51020.14.2 (less lethal weapons), 51020.15.1-51020.15.6 (chemical agents), 51020.12-51020.12.1-51020.5 (controlled uses of force, including extractions).

<sup>16</sup> DOM §§ 51020.5.

<sup>17</sup> DOM § 51020.12.

<sup>18</sup> DOM § 51020.15.3

<sup>19</sup> 15 CCR §§ 3268(a) (defining who is responsible for authorizing and reviewing use of force), 3268.1 (force used in institutions), and 3268.3 (force used in the outside community); DOM §§ 51020.17-51020.21.

<sup>20</sup> 15 CCR § 3268.1.

<sup>21</sup> 15 CCR § 3268.1(d)(1).

<sup>22</sup> 15 CCR § 3268.1(d)(2).

California law requires the independent Office of the Inspector General (OIG) to monitor and report on the CDCR's investigations regarding complaints about staff misconduct and use of force.<sup>23</sup>

### **Challenging Use of Excessive Force by Prison Staff**

A prisoner who has been subjected to excessive use of force by staff should file a CDCR Form 602 administrative appeal. Filing a CDCR 602 administrative appeal is the only way a prisoner can directly request an investigation of use of excessive force. Also, a prisoner will usually have to complete the CDCR 602 administrative appeal process filing any type of lawsuit about the use of excessive force. There are also other administrative offices that can sometimes become involved with complaints regarding excessive force by prison staff. More information about 602s and investigations into use of excessive force is available in a separate letter on Investigations of Staff Misconduct. If the Investigations of Staff Misconduct letter is not enclosed here, a free copy of the letter can be obtained by writing to the Prison Law Office or on the Resources page at [www.prisonlaw.com](http://www.prisonlaw.com).

A prisoner may also be able to file a state petition for writ of habeas corpus or a federal civil rights (§ 1983) lawsuit to force prison officials to do something or stop doing something (called “injunctive relief”) related to the use of excessive force. A prisoner may also be able to bring a federal civil rights (§ 1983) action or a state tort lawsuit to try to get money damages for harm suffered due to past or on-going injuries due to use of excessive force. Free copies of a Manual on State Habeas Corpus Procedure and/or a Manual on Lawsuits for Money Damages Lawsuits Against California Prison Officials can be obtained by writing to the Prison Law Office or on the Resources page at [www.prisonlaw.com](http://www.prisonlaw.com).

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<sup>23</sup> Penal Code § 6133.