

CLAIMS RELATED TO MEDICAL CARE FOR PRISONERS WITH DIABETES

I. INTRODUCTION¹

This memorandum surveys current federal case law regarding the rights and protections afforded prisoners and pretrial detainees with diabetes. Prisoners and pretrial detainees may bring a claim under 42 U.S.C. § 1983 if they can establish that a right afforded by the Constitution or of the laws of the United States was violated by a person acting under color of state law. The most common constitutional amendment implicated in cases involving prisoners with diabetes is the Eighth Amendment, which prohibits cruel and unusual punishment, including inadequate medical care. Because pretrial detainees are not yet at a stage of the criminal process where they can be “punished,” detainee claims are analyzed under the Due Process clause of the Fourteenth Amendment and generally entitled to at least the same protections as prisoners. Prisoners and detainees with diabetes may also bring claims against state and municipal prisons and jails under Title II of the Americans with Disabilities Act (ADA). Finally, in prisons and jails that receive federal funding, prisoners and detainees with diabetes may bring claims under Section 504 of the Rehabilitation Act (504).

To date, courts have upheld claims against prison officials under all of these legal theories for claims including, inter alia, failure to monitor diabetes, failure to provide for special dietary needs, and failure to provide insulin.

¹ The original research in this memorandum was compiled on a pro bono basis by the law firm of Morgan Lewis & Bockius. Updated research and drafting was done by Victoria Thomas, ADA Novo Nordisk Legal Advocacy Fellow at the American Diabetes Association.

II. LEGAL STANDARDS FOR DIABETES-RELATED FEDERAL CIVIL RIGHTS CLAIMS BY PRISONERS AND PRE-TRIAL DETAINEES

A. Violations of the Eighth Amendment

The constitution does not require comfortable prisons, but “neither does it permit inhumane ones.” Farmer v. Brennan, 511 U.S. 825 (1994). It is settled law that “the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.” Id. (quotations omitted).

To establish a claim for inadequate medical care under the Eighth Amendment², a plaintiff must establish: (1) a serious medical need; and (2) acts or omissions by prison officials indicating deliberate indifference to that need. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Deliberate indifference has both an objective and a subjective component. Hunt v. Uphoff, 199 F.3d 1220 (10th Cir. 1999) (citing Farmer v. Brennan, 511 U.S. 825 (1994)). To satisfy the objective component, the medical need must be “sufficiently serious,” that is, “one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.” Id. (quoting Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980)). A number of courts have found that diabetes constitutes a serious medical need in the context of claims of inadequate medical care for detainees. Williams v. Hartz, 43 Fed. Appx. 964, 965 (7th Cir. 2002) (“diabetes is a serious medical condition”); Bowers v. Milwaukee County Jail Med. Staff, 52 Fed. Appx. 295, 298 (7th Cir. 2002) (“Diabetes is a serious medical condition”); Rouse v. Plantier, 182 F.3d 192, 198 (3rd Cir. 1999) (holding that insulin-dependent diabetes, for some, causes such extreme blood glucose fluctuations that they “require intensive medical treatment in order to regulate their blood sugar levels to normal

² As a preliminary matter, it should be noted that under the Prison Litigation Reform Act (PLRA), a prisoner or pre-trial detainee must exhaust administrative remedies before bringing a claim regarding prison conditions. 42 USCS § 1997e(a).

or near normal physiological levels”); Losee v. Garden, 2008 U.S. Dist. LEXIS 53295, *6 (D. Utah July 1, 2008) (“Plaintiff’s Type I diabetes is clearly a serious medical condition”); Aull v. Osborne, 2009 U.S. Dist. LEXIS 2914, *16 (W.D. Ky. Jan. 15, 2009) (“diabetes unquestionably is a serious medical condition”); Suggs v. Mobley, 2008 U.S. Dist. LEXIS 107339, *7 (E.D. Ark. Dec. 12, 2008) (“It is undisputed that diabetes is a serious medical condition, especially the type that requires insulin administration.”); Rollins v. Magnusson, 2004 U.S. Dist. LEXIS 25873, *10 (D. Me. Dec. 28, 2004) (“Rollins’s diabetes is a serious medical condition and he has a constitutional right to receive medical treatment for that condition, including medications such as insulin”).

The subjective component is satisfied when a plaintiff establishes that defendant knew plaintiff faced “a substantial risk of harm and disregarded that risk, ‘by failing to take reasonable measure to abate it.’” Young v. Warren, 151 Fed. Appx. 664, 666 (10th Cir. 2005) (quoting Farmer, 511 U.S. at 847); see also Howard v. City of Columbus, 239 Ga. App. 399, 521 S.E. 2d 51 (Ga. Ct. App. 2000) (holding that for the purposes of “deliberate indifference,” knowledge does not require a “final diagnosis, correct diagnosis, or a complete medical history when the inmate has not been allowed to see and to be examined by a physician or when medical care has been unreasonably delayed”). Deliberate indifference has also been found in “‘situations where there was objective evidence that a plaintiff had serious need for medical care, and prison officials ignored that evidence.’” Jackson v. Fauver, 334 F. Supp. 2d 697 (D. N.J. 2004) (quoting Natale v. Camden Cnty. Corr. Facility, 318 F.3d 575, 582 (3d Cir. 2003)).

“Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including reference to circumstantial evidence...and a fact-finder may conclude that a prison official knew of a substantial risk from

the very fact that the risk was obvious.” Farmer, 511 U.S. at 842; see also Owensby v. City of Cincinnati, 385 F. Supp. 2d 626, 648 (S.D. Ohio 2004) (holding that “the fact that the official actually drew the required inference may be demonstrated through circumstantial evidence or by showing that the risk was ‘obvious’”). While the law requires more than mere negligence, cases are also clear that this prong is satisfied by something less than acts or omissions for the very purpose of causing harms or with knowledge that harm will result. Farmer, 511 U.S. at 835.

B. Violations of the Fourteenth Amendment

The Supreme Court has held that, for pretrial detainees, the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment, controls the issue of whether prison officials must provide medical care to those confined in jail awaiting trial. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239 (1983); accord Hubbard v. Taylor, 399 F.3d 150, 158-59 (3d Cir. 2005); Gonzalez-Cifuentes v. U.S. Dept. of Homeland Security, 2005 U. S. Dist. Lexis 33072 (D. N.J. May 3, 2005).

In Hubbard, the Third Circuit held that the district court erred when it evaluated a pretrial detainee’s claims under the Eighth Amendment. Hubbard, 399 F.3d at 164. Indeed, the court held that “[t]he Eighth Amendment ‘was designed to protect those convicted of crimes and consequently the Clause applies only after the State has complied with constitutional guarantees traditionally associated with criminal prosecutions,’” and is, therefore, only appropriate after conviction. Id. (citations omitted).

The Hubbard decision noted that the Supreme Court only viewed the Eighth Amendment as relevant in pre-trial detainee cases because it established a floor. Id. 165-66. Indeed, “the due process rights of a [pre-trial detainee] are *at least* as great as the Eighth Amendment protections available to a convicted prisoner.” Id. (quoting City of Revere, 463 U.S. at 244); see also Claims Related to Medical Care for Prisoners with Diabetes

Gonzalez-Cifuentes, 2005 U. S. Dist. Lexis 33072, at *18-19 (noting that the Supreme Court has not yet decided whether the Fourteenth Amendment provides greater protection than the Eighth Amendment); Gibson v. Cnty. of Washoe, NV., 290 F.3d 1175, 1188 n.9 (9th Cir. 2002) (holding that “it is quite possible [] that the protections provided pretrial detainees under the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment”). Regardless, the analysis to determine liability under the 14th Amendment is similar to that under the 8th Amendment.

C. Violations of the Rehabilitation Act and Americans with Disabilities Act

The Supreme Court has held that Title II of the ADA³ applies to state prisons. Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998). Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132; see also, Carrion v. Wilkinson, 309 F. Supp.2d 1007, 1016 (N.D. Ohio 2004). There are four elements in a Title II ADA claim against a state or municipal prison or jail: (1) the prisoner or detainee meets one of the statute’s three definitions of disability; (2) the prisoner or detainee is “qualified to participate in or receive the benefit of” the particular program or activity of the prison or jail; (3) the prisoner or detainee was excluded from participation in or denied the benefits of the prison or jail’s services, programs, or activities, or was otherwise discriminated against; and (4) the exclusion, denial of benefits, or discrimination was based on disability. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002). In United States v. Georgia, the Supreme Court held that, in

³ A review of prison litigation involving the Americans with Disabilities Act shows that Title III of the ADA, which covers public accommodations operated by private entities, has not been applied in the context of prisoners’ rights.

the context of Title II of the ADA, “the alleged deliberate refusal of prison officials to accommodate [a prisoner’s] disability-related needs in such fundamentals as... medical care... constituted ‘exclu[sion] from participation in or . . . deni[al of] the benefits of’ the prison’s ‘services, programs, or activities.’” 546 U.S. 151, 157 (2006). However, as will be discussed, the application of the ADA to prison medical care has been limited.

Section 504 of the Rehabilitation Act also protects prisoners and detainees with disabilities in correctional facilities that receive federal funds. Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005). The analysis under Section 504 is similar to that under ADA Title II,⁴ with the additional requirement of a showing that the entity receives federal funding. Doe v. Pfrommer, 148 F. 3d 73, 82 (2d Cir. 1998); Johnson by Johnson v. Thompson, 971 F.2d 1487, 1492 (10th Cir. 1992). The First Circuit has held that unreasonable medical decisions by prison officials may be sufficient to show animus and thus a violation of the Rehabilitation Act:

For example, a plaintiff may argue that her physician's decision was so unreasonable – in the sense of being arbitrary and capricious – as to imply that it was pretext for some discriminatory motive, such as animus, fear, or apathetic attitudes. Or, instead of arguing pretext, a plaintiff may argue that her physician's decision was discriminatory on its face, because it rested on stereotypes of the disabled rather than an individualized inquiry into the patient's condition – and hence was unreasonable in that sense.

Kimman v. N.H. Dep't of Corr., 451 F.3d 274, 284-285 (1st Cir. 2006) (internal quotation marks and citations omitted).

Courts often treat claims under the Rehabilitation Act and the Americans with Disabilities Act as substantively the same. For example, in the prison and jail context, courts

⁴ For example, the Fourth Circuit “has repeatedly held that the ADA and Rehabilitation Act generally are construed to impose the same requirements, and because the language of the Acts is substantially the same, we apply the same analysis to both.” Spencer v. Earley, 278 Fed. Appx. 254, 261 (4th Cir. 2008) (internal quotations and citations omitted).

treat caselaw under the ADA as equally applicable to Rehabilitation Act claims, and vice versa. See, e.g., id. As a result, the remainder of this section will treat these two federal statutes as functionally equivalent.

Frequently, the courts construe claims brought by prisoners and detainees under the ADA and Rehabilitation Act as claims regarding the plaintiff's medical needs; there is widespread agreement among the circuit courts that claims regarding negligent medical care are not a form of disability discrimination, unless the prisoner can show that the poor treatment was motivated by the disability. See Walls v. Texas Dep't of Crim. Justice, 270 Fed. Appx. 358, 359 (5th Cir. 2008); Miller v. Hinton, 288 Fed. Appx. 901, 903 (4th Cir. 2008); Kiman v. N.H. Dep't of Corr., 451 F.3d 274, 285 (1st Cir. 2006); Iseley v. Beard, 200 Fed. Appx. 137, 142 (3d Cir. 2006); Fitzgerald v. Corrections Corporation of America, 403 F.3d 1134, 1143 (10th Cir. 2005); Marlor v. Madison County, 50 Fed. Appx. 872, 873 (9th Cir. 2002); Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996); Owens v. O'Dea, 1998 U.S. App. Lexis 10761 (6th Cir. 1998). Rather, the courts have generally held that claims regarding poor medical care or treatment are cognizable under the Eighth or Fourteenth Amendment, not the ADA or Rehabilitation Act. See, e.g., Walls v. Texas Dep't of Crim. Justice, 270 Fed. Appx. 358, 359 (5th Cir. 2008); Carrion v. Wilkinson, 309 F. Supp.2d 1007, 1016 (N.D. Ohio 2004). But see Coker v. Dallas County Jail, 2009 U.S. Dist. LEXIS 62978 (N.D. Tex. Feb. 25, 2009) (Plaintiff with diabetes and other conditions brought claims under the ADA and Rehabilitation Act regarding the prison's decision to remove his wheelchair. The court held that the denial of the wheelchair was a medical decision, and that the wheelchair was a health service, and denied summary judgment for defendants because there were genuine issues of fact regarding whether the denial of a wheelchair excluded plaintiff from participating in, or denied him the benefits of, services programs or activities at the prison based

on disability); Hutchinson v. Alamedia, 2006 U.S. Dist. LEXIS 92074 (E.D. Cal. Dec. 19, 2006) (prisoner brought ADA and Rehabilitation Act claims regarding denial of access to prison programs due to lack of medical care for a serious injury; court apparently excepted that such claims were cognizable under the ADA and Rehabilitation Act, but granted summary judgment to defendant because plaintiff did not sufficiently allege facts showing how he was denied access to prison programs due to disability). In Carrion, the Northern District of Ohio considered a plaintiff's claims under the ADA and the Rehabilitation Act regarding prison officials' failure to provide him with medically appropriate meals in light of his insulin-treated diabetes. Carrion, 309 F. Supp. 2d at 1011-12. The court granted summary judgment for the defendants, holding that the plaintiff failed to "allege that the defendants denied him the benefits of any services, programs, or activities provided for other non-disabled inmates, or that they subjected him to discrimination because of his diabetes." Id. Rather, plaintiff was denied a particular diet. Id. The court held:

The ADA and Rehabilitation Act afford disabled persons legal rights regarding access to programs and activities enjoyed by all, but do not provide them with a general cause of action for challenging the medical treatment of their underlying disabilities....[Plaintiff's] claims that he was denied medical treatment, in this case, a proper diet, is "not the type[] of claim[] that the ADA and Rehabilitation Act were intended to cover."

Id.⁵

Although rare, courts have upheld ADA and Rehabilitation Act claims brought by prisoners with diabetes. Montez v. Owens, 2007 U.S. Dist. LEXIS 36218 (D. Colo. May 16, 2007) (finding that "running out of [oral diabetes] medicine is unconscionable and a violation of

⁵ Many of these decisions, it should be noted, predate the Supreme Court's decision in United States v. Georgia, supra, and may be inconsistent with the Court's statement in that case that denial of access to prison programs and services such as medical care can amount to an ADA violation as well as an Eighth Amendment claim. Such cases seem to impose an unnecessary requirement that conduct must be deliberate or based on fears or stereotypes in order to violate the ADA. These cases also ignore the reality inside prisons, where inadequate medical care can render an inmate with a chronic condition like diabetes unable to access most or all prison programs and services.

the ADA and Rehabilitation Act. . . To deny a diabetic needed medication is to treat that individual differently, as the non-diabetic does not need Actos or insulin to keep on living. Accommodation for the diabetic is to insure that he or she has access to appropriate medications.”); Garcia v. Miller, 1999 U.S. App. LEXIS 32429 (2d Cir. Dec. 10, 1999) (blind inmate with diabetes found to have cognizable claims under the ADA and Rehabilitation Act where he was punished more than other inmates for skipping meals).

A California District Court has considered whether a juvenile court violated the ADA by committing a minor with type 1 diabetes to a juvenile justice rehabilitation center that plaintiff claimed was more restrictive than other available placements. In re M.S., 2009 Cal. App. LEXIS 924 (Cal. App. 1st Dist. June 12, 2009). The juvenile court found that the other placements did not have doctors on staff and were not near hospitals and that therefore his diabetes needs could not be met in those placements. Id. The District Court held that the juvenile court properly considered the plaintiff’s medical needs and placed him in the program that could best meet those needs and thus the plaintiff failed to state a cognizable claim under the ADA. Id.

In summary, while the ADA and Section 504 should permit a claim that a prison’s poor medical treatment of an inmate’s diabetes denied that inmate access to prison programs and services, courts are often hostile to these claims and view medical care as being outside the scope of the ADA. At minimum, a successful ADA or Section 504 claim would need to point to the specific prison programs or services that an inmate could not access due to poor medical treatment, and not simply allege poor treatment and ask for that treatment to be improved. Because cases finding an ADA or Section 504 violation in the diabetes context have been so rare, the remaining sections of this memo focus on the diabetes case law that has developed under the Eighth and Fourteenth Amendments.

III. SURVEY OF FEDERAL CASE LAW

A. Negligence Does Not Constitute Deliberate Indifference

Claims for inadequate medical care under the Eighth and Fourteenth Amendments often turn on the defendant's state of mind regarding the medical care, rather than the sufficiency of the care itself. As a result, the facts alleged must go beyond showing that there is disagreement about the medical care provided--that the medical care should have been given in a different manner, or that prison officials acted negligently in providing the care. Rather, the facts must show some *awareness* on the part of prison officials that the medical care was insufficient or inappropriate. "It is well-settled that claims of negligence or medical malpractice, without some more culpable state of mind, do not constitute 'deliberate indifference.'" Rouse, 182 F.3d at 197. "Mere disagreement as to the proper medical treatment is also insufficient." Jackson v. Fauver, 334 F. Supp. 2d at 706 (quotations omitted). Quoting the Supreme Court, the Rouse court emphasized: "[I]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute an unnecessary and wanton infliction of pain or to be repugnant to the conscious of mankind." Id. (quoting Estelle v. Gamble, 429 U.S. 97 (1976)); see also Durmer v. O'Carroll, 991 F.2d 64, 67 (3d Cir. 1993) (holding that "the law is clear that simple medical malpractice is insufficient to present a constitutional violation"). Claims regarding medical care are more likely to succeed if the facts show that prison or jail officials knew or should have known that particular medical care was required, but they failed to provide it. For example, alleging that a physician has notified the prison that an inmate requires treatment to prevent his or her retinopathy from worsening, and the prison failed to provide treatment, resulting in deterioration of the prisoner's vision, would be more likely to show deliberate

indifference than merely alleging that the prison medical staff should have provided different or more aggressive retinopathy treatment than they chose to provide.

The Seventh Circuit held that repeated acts of negligent conduct is not tantamount to deliberate indifference. Sellers v. Henman, 41 F.3d 1100 (7th Cir. 1994). In Sellers, the prisoner alleged that he had been denied appropriate medical treatment and that his diet was too low in calories and too high in saturated fat. Id. at 1102. The court noted the importance of diet to the health of a person with diabetes; however, the court held that these allegations standing alone do not prove cruel and unusual punishment. Id. Moreover, negligence is not actionable under the Eighth Amendment. Id. The court noted that while many cases have stated that repeated acts of negligence may constitute *evidence* of deliberate indifference, those acts do not constitute an alternative theory of liability. Id. at 1103 (holding that the notion that repeated acts of negligence constitute deliberate indifference “trip[s] over the clear statement in Farmer that prison officials must know they are subjecting the plaintiff to an excessive risk before they can be found to be violating the Eighth Amendment”).

B. Deliberate Indifference

The Federal Circuit Courts of Appeal and District Courts have found various actions or inactions by prison officials with regard to the medical treatment of prisoners with diabetes, constitute deliberate indifference, as required to implicate the Eighth or Fourteenth Amendments. Examples of deliberate indifference include inadequate medical attention and failure to provide

proper meals. This memorandum outlines what the various Circuits have held constitutes “deliberate indifference.”⁶

(1) Second Circuit

The Second Circuit found that a pretrial detainee provided evidence sufficient to show deliberate indifference where “following his arrest, Charles was pale, dizzy, perspiring profusely, trembling uncontrollably, hardly able to talk, and repeatedly losing consciousness” and the defendant “was informed that Charles was a severe diabetic in insulin shock and needed to go to the hospital immediately” yet defendant “denied Charles medical attention throughout the period of his detention.” Weyant v. Okst, et al., 101 F.3d 845, 857 (2d Cir. 1996).

(1) Third Circuit

In Natale v. Camden Cnty. Corr. Facility, the Third Circuit held that a prisoner’s claim can withstand summary judgment where prison officials ignored the evidence of prisoner’s need for insulin, as told by both the prisoner himself and a doctor. 318 F.3d 575 (3d Cir. 2003). The Court noted that a reasonable jury could conclude that the prison officials knew that the prisoner had diabetes and that if insulin was not administered as required, he would suffer adverse health consequences. Id. at 580.

In Rouse v. Plantier, the court held that prisoners with difficult to manage blood glucose had valid deliberate indifference claims regarding infrequent blood glucose monitoring. 182 F.3d 192, 198-99 (3rd Cir. 1999).

(2) Fourth Circuit

In an unpublished opinion, the Fourth Circuit found that the plaintiff detainee alleged sufficient facts for a jury to find a violation of the Fourteenth Amendment. Scinto v. Preston, 170

⁶ This section focuses solely on deliberate indifference regarding the medical treatment of prisoners with diabetes. Not all circuits have opined in this area. Accordingly, the survey is limited to those jurisdictions which have dealt with this specific issue.

Fed. Appx. 834, 835-836 (4th Cir. 2006). The plaintiff alleged that while he was in police custody he was denied insulin, despite informing the officers that he had diabetes and needed insulin, eventually requiring the officers to take him to the hospital, and causing him permanent damage, some of which occurred while he was in custody. Id.

(3) Sixth Circuit

The Court held that where prisoner alleged that he was not treated for diabetes- it is unclear which type- for 7-10 days after his medical chart was lost, and where the prisoner lost consciousness and sustained injuries to his vision and his head, the plaintiff's claim is more serious than "a mere disagreement or dissatisfaction with the medical attention he received in jail" and so the court vacated and remanded the question of liability for the prison's medical services provider. Marby v. Correctional Medical Servs., 2000 U.S. App. LEXIS 28072 (6th Cir. Nov. 6, 2000) (unpublished).

(4) Seventh Circuit

The Seventh Circuit has recognized the "dangers that people with diabetes may face if taken off their medically prescribed diets" in a case involving a prisoner with type 1 diabetes. Sellers v. Henman, 41 F.3d 1100, 1102 (7th Cir. 1994); accord Dye v. Sheahan, No. 93 C 6645, 1995 U.S. Dist. LEXIS 3027, *6 (N.D. Ill. March 10, 1995). In Sellers, the court found that the trial court prematurely dismissed the prisoner's Eighth Amendment claim, holding "that if [a prisoner] can prove that the defendants have deliberately withheld medical treatment and dietary accommodation that he needs- and that they know he needs- to avoid a diabetic crisis or another heart attack, he is entitled to judgment." Sellers, 41 F.3d at 1103.

Moreover, the Seventh Circuit has recognized that people with diabetes "are prone to coronary artery disease and dangerous weight loss; hence they have a legitimate concern for their diets." Dye, 1995 WL 109318, at *2 (citing Taylor v. Anderson, 868 F. Supp. 1024, 1026 (N.D. Claims Related to Medical Care for Prisoners with Diabetes

Ill. 1994) for its holding that an allegation that a prison official threatened the health of a prisoner with diabetes by failing to provide that prisoner with proper diet was sufficient to state a claim under § 1983). Furthermore, “courts have recognized that denying a prisoner with diabetes a special diet may violate the Eighth Amendment because certain foods are extremely dangerous to diabetics’ health.” Id. (citing Johnson v. Harris, 479 F. Supp. 333, 336-37 (S.D.N.Y. 1979)).

Additionally, the Seventh Circuit has held that knowingly providing the wrong medication to a prisoner with diabetes, when that medication can negatively impact both his diabetes treatment and his health generally, can constitute deliberate indifference to the serious medical need of diabetes. Bowers v. Milwaukee Co. Jail Med. Staff, 52 Fed. Appx. 295, 298 (7th Cir. 2002). In Bowers, the prisoner repeatedly alerted medical personnel at the jail that he was being given another prisoner’s medications in addition to his own diabetes medications, but jail personnel continued to administer medications that can interfere with insulin release, and that caused the prisoner to lose several teeth. Id. at 297-298.

(5) Eighth Circuit

In Roberson v. Bradshaw, 198 F.3d 645 (8th Cir. 1999), the Court held that summary judgment against a plaintiff with type 2 diabetes was not appropriate where there was a question of fact regarding whether prisoner suffered from excessive thirst, diarrhea, migraines, diminished vision, and loss of sleep and where prison officials delayed treatment and ignored prisoner’s complaints regarding treatments received. Id. at 646-47.

(6) Tenth Circuit

In Hunt v. Uphoff, the Tenth Circuit reversed the district court’s dismissal of a prisoner’s claim alleging that denial of medical care constituted a violation of the Eighth Amendment.

Hunt, 199 F.3d 1220 at 1224. The plaintiff alleged that the heart attack that he suffered and subsequent bypass surgery were caused by inadequate treatment he received for his diabetes. Id.

Claims Related to Medical Care for Prisoners with Diabetes 14

at 1223. His claims included: (1) being denied insulin; (2) that special diet requirements were not met; (3) denial of proper care because of a lack of a primary care physician on the premises; and (4) that he was not treated for elevated blood sugars. Id. The Court of Appeals held that it “cannot agree with the district court that the facts as alleged by Mr. Mapp, which we must at this stage of the proceedings accept as true, reflect a ‘mere disagreement with his medical treatment’ not giving rise to a constitutional claim.” Id. at 1224.

In Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1973), the court held that the failure of the chief of police to establish procedures and to train personnel to protect an incarcerated person from injury by reason of his diabetes condition amounted to cruel and unusual punishment. Id. In Dewell, the plaintiff alleged a violation of § 1983 where police failed to notice and/or respond to the diabetes identification information carried by the prisoner. Id. The plaintiff was arrested for public drunkenness and incarcerated for four days without treatment until he was found in a coma and transferred to a hospital. Id. As a result of a lack of insulin, plaintiff suffered a stroke and brain damage. Id. The court noted that failure to procure urgently needed medical attention may amount to cruel and unusual punishment. Id.

(7) Eleventh Circuit

The Eleventh Circuit upheld the lower court’s holding that defendants were deliberately indifferent to the serious needs of a pretrial detainee with undiagnosed diabetes who lost a significant amount of weight in a short time, repeatedly requested medical attention, and was eventually hospitalized and diagnosed with diabetes. Carswell v. Bay County, 854 F.2d 454, 455 (11th Cir. 1988).

C. No Deliberate Indifference

(1) Third Circuit

In Booth v. Pence, 354 F. Supp. 2d 553 (E.D. Pa. 2005) the court held that a correctional officer's withholding of sugar packets to inmate with insulin-treated diabetes in state prison cafeteria was not deliberate indifference to inmate's serious medical needs, in violation of the Eighth Amendment. Id. The court found that the inmate did not make a reasonable request for medical treatment, he was not exposed to undue suffering, there was minimal evidence that the correctional officer had knowledge that the inmate needed medical treatment and there was no evidence that the officer intentionally refused to provide medical care. Id.

In Falciglia v. Erie County Prison, the court affirmed summary judgment for the defendants where a prisoner failed to show deliberate indifference regarding his diet, because the diet was designed for people with diabetes and there was no evidence to show that the defendant prison officials knew the diet was inappropriate for someone with diabetes. 279 Fed. Appx. 138, 141-42 (3d Cir. 2008)

In Rouse v. Plantier, the court held that, in a class action by various prisoners with diabetes, members whose blood glucose levels had remained within appropriate ranges over time could not show that infrequent blood glucose monitoring amounted to deliberate indifference. 182 F.3d 192, 198-99 (3rd Cir. 1999).

(2) Fifth Circuit

The Fifth Circuit upheld the district court's dismissal of a deceased inmate's § 1983 claim brought by his daughter where the prisoner died after falling into a diabetic ketoacidotic coma. Greer v. Tran, 124 Fed. Appx. 261 (5th Cir. 2005). In Greer, the doctor and the correctional facility tested for and ruled out diabetes mellitus shortly after the prisoner's arrival. Id. at 262. Moreover, there was no evidence from the record that the doctor either knew that the

prisoner had diabetes or that the prisoner experienced any symptoms before falling into the diabetic ketoacidotic coma. Id.

(3) Sixth Circuit

Allegations by arrestee with diabetes, that jail personnel: (1) delayed processing one of his urine tests; (2) stopped testing his blood sugar because a physician said that the levels were normal; (3) improperly administered a blood sugar test; and (4) failed to properly adjust diet, amounted to nothing more than a difference of opinion with physician about diagnosis and treatment, and therefore did not constitute a Constitutional claim. LaFlame v. Montgomery Cnty. Sheriff's Dept., 3 Fed. Appx. 346 (6th Cir. 2001). The Sixth Circuit also held that the lack of a special diet did not constitute deliberate indifference in Mullins v. Cranston, 1999 U.S. App. LEXIS 32580 (6th Cir. Dec. 9, 1999) and LaFlame v. Montgomery County Sheriff's Dept., 3 Fed. Appx. 346 (6th Cir. 2001).

(4) Ninth Circuit

The Ninth Circuit upheld a summary judgment verdict in favor of prison officials, who allegedly violated a prisoner's rights by failing to provide a special diet in light of his diabetes. Jackson v. Lucine, 119 Fed. Appx. 70 (9th Cir. 2004). The court held that "difference in opinion about a course of medical treatment does not amount to deliberate indifference to serious medical needs and [prisoner] failed to create a genuine issue of material fact as to whether a special diet was medically necessary." Id.

(5) Tenth Circuit

The Tenth Circuit affirmed the grant of summary judgment for defendants under the Fourteenth Amendment in Randall v. Bd. of County Comm'rs, 184 Fed. Appx. 723 (10th Cir. 2006). The plaintiff with type 1 diabetes provided evidence that he developed end-stage renal failure while incarcerated and, after his medication was changed, required emergency medical

attention due to hypoglycemia more than twelve times. However, the court found that because he received two blood glucose checks per day and received medication every day, the defendants were not deliberately indifferent to a serious medical need.

D. Categories Of Violations

In addition to understanding the holdings of federal courts in prisoner cases, as broken down by circuit, we note that it may be useful to conceptualize the general categories of violations that courts have been willing to remedy. For example, as briefly shown below, courts have held that failures to provide: (1) proper diet; (2) adequate medical care; or (3) properly trained prison officials may all rise to violations of the Eighth Amendment.

a. Proper Diet

A large number of claims brought by prisoners regarding diabetes care are for inappropriate diet. See, e.g., Bettis v. Bickel, 2009 U.S. App. LEXIS 2172 (10th Cir. Jan. 30, 2009) (unpublished); Vandiver v. Corr. Med. Servs., 2009 U.S. App. LEXIS 9702 (6th Cir. 2009) (unpublished); Falciglia v. Erie County Prison, 279 Fed. Appx. 138 (3d Cir. 2008) (unpublished); Randall v. Bd. of County Comm'rs, 184 Fed. Appx. 723 (10th Cir. 2006) (unpublished); Jackson v. Lucine, 119 Fed. Appx. 70 (9th Cir. 2004); (Unpublished); Franklin v. McCaughtry, 110 Fed. Appx. 715, 719 (7th Cir. 2004) (Unpublished); LaFlame v. Montgomery Cnty. Sheriff's Dept., 3 Fed. Appx. 346 (6th Cir. 2001); Hunt v. Uphoff, 199 F.3d 1220 (10th Cir. 1999); Roberson v. Bradshaw, 198 F.3d 645, 646 (8th Cir. 1999); Sellers v. Henman, 41 F.3d 1100, 1102 (7th Cir. 1994); Thomas v. Donahue, 2009 U.S. Dist. LEXIS 40769 at *3-4 (E.D. Cal. Apr. 30, 2009); Wilson v. Woodford, 2009 U.S. Dist. LEXIS 25749 (E.D. Cal. Mar. 27, 2009); Dye v. Sheahan, No. 93 C 6645, 1995 U.S. Dist. LEXIS 3027, *6 (N.D. Ill. March 10, 1995); Taylor v. Anderson, 868 F. Supp. 1024, 1026 (N.D. Ill. 1994); Johnson v. Harris, 479 Claims Related to Medical Care for Prisoners with Diabetes

F.Supp. 333, 335 (S.D.N.Y. 1979). While some courts have held that denying prisoners with diabetes medically appropriate diets can constitute deliberate indifference to a serious medical need, where the plaintiffs are unable to show harm from the diet, courts have dismissed their claims.

Several district courts have held that failure to provide medically appropriate diets may violate the Eighth Amendment. In Johnson v. Harris the court held that the prisoner, Johnson, was entitled to monetary and injunctive relief where prison officials knew of Johnson's difficult to manage diabetes, and refused to provide proper meals. Johnson, 479 F. Supp. at 335. Johnson complained that because the meals provided could be injurious to health, he would have to choose between the harm of eating the wrong foods, or not eating at all. Id. at 335-36. In one year, Johnson was infected with gangrene and consequently had his leg amputated. Id. at 335. The court noted that "it cannot seriously be disputed that the actions of prison authorities 'bespeak a deliberate indifference ... to the agony' of [Johnson] with the consequence that he had been subjected to cruel and unusual punishment in violation of the Eighth Amendment." Id. at 336-37. The court noted that even if the prison officials were not aware of the conditions originally, Johnson's amputation made them aware. Id. at 337. Moreover, the medical director of the prison testified that he was aware of the inadequacy of the meals. Id. The court held that the evidence presented "dispels any suggestion that Johnson's plight arose from a single instance of negligence or ineptitude....Rather, Johnson is challenging a pattern of conduct, that seemingly amounts to a policy, whereby prison officials have consciously ignored the special dietary requirements of one diabetic inmate and have resolved, either consciously or through calculated indifference, to continue to ignore his special medical needs." Id.

Similarly, in Taylor v. Anderson, 868 F. Supp. 1024, 1026 (N.D. Ill. 1994), the court held that a prisoner with diabetes stated a claim of deliberate indifference by alleging that a prison official failed to provide him with his prescribed diabetes diet even though the official was aware of his condition. Dye, 1995 WL 109318, *2 (citing Taylor, 868 F. Supp. at 1026). Dye v. Sheahan, No. 93 C 6645, 1995 U.S. Dist. LEXIS 3027, *6 (N.D. Ill. March 10, 1995).

In Dye, the court denied defendants' motion to dismiss plaintiff's allegations that he did not receive his ADA approved diet, and that the food was improperly prepared and did not meet any state or federal criteria for diabetes meals. Id. at *1. The plaintiff sought compensatory damages and requested that the prison be required to provide detainees and prisoners with diabetes proper ADA and federally approved diets. Id. The court noted that the Seventh Circuit has recognized the "dangers that diabetics may face if taken off their medically prescribed diets." Id. at*2 (citations omitted). Moreover, "courts have recognized that denying a diabetic prisoner a special diet may violate the Eighth Amendment because certain foods are extremely dangerous to diabetics' health." Id. (citing Johnson v. Harris, 479 F. Supp. 333, 336-37 (S.D.N.Y. 1979)).

However, the Sixth, Seventh, and Ninth Circuits have denied prisoner's claims related to improper diets. The Sixth Circuit denied a prisoner's Eighth Amendment claim related to the prison's failure to provide a special diet for prisoners with diabetes. Mullins v. Cranston, 1999 U.S. App. LEXIS 32580 (6th Cir. Dec. 9, 1999). The court upheld the lower court's summary judgment ruling for the defendant because the defendant produced evidence that it offered the plaintiff a class on choosing appropriate foods from the prison food service offerings, and stressed to prisoners that it was up to them to choose foods that met their diabetes-related needs. Id. at *4. The court found that the plaintiff's request that a special tray of food be prepared for him was a mere difference of opinion regarding his medical needs. Id. As previously discussed

above, the Sixth Circuit also upheld a lower court's dismissal of a prisoner's suit regarding appropriate diet, holding that the prisoner's claim constituted a mere difference in medical opinion, not an Eighth Amendment claim. LaFlame v. Montgomery Cnty. Sheriff's Dept., 3 Fed. Appx. 346 (6th Cir. 2001).

As discussed above, the Seventh Circuit has held that allegations by a prisoner with diabetes that his diet was too high in saturated fat and too low in calories did not amount to cruel and unusual punishment. Sellers v. Henman, 41 F.3d 1100, 1102 (7th Cir. 1994). The Seventh Circuit again held that refusal to provide a special diet did not violate the Eighth Amendment in Williams v. Hartz, 43 Fed. Appx. 964, 965 (7th Cir. 2002), where the prison doctor showed that the prisoner refused to take insulin and make better food choices.

Similarly, in an unpublished opinion, the Ninth Circuit noted that upon entering prison, the plaintiff in Lewis received a special diet to control his diabetes, was given random tests to monitor his blood sugar levels, and that the tests showed his blood glucose in acceptable ranges, indicating that the plaintiff's diabetes was under control and his diet appropriate. Hernandez v. Lewis, 1991 U.S. App. LEXIS 20887 at *2 (9th Cir. Aug. 23, 1991). The court held that the plaintiff's claim that the prison diet was inadequate was a "mere difference in judgment, which...does not support a claim of deliberate indifference." Id. In another unpublished opinion, the Ninth Circuit again held that "[l]ack of a specialized diet for a non-insulin-dependent inmate is not 'sufficiently serious' to be unconstitutional. Kaza v. Allen, 1995 U.S. App. LEXIS 32189, *12 (9th Cir. Nov. 7, 1995). As discussed above, the Ninth Circuit has also upheld summary judgment for prison officials, regarding a failure to provide a special diet to a prisoner with diabetes, because the plaintiff failed to offer evidence that the special diet was medically necessary. Jackson v. Lucine, 119 Fed. Appx. 70 (9th Cir. 2004).

In general, certain themes arise across cases considering whether a prison diet violates the Eighth Amendment. The cases in which courts have found that a prison diet constitutes deliberate indifference to a serious medical need are often older cases, from a time when existing diabetes management meant that people with diabetes had to completely avoid certain foods or precisely control their food intake. Now that diabetes management has advanced, a person who is receiving modern diabetes treatment will generally not face immediate dire consequences as the result of a poor diet. As a result, improvements in the medical management of diabetes has made it more difficult to succeed in showing that a particular diet constitutes deliberate indifference to a serious medical need. However, as previously discussed and as demonstrated by the case law, a claim is more likely to be successful if the facts reveal that prison officials were aware that an individual needed a special diet and failed to provide it.

b. Failure to Monitor Disease

At least one court has held that failure to “properly monitor and control the level of sugar in [prisoner’s] blood,” could permit a reasonable juror to infer that defendants were deliberately indifferent to prisoner’s serious need for medical care. Jackson v. Fauver, 334 F. Supp. 2d 697 (D. N.J. 2004). In Jackson, a medical expert explained that the correctional facility’s failure to annually test the plaintiff for ketones resulted in irreversible kidney and heart damage. *Id.*

c. Failure to Train Prison Officials

In Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1973), the court held that the failure of the chief of police to establish procedures and to train personnel to protect an incarcerated person from injury by reason of his diabetes amounted to cruel and unusual punishment. Id.⁷ In Dewell, the plaintiff alleged a violation of § 1983 where police failed to notice and/or respond to

⁷ This case predates key Supreme Court precedent establishing the current deliberate indifference standard (including Estelle v. Gamble and Farmer v. Brennan, discussed above at page 2) and thus it is questionable whether a similar case today would result in the same holding.

the diabetic identification information carried by the prisoner. Id. The plaintiff was arrested for public drunkenness and incarcerated for four days without treatment until he was found in a coma and transferred to a hospital. Id. As a result of a lack of insulin, plaintiff suffered a stroke and brain damage. Id. The court noted that failure to procure urgently needed medical attention may amount to cruel and unusual punishment. Id.

d. Failure to Treat Disease

Certain courts have held that delay in providing medical care may violate the Eighth Amendment. See Hunt, 199 F.3d at 1224 (citing Thomas v. Town of Davie, 847 F.2d 771, 772-73 (11th Cir. 1988) (concluding that an automobile accident victim stated an Eighth Amendment claim against police officers for delay in obtaining medical care when the victim obviously needed immediate medical attention and his condition was deteriorating). The Tenth Circuit noted that delays which have been found to violate the Eighth Amendment frequently involve life-threatening situations and cases where it is apparent that delay would exacerbate a prisoner's problems. Id. Similarly, the First Circuit has held that "the denial of prescribed medicine (for diabetes and high blood pressure) could constitute a sufficiently serious harm" to qualify as deliberate indifference to a serious medical need. Pandev v. Freedman, 1995 U.S. App. LEXIS 27529 (1st Cir, Sept. 26, 1995).

In Howard v. City of Columbus, 239 Ga. App. 399, 521 S.E. 2d 51 (Ga. Ct. App. 2000), the inmate's daughter brought an action alleging Eighth Amendment violations which ultimately led to her father's death (Mr. Howard). Howard, 239 Ga. App. at 399. The deceased was a person with diabetes and hypertension. Id. at 400. The intake screening of Mr. Howard was performed by a deputy with no medical training, who failed to take a medical history for diabetes or hypertension. Id. Over the course of his imprisonment, the lack of proper diet and medication

caused Mr. Howard's condition to worsen. Id. Within about one year, Mr. "Howard's diabetic condition had deteriorated to the extent that he appeared visibly sick to a lay person" and his cell mate filled out numerous sick slips on his behalf. Id.

Mr. Howard had symptoms of overheating, thirst, dizziness, constipation and fainting and lost 30-40 pounds. Id. At one point, Mr. Howard had to be carried to the clinic, arriving with a heart rate of 148 beats per minute (bpm). Id. Despite the protocol which required a 911 call for a heart rate above 120 bpm, the nurse did not call 911 or a doctor, but instead administered blood pressure medication (which turned out to be dangerous for a person with diabetes). Id. at 400-401. Eventually, paramedics were called, and a blood glucose test revealed a blood sugar of 1200+. Id. at 401-402. Shortly thereafter, Mr. Howard died. Id.

The court held that a "repeated and prolonged denial of access to a physician for an obviously seriously sick inmate constitutes deliberate indifference and reckless conduct." Id. at 405. The court also held that "[i]gnorance is not bliss; otherwise a premium would be placed upon ignorance in order to escape liability when an illness is not diagnosed and the sufferer is allowed to slowly die without proper diagnosis or treatment." Id. Thus, the court held that "repeated denial, delay, insufficient or inappropriate medical care constitutes circumstantial evidence of subjective, deliberate indifference." Id.

The Seventh Circuit denied qualified immunity to defendant police officers in Egebergh v. Nicholson for denying plaintiff insulin, resulting in his death. 272 F.3d 925 (7th Cir. 2001). The detainee, Fitzgibbons, was arrested for shoplifting and it was noted during his booking that he needed an evening and morning shot of insulin; his sister brought his insulin to the jail and he was given an evening shot. Id. at 927. However, despite the officers' admitted awareness that people with diabetes can be seriously harmed by being denied insulin, the officers denied

Fitzgibbons his morning insulin before his bail hearing. Id. He died later that night due to diabetic ketoacidosis. Id. The court found that a jury could find that the officers were deliberately indifferent to Fitzgibbons' serious medical need for insulin and thus qualified immunity was inappropriate. Id. at 928.

In Flowers v. Bennett, 123 F. Supp. 2d 595 (N.D. Ala. 2000), the court denied defendants' motion for summary judgment where plaintiff alleged that the prison officials failed to provide her with usable insulin in a timely manner. Flowers, 123 F. Supp. 2d at 601. Though many facts were in dispute, for purposes of the motion the court found that: the plaintiff was booked at 9:59 p.m., during which she told the officer that she had severe diabetes, had taken an insulin shot at supper, and needed a different type of insulin shot before bed and at breakfast. Id. Moreover, plaintiff said that if she did not receive the shots, she would probably go into a coma. Id. The jail did not have the proper insulin, and no one called a medical professional in order to obtain the proper insulin. Id. at 596. Rather the plaintiff was placed on medical watch. Id. Consequently, the plaintiff did not receive her insulin and consequently developed DKA. Id. at 596-97. The court held that:

[i]f someone needs to take different types of insulin, there is certainly a reasonable inference that it would have been prescribed as part of medical treatment. There may be conflicts in the evidence as to what [the officer] knew, what action he did or did not take, what [plaintiff] was offered and what she declined. If, however, the facts are that [the officer] was told that [plaintiff] was a severe diabetic who could go into a coma if she didn't receive insulin, [the officer] was arguably deliberately indifferent.

Id. at 601-02.

e. Inadequate Foot Care

In Ruffin v. Deperio, 97 F. Supp. 2d 346 (W.D.N.Y. 2000), the plaintiff, a state prisoner with diabetes (unclear whether type 1 or type 2), alleged that improper medical care led to the

amputation of his foot from gangrene related to diabetes. Ruffin, 97 F. Supp.2d at 354. In Ruffin, a table fell on the plaintiff's foot, resulting in pain and swelling. Id. at 351. Sometime thereafter, the plaintiff's toe was amputated, and later his leg below the knee. Id. at 349.

Defendants argued that only the initial pain and swelling had to be an objectively serious medical injury to fall within the Eighth Amendment, and that the plaintiffs could not "bootstrap" the later amputations. Id. at 351. The court rejected this argument in two ways. First, the court held that the Eighth Amendment does not limit serious injuries to fractures and dislocations, but "instead permits injury to focus on level of pain and degeneration." Id. at 351 (citations omitted).

Second, the court held that the foot amputation was:

"extremely relevant" to the objective analysis because "[a] reasonable layperson could certainly conclude, in light of plaintiff's extensive medical history and the well-documented concerns about injuries to diabetics, particularly injuries to their extremities, that a table falling on plaintiff's foot would result in potentially more severe injuries to him than it would an otherwise healthy individual."

Id. at 352.

With regard to the subjective "deliberate indifference" analysis, the defendants argued that because plaintiff received medical care, and was eventually referred to an outside specialist, the defendants were not deliberately indifferent. Id. at 353. The court found, however, that "a reasonable jury could conclude that defendants' 'treatment' of plaintiff consisted of little more than documenting his worsening condition." Id. Ultimately, the court held that the plaintiff had shown "that the defendants' actions displayed a sufficient degree of apathy to his serious medical needs so as to survive summary judgment." Id.

The court rejected defendants' characterization of plaintiff's allegations as mere negligence or disagreement over treatment. Id. at 354. The court noted that the plaintiff did not complain that he requested a specific type of treatment and was refused. Id. "Rather, [plaintiff] argues that defendants' failure to act on his repeated complaints of pain, swelling, difficulty in

walking, inability to sleep due to foot pain, and blackening of toes...,” (especially when combined with the fact that his glycerin levels were 3-5 times above normal), “all of which are obvious symptoms of serious medical problems in a diabetic, constitutes deliberate indifference to his serious medical needs.” Id.

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