A 'Deliberate Indifference' Circ. Split For Prison Medical Cases

By **Allison Becker and Kendra Stark** (August 21, 2023)

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As a result of outbreaks and medical staffing shortages at many correctional facilities during the COVID-19 pandemic, correctional medical lawsuits have been on the rise.

In correctional medical litigation, the most common cause of action asserted is a claim for deliberate indifference, brought under Title 42 of the U.S. Code Section 1983. These claims arise out of the provision of medical care or treatment to patients incarcerated in jails or prisons.

Medical providers sued under Section 1983 are typically employed by the governmental entity overseeing the correctional facility or a private contractor.

These claims are asserted as often by pro se plaintiffs as they are by represented plaintiffs, and they are commonly filed in federal court with accompanying state law claims.

This article discusses the legal standard for deliberate indifference claims across the country and how the landscape has changed since the U.S. Supreme Court's 2015 decision in Kingsley v. Hendrickson.

The Rise of Deliberate Indifference Claims

The U.S. Supreme Court coined the phrase "deliberate indifference" in 1976 in the case of Estelle v. Gamble. In that case, the Supreme Court held that deliberate indifference to the serious medical needs of people in prison constituted "unnecessary and wanton infliction of pain" prohibited by the Eighth Amendment and therefore gave rise to a cause of action under Section 1983.[1]

In 1994, with the case of Farmer v. Brennan, the Supreme Court formally established a two-pronged test to determine whether a plaintiff has established a claim for deliberate indifference under Section 1983.

The first prong, the objective test, requires the existence of an objectively serious medical need.[2]

Circuit courts of appeals across the country have defined an objectively serious medical need somewhat differently, but generally, the medical need must be one that a physician has diagnosed as requiring treatment or one that is so obvious that even a layperson would recognize the need for medical attention.[3]

The second prong, the subjective test, requires that the defendant have a culpable state of mind, meaning they are subjectively aware of a serious risk of harm to the patient, and intentionally disregard it.[4]

Importantly, the ruling in Estelle clarified that simple medical malpractice does not constitute deliberate indifference:

> Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.[5]

The Objective/Subjective Circuit Court Split on 14th Amendment Claims

Prior to 2015, courts generally applied the two-pronged test established in Farmer in all Section 1983 medical claims, without much consideration of whether the claim was asserted by a pretrial detainee under the 14th Amendment or a person in prison under the Eighth Amendment.

In 2015, however, the Supreme Court decided Kingsley v. Hendrickson, in which it adopted an objective unreasonableness standard for excessive force claims brought by pretrial detainees under Section 1983 and the 14th Amendment.[6]

While Kingsley did not involve the provision of medical care, following that decision, some circuit courts began to adopt the same objective unreasonableness standard for claims brought by pretrial detainees related to medical care.

These courts essentially did away with the subjective prong of the Farmer test in 14th Amendment deliberate-indifference claims, creating a wholly objective analysis of those claims. This created a split among the circuits on the standard required to establish deliberate indifference to the serious medical needs of pretrial detainees.

Circuits that apply the Kingsley standard hold that claims asserted by pretrial detainees — individuals who have been arrested but not convicted of a crime — should be evaluated under an objective unreasonableness standard and not one of subjective intent.

These courts hold that because pretrial detainees have not actually been convicted of a crime, their rights should not be analyzed under a standard established to determine whether conduct constituted cruel and unusual punishment under the Eighth Amendment.

Instead, these claims should be analyzed under a more objective standard, which is more favorable to the patient, to ensure protection of the patient's due process rights under the 14th Amendment.

For example, in its 2017 decision in Darnell v. Pineiro, the U.S. Court of Appeals for the Second Circuit held that following Kingsley, "punishment has no place in defining the mens rea element of a pretrial detainee's claim under the Due Process Clause." As such, the court held that the subjective prong of a deliberate indifference claim should be defined objectively.[7]

Similarly, in Gordon v. County of Orange, the U.S. Court of Appeals for the Ninth Circuit in 2021 held:

> While Kingsley did not necessarily answer the broader question of whether the objective standard applies to all Section 1983 claims brought under the Fourteenth Amendment against individual defendants[,] logic dictates extending the objective deliberative indifference standard … to medical care claims.[8]

The U.S. Court of Appeals for the Seventh Circuit utilizes this new objective unreasonableness standard as well.

Other circuits, however, hold that the rights of all patients to be free from deliberate indifference should be analyzed under the subjective standard established in Farmer, regardless of that patient's incarceration status at the time of the alleged violation.

For example, in Barton v. Taber, the U.S. Court of Appeals for the Eighth Circuit held in 2016 that the traditional standard for the subjective prong of the deliberate indifference test, requiring something much more than gross negligence and akin to criminal recklessness, applied to a pretrial detainee's claim of deliberate indifference to a serious medical need.[9]

Likewise, in Strain v. Regalado, the U.S. Court of Appeals for the Tenth Circuit held in 2020 that while pretrial detainees were granted access to deliberate indifference claims under the 14th Amendment, the court should "apply the same deliberate indifference standard no matter which amendment provides the constitutional basis for the claim."[10] The Third, Fifth and Eleventh Circuits also follow this approach.

Interestingly, there are some circuit courts — the First, Fourth and D.C. Circuits — that have not yet decided the issue. For now, courts in these circuits continue to use the Eighth Amendment test set forth in Estelle and Farmer.

There have been a few recent attempts to obtain guidance from the Supreme Court on this circuit split, however, as of now the Supreme Court has denied all petitions for certiorari on this issue.[11]

Conclusion

Ultimately, because the applicable standard for deliberate indifference claims varies among the circuits, when handling these cases it is important to stay up-to-date on the correct standard in the applicable circuit.

It will be interesting to see whether additional circuits adopt the Kingsley standard and whether the Supreme Court will ultimately establish a uniform standard for Section 1983 medical claims that arise under the 14th Amendment.

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[1] Estelle v. Gamble, 429 U.S. 97, 104–05, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976).

[2] Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811 (1994).

[3] Iko v. Shreve, 535 F.3d 225, 241 (4th Cir. 2008).

[4] Id.

[5] Estelle, 429 U.S. at 106.

[6] Kingsley v. Hendrickson, 576 U.S. 389, 396–97 (2015).

[7] Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017).

[8] Gordon v. Cnty. of Orange, 888 F.3d 1118, 1124 (9th Cir. 2018).

[9] Barton v. Taber, 820 F.3d 958, 964 (8th Cir. 2016).

[10] Strain v. Regalado, 977 F.3d 984, 989 (10th Cir. 2020).

[11] Brawner v. Scott Cnty., Tennessee, 14 F.4th 585 (6th Cir. 2021), cert. denied, 143 S. Ct. 84, 214 L. Ed. 2d 13 (2022); Cope v. Cogdill, 3 F.4th 198 (5th Cir. 2021), cert. denied, 142 S. Ct. 2573, 213 L. Ed. 2d 1123 (2022).