

**II. Even Absent Physical Injury, the Jury may Award Punitive Damages for The Eighth Amendment Violation as Well as Intentional Infliction of Emotional Distress.**

**A. The PLRA § 1997e(e) does not bar compensatory or punitive damages.**

The majority of Courts of Appeal have held that where there is insufficient physical injury to satisfy § 1997e(e), compensatory damages are barred but a prisoner may still recover nominal or punitive damages. See *Thompson v. Carter*, 284 F.3d 411, 416 (2d Cir. 2002) (“[§1997e(e)] does not restrict a plaintiff’s ability to recover... nominal or punitive damages”); *Mitchell v. Horn*, 318 F.3d 523, 533 (3d Cir. 2003) (“[R]egardless how we construe §1997e(e)’s physical injury requirement, it will not affect [plaintiff]’s ability to seek nominal or punitive damages”); *Calhoun v. DeTella*, 319 F.3d 936, 941 (7<sup>th</sup> Cir. 2003) (“[§1997e(e)] is inapplicable to awards of nominal or punitive damages”); *Royal v. Kautzky*, 375 F.3d 720 (8<sup>th</sup> Cir.2004); *Oliver v. Keller*, 289 F.3d 623 (9<sup>th</sup> Cir. 2002); *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir.2001); *contra Harris v. Gardner*, 216 F.3d 970, 984 (11<sup>th</sup> Cir. 2000) (*en banc*); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C.Cir. 1998) (barring punitive damages but expressing no view as to nominal damages).

The logic of this position was explained in *Calhoun*, 319 F.3d. 936. Compensatory damages are awarded “for” an injury, which, under § 1997e(e) may not be purely mental or emotional. *Id.* at 941. However, “[b]ecause punitive damages are designed to punish and deter wrongdoers for deprivations of constitutional rights they are not compensation ‘for’ emotional and mental injury.” 319 F.3d at 942. (Similarly, nominal damages “are not compensation for loss or injury, but rather recognition of a violation of rights. *Id.* at 941.)

The U.S. Court of Appeals for the First Circuit has not reached this issue. *See Shaheed-Muhammad v. DiPaolo*, 393 F.Supp.2d 80, 107-8, (2005) (holding § 1997e(e) inapplicable to claim of intangible constitutional harm and therefore not deciding the issue). However, district courts within the first circuit have held that § 1997e(e) does not bar compensatory or punitive damages. *See Mitchell v. Newryder*, 245 F.Supp.2d 200, 205 n. 4 (D.Me. 2003) (§ 1997e(e) does not bar nominal or punitive damages where plaintiff was made to sit in his feces for five hours, even if only *de minimis* injury; rejects *Harris*, 216 F.3d at 984 and *Davis*, 158 F.3d at 1348)); *see also Libby v. Merrill*, 2003 WL 21756830 at \*3 - \*4 (D.Me. 2003), *report and recommendation adopted by Libby v. Merrill*, 2003 WL 22669017.

This majority view better accords with the PLRA's purpose, as stated in an earlier *Shaheed* opinion: “[W]hile the PLRA dramatically curtailed the litigation options available to prisoners, it was not its purpose to insulate from review all claims in which legitimate constitutional issues predominate without accompanying physical harm.” *Shaheed-Muhammad v. DiPaolo*, 138 F.Supp. 2d 99, 109 (D.Mass. 2001).

**B. Punitive damages may be awarded on an Eighth Amendment claim without physical injury.**

An Eighth Amendment claim with only *de minimis* physical injury may nevertheless give rise to punitive damages, since physical injury is not a required element of an eighth amendment claim. In order for conditions of confinement to violate the Eighth Amendment, “a prison official’s act or omission must result in the denial of ‘the minimal civilized measure of life’s necessities’” *Farmer v. Brennan* 511 U.S. 825, 834 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The Eighth Amendment “imposes duties” on prison officials, “who must provide human conditions

of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’” *Id.* at 832 (citation omitted). The Supreme Court has held that “*de minimis* uses of physical force” are not Eighth Amendment violations. *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992). However “*de minimis*” in that case referred to the defendant’s conduct, the amount of force used, and not the nature or severity of the injury. *See Oliver*, 289 F.3d at 628 (discussing *Hudson*, and noting, “In ruling that the requisite physical injury must be more than *de minimis* for purposes of § 1997e(e), we are not importing the standard used for Eighth Amendment excessive force claims, which examines whether the use of physical *force* is more than *de minimis*”; emphasis in original).

Clearly an Eighth Amendment claim can charge conduct justifying punitive damages without any physical injury. “Punitive damages may be awarded for conduct that is ‘outrageous because of the defendant’s evil motive or his reckless indifference to the rights of others.’” *Goodrow v. Lane Bryant, Inc.* 432 Mass. 165, 178 (2000). As *Calhoun* notes, punitive damages are not awarded “for” an injury, but rather to punish and deter wrongdoers. 319 F.3d at 942. Thus in *Calhoun*, where the plaintiff claimed an Eighth Amendment violation from a strip search, the Seventh Circuit held that while lack of physical injury barred compensatory damages under § 1997e(e), nominal and punitive damages were still available. 319 F.3d 942. Similarly, *Oliver* permits punitive damages where the plaintiff had only *de minimis* physical injuries from his confinement in a jail holding cell. 289 F.3d at 630. In *Mitchell v. Newryder*, 245 F.Supp.2d 200 (D.Me. 2003), the court held that even if plaintiff’s claim that he was made to sit in feces

for five hours did not meet the § 1997e(e) threshold for physical damages, he still had a valid Eighth Amendment claim which could be compensated with nominal and punitive damages. *Id.* at 205 and n. 4. *See also Hill v. Arpaio*, 2007 WL 1120305 (D.Ariz. 2007) (only *de minimis* injuries from excessive force and overcrowding but punitive damages still available).<sup>1</sup>

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<sup>1</sup> *See also Stewart v. Lyles*, 66 Fed Appx. 18, \*21 (7th Cir. 2003) (in § 1983 case regarding strip searches in front of opposite-sex correctional officers and anal cavity searches in which plaintiff did not allege physical injury, plaintiff survived a motion to dismiss and was permitted to seek punitive and nominal damages); *Johnson-Bey v. M.E.Ray*, 38 Fed.Appx. 507, \*510 (10th Cir. 2002) (although plaintiff suffered no physical injury, court permitted recovery of punitive damages in § 1983 case in which plaintiff adequately alleged an Eighth Amendment violation in asserting that correctional officers had "set him up" by placing a knife in other prisoner's cell and telling that prisoner that plaintiff was to blame); *Bailey v. Albright*, 2006 WL 1793204, \*2-3 (W.D.Pa. 2006) (upholding verdict in § 1983 case in which jury denied compensatory damages but granted \$10,000 in punitive damages, understanding that the jury concluded that plaintiff suffered no actual loss, but an Eighth Amendment violation made punitive damages appropriate); *Smith v. Carroll*, 2006 WL 1338825, \*2 (D.Del. 2006) (denying defendants' motion to dismiss in § 1983 case in which plaintiff alleged poor prison conditions in violation of the Eighth Amendment, but no physical injury, and permitting the possibility of punitive, but not compensatory, recovery); *Boroto v. McDonald*, 2006 WL 2789152 (N.D.Fla. 2006) (affirming magistrate's recommendation that plaintiff can proceed on § 1983 claim alleging Eighth Amendment violation and pursue punitive damages for the violation despite plaintiff's inability to show physical injury); *Green v. Padula*, 2007 WL 895487, \*1-2 (D.S.C. 2007) (plaintiff who alleged Eighth Amendment violation for being handcuffed to holding cell window for 2.5 hours and denied food for several days but did not allege physical injury was permitted to recover punitive damages); *Houston v. Buck*, 2005 WL 1378964, \*3 (E.D.Cal. 2005) (in § 1983 claim alleging sexual harassment in violation of the Eighth Amendment, in which plaintiff did not allege suffering more than *de minimus* physical injury, plaintiff could recover punitive damages); *Davis v. Locke*, 936 F.2d 1208, 1214 (11th Cir. 1991) (affirming jury's award of punitive damages for violation of plaintiff's Eighth Amendment right in § 1983 case in which plaintiff alleged psychological, but not physical, injury, and in which the jury did not award any compensatory damages).