UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MICHAEL GRAY, Plaintiff, v. K.M. SIMONE, Lieutenant, AND HUBERT DUNCAN, Investigator, Defendant.	)	CASE NO: 1:18-CV-01005-RLY-MPB

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This Court appointed Whitewater Valley Pro Bono Commission "as amici curiae for the sole purpose of submitting an amicus brief … set[ting] forth the relevant case law regarding First Amendment claims of retaliation in the prison context." Dkt. 45 at 1. This brief will be considered in connection with the pending motion for summary judgment in the above-captioned case. "In addition, the [C]ourt anticipates that this amicus brief will be of great benefit to the [C]ourt in future cases brought by prisoners proceeding *pro se* and the amicus brief may be re-docketed at the discretion of a judicial officer in future cases." *Id.* Future readers are cautioned that the case law cited in this brief is current as of the date of filing, March 15, 2019, and are encouraged to conduct their own research as may be necessary and appropriate.

I. General Analysis Applicable to Retaliation Claims

Inmates are not stripped of the full panoply of their First Amendment rights upon incarceration. *Bridges v. Gilbert*, 557 F.3d 541, 547-548 (7th Cir. 2009). Although some restrictions on First Amendment rights are validly justified "by the considerations underlying our penal system," prisons are not free to disregard "the valid constitutional claims of prison inmates." *Id.* (first quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974); then quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)). Retaliating against an inmate for validly exercising First Amendment rights infringes upon the First Amendment because it "tends to chill an individual's exercise of his First Amendment rights." *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006); *see also Howland v. Kilquist*, 833 F.2d 639, 644 (7th Cir. 1987) ("It is well established that an act in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983, even if the act, when taken for different reasons, would have been proper." (citation and alteration omitted)).

A First Amendment retaliation claim has three elements. First, because the heart of the constitutional claim is that the inmate was retaliated against for validly exercising his First Amendment rights, the inmate must show that "he engaged in an activity protected by the First Amendment." *Bridges*, 557 F.3d at 546. Second, the inmate must show that the alleged retaliatory action, or "deprivation," was sufficiently serious that it "would likely deter First Amendment activity in the future." *Id.* Third and finally, the inmate must show that his protected "First Amendment activity was 'at least a motivating factor' in the Defendants' decision to take the retaliatory action." *Id.* (quoting *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008)); *see also, e.g.*, *Daugherty v. Page*, 906 F.3d 606, 610 (7th Cir. 2018); *Perez v. Fenoglio*, 792 F.3d 768, 783 (7th Cir. 2015); *Watkins v. Kasper*, 599 F.3d 791 (7th Cir. 2010).[1]

First Amendment retaliation claims may be brought under 42 U.S.C. § 1983, the federal statute that provides a cause of action against state officials who "cause[] … the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

II. Protected First Amendment Activity: The *Turner v. Safley* Analysis

The first element of a First Amendment retaliation claim is that the inmate engaged in activity protected by the First Amendment. *See, e.g.*, *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009). Courts in the Seventh Circuit apply "the *Turner* [*v. Safley*, 482 U.S. 78 (1987)] legitimate penological interests test to determine whether [the inmate] has alleged that he engaged in protected speech." *Bridges*, 557 F.3d at 551.[2] In other words, if a prison official retaliates against an inmate for engaging in speech,

[1] *See also Reed v. Bowen*, No. 2:16-cv-00319-WTL-DLP, 2018 WL 2762561, at *9 (S.D. Ind. June 8, 2018); *Holder v. Marberry*, No. 2:10-cv-36-JMS-DKL, 2011 WL 4729914, at *5 (S.D. Ind. Oct. 6, 2011); *Rivera v. Lockett*, No. 2:11-cv-00142-JMS-DKL, 2014 WL 1052108, at *2 (S.D. Ind. Mar. 18, 2014); *Reaves v. Tipton*, No. 2:18-cv-00085-WTL-MJD, 2018 WL 1532789, at *1 (S.D. Ind. Mar. 29, 2018); *Herron v. Meyer*, No. 2:13-cv-109-JMS-WGH, 2014 WL 655557 (S.D. Ind. Feb. 20, 2014).

[2] *See also Thomas v. Wolfe*, No. 1:12-cv-00443-JMS-DKL, 2016 WL 4592201, at *14 (S.D. Ind. Sept. 2, 2016) ("In the Seventh Circuit, courts must 'apply the *Turner* legitimate penological interests test to determine whether [the plaintiff prisoner] has

that prison official is restricting speech. Under *Turner*, "prison regulations that restrict inmates' constitutional rights," including restrictions on speech, "are nevertheless valid if they are reasonably related to legitimate penological interests." *Singer v. Raemisch*, 593 F.3d 529, 534 (7th Cir. 2010). Therefore, to determine whether an inmate engaged in activity protected by the First Amendment adequate to support a retaliation claim, courts "examine whether the prisoner engaged in speech in a manner consistent with legitimate penological interests." *Watkins v. Kasper*, 599 F.3d 791, 794-795 (7th Cir. 2010).

Under *Turner*, courts consider four factors to determine whether a prison restricted an inmate's constitutional rights in a manner consistent with legitimate penological interests:

> (1) whether there is a rational relationship between the regulation and the legitimate government interest advanced;
>
> (2) whether the inmates have alternative means of exercising the restricted right;
>
> (3) whether and the extent to which accommodation of the asserted right will impact prison staff, inmates' liberty, and the allocation of limited prison resources; and
>
> (4) whether the contested regulation is an 'exaggerated response' to prison concerns and if there is a 'ready alternative' that would accommodate inmates' rights.

Singer, 593 F.3d at 534. Inmates challenging the reasonableness of prison regulations "bear the burden of proving [their] invalidity" under *Turner*, and courts give "substantial deference to the professional judgment of prison administrators" because they "bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Id.* (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)).

Although courts should consider all four *Turner* factors and all four factors are important, this first factor—whether there is a rational relationship between the regulation and the legitimate

… engaged in protected speech' when considering a claim of retaliation.'" (alterations in original) (quoting *Bridges v. Gilbert*, 557 F.3d 541, 551 (7th Cir. 2009))).

government interest advanced—"can act as a threshold factor." For example, if "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational," the regulation does not satisfy *Turner*. *Id.* (quoting *Turner*, 482 U.S. at 89-90). On the other hand, if "there is only minimal evidence suggesting that a prison's regulation is irrational, running through each factor at length is unnecessary." *Id.* The *Turner* factors are analyzed on a case-by-case basis.

For clarity, we note that the "public concern" test no longer applies to prisoner First Amendment retaliation claims. Older Seventh Circuit cases protected inmate speech only if the inmate could show that his or her speech involved a matter of "public interest or concern." *E.g.*, *Brookins v. Kolb*, 990 F.2d 308, 313 (7th Cir. 1993), *abrogated by Bridges*, 557 F.3d at 551. That "public concern" test was adopted from the case law regarding retaliation claims brought by *public employees* and is no longer good law as applied to retaliation claims brought by prisoners. In *Bridges v. Gilbert*, the Seventh Circuit rejected the requirement that inmates demonstrate that their speech involved public concern. *Bridges*, 557 F.3d at 551 ("[W]e conclude that a prisoner's speech can be protected even when it does not involve a matter of public concern."). One year later, the Seventh Circuit made clear that it had completely abandoned the "public concern" requirement for retaliation claims brought by inmates, even when those inmates are *also* public employees (for example, if the inmate works for the prison). *Watkins*, 599 F.3d at 796 ("Upon further consideration, we think that it's time to completely jettison the public concern test from our prisoner free speech jurisprudence, even in the case of speech by a prisoner-employee. … [We] hold that the public concern test developed in the public employment context has no application to prisoners' First Amendment claims, even in the case of speech by a prisoner-employee.").[3]

[3] *But see Herron v. Meyer*, 820 F.3d 860, 864 (7th Cir. 2016) (noting, but declining to address, that "decisions in the prison-grievance line do not explain why the First Amendment offers greater protection to prisoners than to public employees" when prisoners base First Amendment retaliation claims on grievances about the conditions of their employment).

A. Frequently Litigated Protected Activities

Although litigants and the courts can always rely on the *Turner* factors to determine whether an inmate engaged in protected activity sufficient to support a retaliation claim, the protected (or non-protected) nature of some frequently recurring activities is well-established:

1. Filing Lawsuits

Inmates have a constitutional right of access to the courts, and filing lawsuits is a protected First Amendment activity. *See, e.g.*, *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000) ("Prisoners have a constitutional right of access to the courts … ."); *Higgason v. Farley*, 83 F.3d 807, 810 (7th Cir. 1996) ("If a prisoner is transferred for exercising his own right of access to the courts, or for assisting others in exercising their right of access to the courts, he has a claim under § 1983.").[4] However, *threatening* to file a lawsuit might not be protected First Amendment activity. *See, e.g.*, *Reed v. Bowen*, No. 2:16-cv-00319-WTL-DLP, 2018 WL 2762561, at *9 (S.D. Ind. June 8, 2018) (stating that threatening to file lawsuits is "arguably not a constitutionally protected activity").

2. Filing Grievances

Filing non-frivolous grievances through the prison administrative system is protected First Amendment activity. *See, e.g.*, *Perez*, 792 F.3d at 783; *Daugherty*, 906 F.3d at 610; *Hughes v. Scott*, 816 F.3d 955, 956 (7th Cir. 2016) ("Grievances addressed to a government agency are, if intelligible, nonfrivolous, and nonmalicious, petitions for the redress of grievances within the meaning of the First Amendment and are therefore prima facie protected by the amendment."); *Gomez v. Randle*, 680 F.3d 859, 866 (7th Cir. 2012) ("A prisoner has a First Amendment right to make grievances about conditions of confinement."); *DeWalt*, 224 F.3d at 618 ("Prisoners have a constitutional right of access

[4] *See also Richardson v. Brown*, No. 2:11-cv-161-JMS-WGH, 2013 WL 5093801, at *6 (S.D. Ind. Sept. 11, 2013) ("Prisoners have a constitutional right of access to the courts under the First Amendment. Because this right encompasses pursuing administrative remedies or a lawsuit, prison officials may not retaliate against a prisoner for taking those actions."). *Hampton v. Gilmore*, No. 2:15-cv-00291-JMS-DKL, 2017 WL 747599, at *3 (S.D. Ind. Feb. 27, 2017) ("Hampton alleges that he was retaliated against for filing lawsuits, an activity that is protected by the First Amendment.").

to the courts that, by necessity, includes the right to pursue the administrative remedies that must be exhausted before a prisoner can seek relief in court. Thus, a prison official may not retaliate against a prisoner because that prisoner filed a grievance."); *Hasan v. U.S. Dep't of Labor*, 400 F.3d 1001, 1005 (7th Cir. 2005) ("Prisoner's grievances, unless frivolous, concerning the conditions in which they are being confined are deemed petitions for redress of grievances and thus are protected by the First Amendment.").[5]

Even repetitious filing of similar grievances is protected. *See, e.g.*, *Hughes*, 816 F.3d at 956 ("We are given no reason to doubt that Hughes' grievances fall within the protected scope; though repetitious, their repetition reflected the institution's failure to respond to any of them."). Moreover, a grievance does not have to be in the exact format specified by prison procedures to be protected. *See, e.g.*, *Pearson v. Wellborn*, 471 F.3d 732, 741 (7th Cir. 2006) ("We are … unconvinced that the form of expression—i.e., written or oral—dictates whether constitutional protection attaches. … [W]e decline to hold that legitimate complaints lose their protected status simply because they are spoken. Nothing in the First Amendment itself suggests that the right to petition for redress of grievances only attaches when the petitioning takes a specific form."); *Daugherty*, 906 F.3d at 610 (finding that "oral complaints about prison conditions" are protected).

However, although a prisoner need not comply with every technical prison requirement when submitting grievances, prisons may place reasonable restrictions on *how* inmates file complaints, consistent with *Turner* and the First Amendment. "If inmates have some First Amendment rights, still they have only those rights that are consistent with prison discipline." *Ustrak v. Fairman*, 781 F.2d 573, 580 (7th Cir. 1986). The Seventh Circuit has recognized that "certain types of 'petitioning' would be obviously inconsistent with imprisonment (marches or group protests, for example)." *Pearson*,

[5] *See also Reed*, 2018 WL 2762561 at *9 ("A prisoner has a First Amendment right to make grievances about the conditions of confinement." (quoting *Gomez v. Randle*, 680 F.3d 859, 866 (7th Cir. 2012)).

471 F.3d at 741; *see also Felton v. Huibregtse*, 525 Fed. Appx. 484, 487 (7th Cir. 2013) (collecting cases and stating that "if justified by legitimate penological concerns, prisoners can be limited in *how* they make their complaints"). For example, a prison may, consistent with *Turner*, restrict the use of disrespectful language in grievances. *See, e.g.*, *Felton*, 525 Fed. Appx. at 487 (stating that "the need for obedience in prisons justifies reasonable limitations on disrespectful language"); *Ustrak*, 781 F.2d at 580 (holding that letter calling "prison officers such things as 'stupid lazy assholes' and invit[ing] them to 'bring their fat asses around the gallery at night'" was not protected); *see also Lewis v. Henneman*, __ Fed. Appx. __, No. 18-2363, 2019 WL 718887, at *2 (7th Cir. Feb. 19, 2019) (noting that neither party claimed plaintiff's "cursing" was "protected speech").

Prisons may also, consistent with the First Amendment, restrict inmates' ability to file group complaints or group grievances. Group petitions are not necessarily protected First Amendment activity because they might be "incompatible with the legitimate penological interests of prison security." *Garner v. Brown*, No. 18-1524, 2018 WL 5778386, at *2 (7th Cir. Nov. 2, 2018). ("[A prison official] attested that group petitions and gang activity have led to riots, disrespect for staff, and violent confrontations. [The official] further attested he thought the letter could have signaled that a disruption at the prison was being planned because the letter impliedly demanded changes."). If a group letter or petition does not follow established grievance procedures, it is "not a grievance" and "cannot be protected speech on that basis." *Garner*, 2018 WL 5778386 at *2. In fact, group complaints that do not comply with grievance procedures are less likely to be protected when the prison allows "inmates [to] file group complaints through the inmate grievance system," indicating that they have "acceptable alternative means of expression." *Id.* at *3.

As with threatening to file lawsuits, merely threatening to file a grievance is likely not protected activity. *See Bridges*, 557 F.3d at 555 ("[I]t seems implausible that a *threat* to file a grievance would itself constitute a First Amendment-protected grievance." (emphasis in original)).

3. Filing Other Administrative Complaints

As with filing lawsuits and prison grievances, filing complaints with other administrative agencies is generally protected First Amendment activity. *See, e.g.*, *Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994) (finding that filing a claim of racial discrimination with the United States Department of Justice is protected activity).

4. Requesting Religious Accommodations

Requesting religious accommodations, such as a kosher diet, and then filing complaints and grievances if the request is not honored, is protected activity. *E.g.*, *Woodring v. Liebel*, No. 1:14-cv-00165-JMS-DML, 2016 WL 4798990 (S.D. Ind. Sept. 14, 2016).

5. Possession of Gang-Related or Obscene Material

A prison may, consistent with *Turner*, restrict inmates' access to obscene or gang-related material or other material that poses a threat to prison safety and welfare. Therefore, possession of these materials or receipt of them in the mail is not protected by the First Amendment. *See, e.g.*, *Van den Bosch v. Raemisch*, 658 F.3d 778, 787-788 (7th Cir. 2011) (holding that prison's confiscation of newsletter that "contain[ed] misleading information, encourage[d] distrust of prison staff, and could potentially undermine the prison's rehabilitative initiatives" was permissible); *Singer v. Raemisch*, 593 F.3d 529, 536-537 (7th Cir. 2010) (holding that prison officials were rational in their belief that possession of material related to a certain video game "if left unchecked … could lead to gang behavior among inmates and undermine prison security in the future," and therefore that confiscation of the materials was constitutional); *Jackson v. Frank*, 509 F.3d 389, 390-391 (7th Cir. 2007) (upholding prison policy of banning inmate possession of "individual, commercially published photographs" because of their "particular burden on the prison system because they often contain[] nudity and other forbidden content like gang symbols"); *Mays v. Springborn*, 575 F.3d 643, 649 (7th Cir. 2009) (upholding prison's

decision to censor inmate's access to magazine pages containing "an article about a prison riot and images of gang signs").

III. Deprivation (Retaliatory Action)

The second element of a retaliation claim is that the inmate be the victim of a deprivation that can be sufficiently characterized as retaliation. To constitute actionable retaliation, the deprivation must be one that would "likely deter First Amendment activity in the future." *Bridges*, 557 F.3d at 546. The relevant inquiry is whether the retaliatory action would "deter a person of ordinary firmness from exercising his First Amendment rights." *Id.* at 552; *see also Hughes*, 816 F.3d at 956 ("[F]or retaliation for filing petitions to be actionable, the means of retaliation must be sufficiently clear and emphatic to deter a person of 'ordinary firmness' from submitting such petitions in the future.").

Whether a defendants' actions constitute actionable retaliation is an objective inquiry. In other words, "a retaliatory action need not *actually* deter the plaintiff from persisting with First Amendment activity; an objective test determines whether retaliatory actions would deter a person of 'ordinary firmness' from engaging in the protected activity." *McKinley v. Schoenbeck*, 731 Fed. Appx. 511, 515 (7th Cir. 2018).[6] Therefore, it is not an adequate defense that the inmate might have continued to engage in protected activity after the defendant(s) engaged in retaliatory behavior.

The deprivation does not have to violate an independent constitutional right to constitute actionable retaliation. The core of a retaliation claim is that the defendant violated an inmate's *First Amendment* rights by retaliating against him or her for engaging in protected First Amendment activity,

[6] *See also Johnson v. G.E.O.*, No. 1:16-cv-01146-TWP-TAB, 2018 WL 1505005, at *3 (S.D. Ind. Mar. 26, 2018) ("Officer Prus argues that Johnson did not suffer a deprivation that would likely deter further First Amendment activity … because … [he] continued to submit complaints and grievances. But, while Johnson's actions may be relevant, the question is not whether *Johnson* was deterred, but whether a person of 'ordinary firmness' would have been deterred."). *But see Holder v. Marberry*, No. 2:10-cv-36-JMS-DKL, 2011 WL 4729914, at *5 (S.D. Ind. Oct. 6, 2011) ("The record demonstrates that Holder did in fact persist in complaining about what he perceived to be the retaliatory shakedown and taking of his property. … Holder was not deterred.").

so the "ordinary firmness" analysis is entirely independent of the question whether the allegedly retaliatory action would otherwise be constitutional or permissible on its own, as long as the defendant acted with an improper retaliatory motive. *E.g.*, *Gomez v. Randle*, 680 F.3d 859, 866 (7th Cir. 2012) ("An act in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act, when taken for different reasons, would have been proper." (quoting *Howland v. Kilquist*, 833 F.2d 639, 644 (7th Cir. 1987) (alteration omitted)); *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000) ("An act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution. … That is so even if the adverse action does not independently violate the Constitution."); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996) ("To succeed on his retaliation claim, Babcock need not establish an independent constitutional interest in either assignment to a given prison or placement in a single cell, because the crux of his claim is that state officials violated his *First Amendment* rights by retaliating against him for his protected speech activities." (alterations omitted) (emphasis in original) (quoting *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995)).[7]

A. Frequently Litigated Retaliatory Action

1. Administrative Segregation

Placement of an inmate in administrative segregation can constitute actionable retaliation. Courts may consider the length of the detention as a factor in determining whether the placement would deter a person of ordinary firmness from engaging in protected First Amendment activity. For example, in *McKinley*, the court held that an inmate who was placed in administrative segregation for three years had "satisfie[d] the burden to prove an adverse action likely to deter future First Amendment activity." *McKinley*, 731 Fed. Appx. at 514. In *Babcock*, the court recognized a retaliation

[7] *See also Richardson v. Brown*, No. 2:11-cv-161-JMS-WGH, 2013 WL 5093801, at *6 (S.D. Ind. Sept. 11, 2013) ("A prisoner has a retaliation claim under § 1983 even if the adverse action of which he complains does not independently violate the Constitution."); *Woodring v. Liebel*, No. 1:14-cv-00165-JMS-DML, 2016 WL 4798990, at *5 (S.D. Ind. Sept. 14, 2016).

claim for an inmate who was transferred to administrative segregation for a year. *Babcock*, 102 F.3d at 275.[8]

2. Denial of Medical Treatment

"[D]enial of medical treatment is a deprivation likely to dissuade a reasonable person from engaging in future First Amendment activity." *Perez*, 792 F.3d at 783.[9] In *Perez*, the Seventh Circuit recognized a retaliation claim for an inmate who was denied medical treatment for "a torn ligament in his right hand, dislocation of his thumb, tissue damage, and a 'gaping wound' between his thumb and right index finger." *Id.* at 774. The denial of medical treatment does not need to be serious enough to give rise to an independent Eighth or Fourteenth Amendment claim for deliberate indifference to medical treatment. *See, e.g.*, *Murphy v. Lane*, 833 F.2d 106, 108 (7th Cir. 1987) (recognizing a retaliation claim for denial of medical treatment even though lack of medical treatment (psychiatric treatment) did not establish independent deliberate indifference claim).

3. Beatings and Physical Retaliation

"A beating would … deter an ordinary person from exercising his or her First Amendment rights." *McKinley*, 731 Fed. Appx. at 515.

4. Verbal Harassment

"[S]imple verbal harassment" is normally "insufficient to deter a person of ordinary firmness" from engaging in protected First Amendment activity. *Long v. Hammer*, 727 Fed. Appx. 215, 717 (7th

[8] *See also Vermillion v. Levenhagen*, No. 1:15-cv-00605-RLY-TAB, 2018 WL 2321112 (S.D. Ind. May 22, 2018) ("There is also no dispute that Vermillion suffered deprivations that would likely deter First Amendment activity in the future. For example, he was placed in punitive segregation at ISP; he was transferred to WCU; and he was kept in solitary confinement for more than four years.").

[9] *See also Thompson v. Hale*, No. 2:13-cv-00335-JMS-WGH, 2016 WL 110516, at *4 (S.D. Ind. Jan. 7, 2016) ("[T]he withholding of pain killers when a prisoner is suffering from a torn Achilles tendon would likely deter First Amendment activity in the future.").

Cir. 2018); *see also Hughes*, 816 F.3d at 956.[10] However, a statement that an inmate's "life at [the prison] would go better if he stopped complaining … could well be thought a threat" that goes "beyond simple verbal harassment." *Hughes*, 816 F.3d at 956.

5. Denial of Transfer or Retaliatory Transfer

Denying or delaying a transfer to which an inmate is entitled is actionable retaliation. *See Babcock*, 102 F.3d at 275 ("If believed, the claim that McDaniel prevented an expeditious transfer in order to retaliate against Babcock for exercising his constitutional rights would entitle Babcock to damages."). Transferring an inmate can also constitute actionable retaliation. *See, e.g.*, *Gomez v. Randle*, 680 F.3d 859, 866 (7th Cir. 2012) ("In addition, Gomez suffered a deprivation when he was transferred from Stateville to Menard, where he had known enemies. … It can be inferred that this punishment would likely deter future First Amendment activity."); *Higgason v. Farley*, 83 F.3d 807, 810 (7th Cir. 1996) ("If a prisoner is transferred for exercising his own right of access to the courts, or for assisting others in exercising their right of access to courts, he has a claim under § 1983.").[11]

6. Mail Tampering

The Seventh Circuit has held in an unpublished opinion that a "single, minor instance of mail tampering … [is] not enough to deter an ordinary prisoner from exercising his First Amendment rights." *Shaw v. Litscher*, 715 Fed. Appx. 521, 524 (7th Cir. 2017) (addressing inmate's claim that prison official removed legal document from mailing to a fellow inmate in retaliation for inmate's lawsuit).

[10] *See also Smith v. Pope*, No. 3:09-cv-101-WGH-RLY, 2012 WL 6084631, at *7 (S.D. Ind. Dec. 6, 2012) ("Smith does not cite, and the court cannot find, any case that supports the proposition that vulgar or rude language by a prison employee can by itself sustain a claim of retaliation.").

[11] *See also Woodring v. Liebel*, No. 1:14-cv-00165-JMS-DML, 2016 WL 4798990, at *5 (S.D. Ind. Sept. 14, 2016) ("A transfer to less amenable and more restrictive quarters for non-punitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence. However, even if the transfer would not be actionable in and of itself, if the transfer was taken in retaliation for the exercise of a constitutionally protected right, then it is actionable under 42 U.S.C. § 1983.").

7. Filing False Disciplinary Charges

Filing false disciplinary charges may constitute actionable retaliation. *E.g.*, *Lekas v. Briley*, 405 F.3d 602, 614 (7th Cir. 2005) ("[A] prisoner can sufficiently state a claim for relief when he alleges that prison officials issued baseless disciplinary tickets against him in retaliation for pursuit of administrative grievances."); *Black v. Lane*, 22 F.3d 1395, 1401 (7th Cir. 1994). However, "[a] single retaliatory disciplinary charge that is later dismissed is insufficient to serve as the basis of a § 1983 action." *Bridges*, 557 F.3d at 555.

8. Strip Searching

The Seventh Circuit has recognized retaliation claims for allegedly retaliatory strip searches. *E.g.*, *Mays v. Springborn*, 719 F.3d 631, 634 (7th Cir. 2013); *see also Yazidi v. Houghton*, No. 1:08-cv-1010-SEB-TAB, 2010 WL 1839331, at *3 (S.D. Ind. May 5, 2010) (recognizing that "being shaken down [in a strip search] would deter an individual from filing grievances").

9. Firing

Firing an inmate from a prison job is "a deprivation that … would likely deter future First Amendment activity." *Hampton v. Gilmore*, No. 2:15-cv-00291-JMS-DKL, 2017 WL 747599, at *3 (S.D. Ind. Feb. 27, 2017).

10. Refusing to Process Grievances

The Southern District of Indiana has held that inmates are not entitled "to any particular outcome of [their] grievances" and that a prison's refusal to process a grievance is not actionable retaliation. *Henson v. Lunsford*, No. 1:10-cv-1009-WTL-DML, 2015 WL 328929, at *6 (S.D. Ind. Jan. 23, 2015) ("The First Amendment right to petition the government for a redress of grievances protects a person's right to complain to the government that the government has wronged him, but it does not require that a government official respond to the grievance. Denying a grievance or even failure to

investigate a prisoner's complaints does not make an official liable for damages under section 1983." (quoting *Perales v. Bowlin*, 644 F. Supp. 2d 1090 (N.D. Ind. 2009)).

IV. Causation

To prove a case of First Amendment retaliation, an inmate must show that his or her protected activity was the *cause* of the retaliatory action. An inmate makes out a prima facie case of retaliation if he or she shows that his or her "protected activity was 'at least *a* motivating factor' for the retaliatory action." *Thomas v. Anderson*, 912 F.3d 971, 976 (7th Cir. 2018);[12] *see also Devbrow v. Gallegos*, 735 F.3d 584, 588 (7th Cir. 2013); *Mays v. Springborn*, 719 F.3d 631, 635 (7th Cir. 2013); *Greene v. Doruff*, 660 F.3d 975, 980 (7th Cir. 2011). "[A] motivating factor does not amount to a but-for factor or to the only factor, but is rather a factor that motivated the defendant's actions." *Spiegla v. Hull*, 371 F.3d 928, 942 (7th Cir. 2004).[13] "A motivating factor is a factor that weighs in the defendant's decision to take the action complained of—in other words, it is a consideration present to his mind that favors, that pushes him toward, the action. It is a, not necessarily the, reason that he takes the action. Its precise weight in his decision is not important." *Hasan v. U.S. Dep't of Labor*, 400 F.3d 1001, 1006 (7th Cir. 2005).

The "but-for" causation requirement applied by some courts in the wake of the Supreme Court's analysis in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 180 (2009), does not apply to First

[12] *See also Smith v. Pope*, No. 3:09-cv-101-WGH-RLY, 2012 WL 6084631, at *7 (S.D. Ind. Dec. 6, 2012) ("In a retaliation claim, a prisoner must establish that he was engaging in protected conduct and his protected conduct was a motivating factor behind the prison officials' retaliatory conduct. A motivating factor is a 'consideration present to [Defendant's] mind that favors, that pushes him toward action.'" (citation omitted) (quoting *Hasan v. U.S. Dep't of Labor*, 400 F.3d 1001, 1006 (7th Cir. 2005)); *Vermillion v. Levenhagen*, 2018 WL 2321112, at *7 (S.D. Ind. May 22, 2018) ("Retaliation also requires a showing that the plaintiff's conduct was a motivating factor in the defendants' conduct.").

[13] *Spiegla v. Hull* is a public employee First Amendment retaliation case, but the Seventh Circuit has relied interchangeably on prisoner and public employee First Amendment retaliation cases in the causation analysis. There *are* some elements of the claims that are different (for example, a public employee must show that his or her speech involved a matter of public concern, whereas whether an inmate's speech is protected is evaluated under *Turner*, as described above). However, the causation analysis is the same. *See, e.g.*, *Hasan v. U.S. Dep't of Labor*, 400 F.3d 1001, 1006 (7th Cir. 2005) ("We cannot think of a reason why a stricter standard for proof of causation should apply when the plaintiff is a prisoner rather than an employee. A prisoner has less freedom of speech than a free person, but less is not zero, and if he is a victim of retaliation for the exercise of what free speech he does have, he should have the same right to a remedy as his free counterpart.").

Amendment retaliation cases. In *Gross*, the Court applied a but-for causation requirement to plaintiffs bringing disparate-treatment claims under the federal Age Discrimination in Employment Act. Some courts then extended *Gross* to some First Amendment retaliation cases, but the Seventh Circuit has since hesitated to apply the *Gross* but-for causation analysis to constitutional retaliation claims generally, *e.g.*, *Greene v. Doruff*, 660 F.3d 975, 977-978 (7th Cir. 2011), and has explicitly rejected any application of a but-for causation analysis to First Amendment retaliation claims brought by inmates, *e.g.*, *Mays v. Springborn*, 719 F.3d 631, 634-635 (7th Cir. 2013).[14]

Greene and *Mays* are clear that the motivating factor analysis, not the but-for causation standard of *Gross*, applies to First Amendment retaliation claims. Given that older case law sometimes misstates the causation standard,[15] it is unsurprising (but incorrect) that defendants sometimes argue that a but-for causation standard should apply.

A. Establishing Retaliatory Animus as Motivating Factor

To establish that retaliatory animus was a motivating factor in the defendants' retaliatory action, the plaintiff must show, at a minimum, that the defendants were *aware of* the plaintiff's protected activity. *See, e.g.*, *Daugherty*, 906 F.3d at 610 (affirming grant of summary judgment when inmate presented only "vague and confusing testimony that [the inmate], at some point, named [the defendant] in a grievance" but "no evidence about what the grievance said or whether [the defendant] even saw or knew about it").[16]

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[14] *See also Thomas v. Anderson*, 912 F.3d 971, 976 (7th Cir. 2018) (applying motivating factor analysis); *Daugherty v. Page*, 906 F.3d 606, 610 (7th Cir. 2018) (same); *Perez v. Fenoglio*, 792 F.3d 768, 783 (7th Cir. 2015) (same).

[15] *E.g.*, *Holder v. Marberry*, No. 2:10-cv-36-JMS-DKL, 2011 WL 4729914, at *6 (S.D. Ind. Oct. 6, 2011) (applying but-for causation standard to inmate's First Amendment retaliation claim); *Rose v. Carey*, No. 1:06-cv-1504-SEB-JMS, 2008 WL 4443229, at *5 (S.D. Ind. Sept. 25, 2008) (same).

[16] *See also Cannon v. Newport*, 723 Fed. Appx. 344, 346 (7th Cir. 2018) (affirming summary judgment of inmate's retaliation claim in favor of defendant when inmate "produced no evidence to show 'what the defendant knew or when he knew it'" to refute the defendant's claim that he was not aware of the inmate's protected activity); *Beamon v. Pollard*, 711 Fed. Appx. 794, 795 (7th Cir. 2018) (affirming summary judgment of inmate's retaliation claim when inmate presented "no evidence [that] hints that any of them even knew about [the inmate's] grievance"); *Obriecht v. Raemisch*, 565 Fed. Appx. 535, 538 (7th

Suspicious timing alone is not enough to establish that retaliatory animus was a motivating factor, but the timing of any alleged retaliatory action is an appropriate consideration in the analysis. *E.g.*, *McKinley*, 731 Fed. Appx. at 514 ("Temporal proximity is ordinarily not sufficient to establish causation, but McKinley does not rely on timing alone. … The timing of McKinley's placement in segregation coupled with these comments could allow a reasonable jury to infer that McKinley's protected speech was a motivating factor for his placement in segregation." (citation omitted)).[17] In any claim of retaliation based on suspicious timing, the length of time between the protected activity and any allegedly retaliatory conduct will be highly relevant. The Seventh Circuit has held that delays of, for example, five weeks, four months, seven months, and eight months are too long to support an inference that retaliatory animus motivated the action. *Shaw v. Litscher*, 715 Fed. Appx. 521, 523 (7th Cir. 2017) (collecting cases and holding that "a time lag of seven months is too long to permit a reasonable inference of retaliation").

Although suspicious timing is not sufficient, a plaintiff may support a reasonable inference of retaliatory animus with the overall "chronology of events." *E.g.*, *Mays*, 575 F.3d at 650 ("Mays presented a chronology of events from which retaliation could be inferred; almost immediately after making his protected complaint about strip searches, the guards subjected him to a much more onerous search."); *see also Beamon v. Dittman*, 720 Fed. Appx. 772, 775 (7th Cir. 2017) ("[The defendant] opened the letter, examined it, and found nothing objectionable about it … Only *after* [the inmate] had filed his grievance against [the defendant] … and only *after* [the inmate] stated in his postscript his plan to litigate that issue did [the defendant] consider the *same* contents objectionable.").

Cir. 2014) ("[A]s the district court explained, he could not prevail on a retaliation claim without evidence that a particular defendant knew about those grievances.").

[17] *See also Smith v. Pope*, No. 3:09-cv-101-WGH-RLY, 2012 WL 6084631, at *8 (S.D. Ind. Dec. 6, 2012) ("'The inference of causation weakens as the time between the protected expression and the adverse action increases,' and Smith does not explain why [defendants] waited two months to restrict his access if they had retaliatory intent. … Absent some causal link, along with an explanation as to why [defendants] waited so long to retaliate, there is no triable issue." (quoting *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 616 (7th Cir. 2001))).

B. Burden-Shifting Analysis

Once an inmate has established a prima facie case of retaliation by demonstrating that retaliatory animus was at least a "motivating factor" in the retaliatory action taken against him, "[t]he burden then shifts to the defendants to show that they would have taken the action despite the bad motive." *Mays*, 719 F.3d at 635 (citation omitted); *see also Greene*, 660 F.3d at 980. In other words, the defendant can rebut the plaintiff's prima facie case of retaliation "by showing that his conduct was not a necessary condition of the harm—the harm would have occurred anyway." *Greene*, 660 F.3d at 980. "[T]he ultimate question is whether events would have transpired differently absent the retaliatory motive." *Babcock*, 102 F.3d at 275.[18]

One way that defendants commonly rebut a presumption of retaliatory animus is by demonstrating that the allegedly retaliatory action was "standard procedure." *See, e.g.*, *Howland v. Kilquist*, 833 F.2d 639, 644 (7th Cir. 1987) (affirming district court's judgment when plaintiff could not rebut defendant's evidence that the allegedly retaliatory transfer followed a "standard procedure" that had been in place for ten years).

C. Establishing Pretext

If the defendants meet their burden of establishing a non-retaliatory motive for the allegedly retaliatory action, the plaintiff "then must persuade a fact-finder that the defendants' proffered reasons were pretextual and that retaliatory animus was the real reason" for the retaliatory action. *Massey v. Johnson*, 457 F.3d 711, 717 (7th Cir. 2006); *see also McKinley*, 731 Fed. Appx. at 515.

In the summary judgment context, this means that "to rebut the defendants' proffered explanations for [the retaliatory action], [the plaintiff] must produce evidence upon which a rational

[18] *See also Vermillion v. Levenhagen*, No. 1:15-cv-00605-RLY-TAB, 2018 WL 2321112, at *7 (S.D. Ind. May 22, 2018) ("A defendant can prevail if he shows that the offending action would have happened even if there had been no retaliatory motive, i.e., the alleged harm would have occurred anyway. If defendants meet this burden, Vermillion must then show that the defendants' proffered reason is pretextual, that is, a lie." (citations omitted)).

finder of fact could infer that these explanations were lies." *Massey*, 457 F.3d at 717; *see also McKinley*, 731 Fed. Appx. at 515. Speculation regarding the defendants' proffered motive "cannot overcome the contrary evidence" of a benign motive. *Devbrow v. Gallegos*, 735 F.3d 584, 588 (7th Cir. 2013). Instead, the plaintiff must rebut the defendants' proffered motive with evidence, circumstantial or otherwise. For example, in *McKinley*, when defendants claimed that a plaintiff's disciplinary history motivated their disciplinary action, not retaliatory animus, the plaintiff met his burden of establishing pretext by "argu[ing] … that … he had not been found guilty of a disciplinary infraction since 2008 when he was placed in segregation in 2012." *McKinley*, 731 Fed. Appx. at 515.

V. Damages

Under the Prison Litigation Reform Act,[19] inmates may not recover compensatory damages for mental or emotional damages for constitutional violations under § 1983 without proof of physical injury. 42 U.S.C. § 1997e(e); *see also, e.g.*, *Cassidy v. Ind. Dep't of Corr.*, 199 F.3d 374, 376 (7th Cir. 2000) (applying § 1997e(e) to a constitutional tort claim); *Pearson v. Wellborn*, 471 F.3d 732, 744 (7th Cir. 2006) (applying § 1997e(e) to constitutional retaliation claim).

However, nominal damages are not subject to the § 1997e(e) "physical injury" requirement. *See Calhoun v. DeTella*, 319 F.3d 936, 940-941 (7th Cir. 2003); *Beamon v. Dittman*, 720 Fed. Appx. 772, 776 (7th Cir. 2017). A constitutional violation is an injury in and of itself, and a plaintiff who proves a constitutional violation is entitled to nominal damages for that injury. *Calhoun*, 319 F.3d at 941; *see also Rowe v. Shake*, 196 F.3d 778, 781-782 (7th Cir. 1999) ("A deprivation of First Amendment rights

[19] This amicus brief is not intended to serve as a comprehensive guide to the additional procedural complexities that incarcerated plaintiffs face under the Prison Litigation Reform Act, 42 U.S.C. § 1997e. For example, this amicus brief does not address at all the PLRA's requirement that inmates exhaust their administrative remedies before filing suit. § 1997e(a). Litigants should seek out further resources on these issues, particularly if defendants raise an inmate's failure to exhaust administrative remedies as an affirmative defense.

standing alone is a cognizable injury. … A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained.").

Similarly, punitive damages are not subject to the § 1997e(e) "physical injury" requirement. *See Calhoun*, 319 F.3d at 942; *Beamon*, 720 Fed. Appx. at 776.

VI. Unique Procedural Considerations for Prisoners

Certain procedural matters warrant additional note in this brief.

A. Differences in Remedies for State and Federal Prisoners

Because of relevant differences in the nature of claims brought by state as opposed to federal inmates, it is not likely that federal inmates have a cause of action in federal court against federal officials for retaliation in violation of the First Amendment.

First Amendment retaliation claims brought by state prisoners are properly brought under 42 U.S.C. § 1983, which "entitles an injured person to money damages if a *state* official violates his or her constitutional rights." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017). It does not provide a federal cause of action against federal officials, and "Congress did not create an analogous statute for federal officials." *Id.* An individual seeking money damages for the violation of constitutional rights by a federal official must proceed instead, if possible, under *Bivens v. Six Unknown Named Agents Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Under *Bivens*, federal courts sometimes recognize an implied right of action for money damages against federal officials, for a limited class of constitutional violations. *Ziglar*, 137 S. Ct. at 1854.

In *Ziglar*, the United States Supreme Court reiterated the limited reach of *Bivens*, recognizing that the Supreme Court has "recognized … an implied cause of action" to remedy constitutional violations by federal actors in only three circumstances. *Id.* First, in *Bivens* itself, the Supreme Court recognized "a damages remedy to compensate persons injured by federal officers who violated the

prohibition against unreasonable search and seizures." *Id.* Second, in *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court extended *Bivens* to provide a cause of action to remedy gender discrimination by federal officials in violation of the Fifth Amendment Due Process Clause. *Ziglar*, 137 S. Ct. at 1854-55. Third and finally, in *Carlson v. Green*, 446 U.S. 15 (1980), the Supreme Court recognized a damages remedy under *Bivens* to remedy federal officials' "failure to provide adequate medical treatment" to prisoners in violation of the Eighth Amendment Cruel and Unusual Punishment Clause. *Ziglar*, 137 S. Ct. at 1855.

In *Ziglar*, the Supreme Court questioned whether the reasoning of *Bivens*, *Davis*, and *Carlson* survived some of the Supreme Court's later implied-right-of-action jurisprudence, but it did not overrule *Bivens*, *Davis*, or *Carlson*. However, the Court "made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity" and that courts should hesitate before "extend[ing] *Bivens* to any new context or new category of defendants." *Ziglar*, 137 S. Ct. at 1857 (first quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009); then quoting *Correctional Srvcs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). A *Bivens* remedy is not available in new contexts not previously recognized by the Supreme Court (i.e., under *Bivens*, *Davis*, or *Carlson*) "if there are 'special factors counseling hesitation in the absence of affirmative action by Congress.'" *Id.* (quoting *Carlson*, 446 U.S. at 18). The Supreme Court has never recognized a *Bivens* remedy for First Amendment retaliation claims against federal officials.

Applying *Ziglar*, courts in the Southern District of Indiana have uniformly declined to recognize a *Bivens* remedy for federal inmates bringing First Amendment retaliation claims against federal officials. *See, e.g.*, *Early v. Shepherd*, No. 2:16-cv-00086-JMS-MJD, 2018 WL 4539230, at *14 (S.D. Ind. Sept. 21, 2018); *Badley v. Granger*, No. 2:17-cv-00041-JMS-DLP, 2018 WL 3022653, at *4 (S.D. Ind. June 18, 2018); *Muhammad v. Gehrke*, No. 2:15-cv-00334-WTL-MJD, 2018 WL 1334936, at *4 (S.D. Ind. Mar. 15, 2018).

The Seventh Circuit has not addressed whether *Bivens* authorizes (or whether *Ziglar* precludes) a damages remedy against federal officials who retaliate against inmates in violation of the First Amendment, and the United States Supreme Court has not yet foreclosed the possibility of a *Bivens* remedy for such claims. Federal inmates should be prepared for courts in the Southern District of Indiana to dismiss their First Amendment retaliation claims against federal officials, but absent a definitive ruling from the Supreme Court, they should continue to make such claims in order to preserve them for purposes of appeal.

B. 42 U.S.C. § 1983 and Naming the Proper Defendant

For state prisoners, § 1983 provides a federal cause of action against state officials acting under color of state law who deprive them of their constitutional rights. Section 1983 applies to "[e]very *person*" acting under color of state law. 42 U.S.C. § 1983 (emphasis added). The Eleventh Amendment[20] provides states and state officials with certain forms of sovereign immunity from suit in federal court under § 1983. *E.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66-67 (1989). Therefore, not every potential defendant is considered a "person" under § 1983, and inmates must name the proper defendants or risk the court dismissing their lawsuits.[21]

An inmate with a potential First Amendment retaliation claim has three options for categories of defendants: states, state officials in their "official" capacities, and state officials in their "individual" capacities. States are not considered "persons" and cannot be sued for money damages under § 1983. *Will*, 491 U.S. at 64. State officials who are named as defendants in their "official capacities" are also not considered "persons" under § 1983 in an action for money damages. *Hafer v. Melo*, 502 U.S. 21, 26

[20] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign state." U.S. Const. amend. XI.

[21] This amicus brief is not intended to provide a comprehensive guide to the procedural complexities of litigating under 42 U.S.C. § 1983, including Eleventh Amendment sovereign immunity or qualified immunity. Litigants should seek out more comprehensive resources on those topics if defendants raise any form of arguments based on sovereign or qualified immunity.

(1991). This is because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office … [and] is no different from a suit against the State itself." *Will*, 491 U.S. at 71. Therefore, inmates who are seeking money damages in their First Amendment retaliation lawsuits should *not* name states or state officials acting in their "official capacity" as defendants.

States, and state officials acting in their official capacities, *may* be sued for prospective relief, not money damages, if the inmate is suffering from a continuing violation of his or her constitutional rights. *Green v. Mansour*, 474 U.S. 64, 68 (1985). If an inmate is suffering from a "continuing violation of federal law," the inmate can file a lawsuit against a state or state officials in their official capacities asking the court to order the defendants to stop violating the inmate's constitutional rights, *id.*, which is called an "injunction" or "prospective relief." This is often referred to as the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). To bring a claim under *Ex parte Young*, the inmate must allege a "continuing violation of federal law" or a "threat of state officials violating" his or her constitutional rights "in the future." *Green*, 474 U.S. at 73.

State officials in their "individual" capacities *are* considered "persons" under § 1983 and may be sued for money damages. *E.g.*, *Hafer v. Melo*, 502 U.S. 21, 27 (1991). Therefore, inmates who are seeking money damages in their First Amendment retaliation lawsuits should be sure to name a prison official in his or her "individual" capacity in the complaint. However, even though they are proper defendants under § 1983, state officials sued in their individual capacities may plead the affirmative defense of "qualified immunity." State officials in their individual capacities are immune from lawsuit if their actions did not violate law that was "clearly established at the time" of the constitutional violation. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The fact that a state official might plead the affirmative defense of qualified immunity does not mean that inmates cannot name state officials in

their individual capacities in their complaints, but inmates will need to be prepared to argue that the state official's actions violated "clearly established" law.

Section 1983 does not provide a cause of action against each and every state official in a prison. Individual defendants are not liable under 42 U.S.C. § 1983 unless they had "personal involvement in the alleged constitutional deprivation." *Minix v. Canarreci*, 597 F.3d 824, 833 (7th Cir. 2003).[22] "[A]n official meets the 'personal involvement' requirement when 'she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." *Black v. Lane*, 22 F.3d 1395, 1401 (7th Cir. 1994) (quoting *Smith v. Rowe*, 761 F.2d 360, 369 (7th Cir. 1985)). A director who knows "'of the actions of his subordinates which resulted in a constitutional violation' and 'failed to take any preventive action'" may be liable under § 1983. *Id.* (quoting *Smith*, 761 F.2d at 369).

In sum, inmates should not name states, or state officials in their official capacities, as defendants unless they are asking the court to stop the defendants from continuing to violate their constitutional rights. Inmates who are seeking money damages for *past* violations of their constitutional rights should sue state or prison officials in their *individual* capacities, but should be prepared for the defendants to argue that they are entitled to qualified immunity or were not personally involved in the constitutional violation. An inmate seeking prospective injunctive relief *and* money damages should name the defendants in official *and* individual capacities.

[22] *See also Arce v. Barnes*, No. 1:13-cv-01777-WTL-MJD, 2015 WL 5567149 (S.D. Ind. Sept. 21, 2015) (declining to reconsider dismissal of inmate's First Amendment retaliation claim because inmate had not sufficiently alleged personal involvement and § 1983 did not allow him to proceed on theory of supervisory liability against individual defendants); *Dixon v. Woodruff-Fibley*, No. 1:04-cv-1374-DFH-VSS, 2006 WL 2644934, at *5 (S.D. Ind. Sept. 14, 2006) ("It is well-settled that in a § 1983 case, to be liable for damages, an individual must have personally participated in the alleged constitutional deprivation."); *Benford v. Rogers*, No. 2:11-cv-114-JMS-WGH, 2013 WL 3940628, at *3 (S.D. Ind. July 20, 2013) ("Another bedrock principle of § 1983 jurisprudence is implicated here: An individual must have personally participated in the alleged constitutional deprivation in order to be held responsible for the violation of a federally secured right for which a remedy in damages is sought pursuant to § 1983.").

C. *Heck v. Humphrey* and Challenges to Length of Confinement

An inmate alleging that prison officials retaliated against him for protected First Amendment activity by acting to revoke his good-time credits or otherwise extend the length of his confinement may be barred from bringing a retaliation suit by the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck v. Humphrey*, "when a state prisoner seeks damages in a § 1983 suit, [courts] must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. An inmate cannot collaterally attack the length of his confinement without "prov[ing] that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 487-488 (citation omitted). In *Edwards v. Balisok*, the Supreme Court extended *Heck* to § 1983 actions brought by inmates bringing constitutional challenges to prison disciplinary proceedings that result in the loss of good-time credits. *Edwards v. Balisok*, 520 U.S. 641 (1997).

An inmate alleging that his good-time credits were revoked in retaliation for exercising his First Amendment rights is essentially claiming "that the [disciplinary proceedings] should never have taken place at all, because they were acts of retaliation for his exercise of rights protected by the First Amendment." *Whitfield v. Howard*, 852 F.3d 656, 663 (7th Cir. 2017). Thus, an inmate alleging that his or her good-time credits were revoked in retaliation for engaging in protected First Amendment activity must follow the process mandated by *Heck* and have the good-time credits restored before he or she can bring a § 1983 suit for damages.

The doctrine of *Heck v. Humphrey* comes from the rule that habeas corpus is the exclusive remedy for an inmate "attacking the very duration of their physical confinement itself." *Preiser v. Rodriguez*, 411 U.S. 475, 487-488 (1973). Inmates who are no longer "in custody" are "jurisdictionally barred from using habeas corpus," *Whitfield*, 852 F.3d at 662, leaving some former inmates potentially

without a remedy for retaliatory action taken while they were in custody that resulted in a loss of good-time credits or otherwise an extension of their time in custody.

For these inmates (who are no longer in custody and cannot rely on habeas corpus), the Seventh Circuit has held that "*Heck* bars a § 1983 action where: (1) favorable judgment would necessarily call into question the validity of the underlying conviction or sentence and (2) the plaintiff could have pursued collateral relief but failed to do so in a timely manner." *Burd v. Sessler*, 702 F.3d 429, 436 (7th Cir. 2012). A plaintiff attempting to bring a retaliation claim challenging prison disciplinary proceedings that resulted in a loss of good-time credits that extended the length of his or her confinement *after* he or she has been released will have to demonstrate that he or she exercised diligence in challenging the discipline through state post-discipline proceedings and/or federal habeas corpus proceedings. Courts seem particularly concerned about plaintiffs who "hav[e] … constitutional claim[s], yet (perhaps for strategic reasons) sit[] it out while in custody and wait[] to bring [their] claims until habeas corpus is jurisdictionally barred because the 'custody' requirement is no longer met." *Whitfield*, 852 F.3d at 664.

There is no bright-line rule about how perfectly and how diligently a plaintiff must have pursued collateral relief. "[T]here is a subtle but important difference between requiring a plaintiff to pursue appropriate relief in a timely manner (that is, while she is in custody and able to do so), and a requirement that she *exhaust* all collateral relief." *Id.* at 664. For example, in *Whitfield*, the plaintiff had challenged the revocation of good-time credits through all avenues in state post-revocation proceedings, petitioning all the way to the state's highest court, and had attempted to file a federal habeas corpus petition. If a plaintiff can demonstrate that he "did his best to obtain relief in a timely way while he was in custody," *id.*, he probably will not run afoul of *Heck*.

RESPECTFULLY SUBMITTED this 15th day of March, 2019.

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On this 15th day of March 2019, the undersigned counsel hereby certifies that a copy of the foregoing document has been electronically filed with the Clerk of Court and a copy has been mailed to the *pro se* Plaintiff by first class U.S. Mail:

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