**9.26 PARTICULAR RIGHTS—EIGHTH AMENDMENT—CONVICTED PRISONER’S CLAIM OF EXCESSIVE FORCE**

 As previously explained, the plaintiff has the burden of proving that the act[s] of the defendant [*name*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] rights under the Eighth Amendment to the Constitution when [*insert factual basis of the plaintiff’s claim*].

 Under the Eighth Amendment, a convicted prisoner has the right to be free from “cruel and unusual punishments.” To establish the defendant deprived the plaintiff of this Eighth Amendment right, the plaintiff must prove the following elements by a preponderance of the evidence:

 1. the defendant used excessive and unnecessary force under all of the circumstances;

2. the defendant acted maliciously and sadistically for the purpose of causing harm, and not in a good faith effort to maintain or restore discipline; and

 3. the act[s] of the defendant caused harm to the plaintiff.

 In determining whether these three elements have been met in this case, consider the following factors:

 (1) the extent of the injury suffered;

 (2) the need to use force;

 (3) the relationship between the need to use force and the amount of force used;

 (4) any threat reasonably perceived by the defendant; and

 (5) any efforts made to temper the severity of a forceful response, such as, if feasible, providing a prior warning or giving an order to comply.

**Comment**

 Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8, and when the plaintiff is a convicted prisoner. For claims of sexual assault when the plaintiff is a convicted prisoner, use Instruction 9.26A (Particular Rights—Eighth Amendment—Convicted Prisoner’s Claim of Sexual Assault). When the plaintiff is a pretrial detainee, use Instruction 9.29 (Particular Rights—Fourteenth Amendment—Pretrial Detainee’s Claim of Excessive Force). When the plaintiff is not in custody, use Instruction 9.25 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Excessive Force).

 When the prisoner claims unconstitutional conditions of confinement, including inadequate medical care, use Instruction 9.27 (Particular Rights—Eighth Amendment—Convicted Prisoner’s Claim re Conditions of Confinement/Medical Care), which sets out the applicable deliberate indifference standard.

 The Eighth Amendment prohibits cruel and unusual punishment in penal institutions. *Wood v. Beauclair*, 692 F.3d 1041, 1045 (9th Cir. 2012). “[U]nnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.” *Furnace v. Sullivan*, 705 F.3d 1021, 1027 (9th Cir. 2013) (quoting *Hudson v. McMillian*, 503 U.S. 1, 5 (1992)).

 The Ninth Circuit has identified five factors set forth in *Hudson* to be considered in determining whether the use of force in a penal institution was excessive: “(1) the extent of injury suffered by an inmate; (2) the need for application of force; (3) the relationship between that need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful response.” *Furnace*, 705 F.3d at 1028. In *Furnace*,the court also considered whether verbal warnings were given prior to the administration of force. *Id.* at 1029 (“Officers cannot justify force as necessary for gaining inmate compliance when inmates have been given no order with which to comply.”).

 “Whether a particular event or condition in fact constitutes ‘cruel and unusual punishment’ is gauged against ‘the evolving standards of decency that mark the progress of a maturing society.’”  *Schwenk v. Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000) (quoting *Hudson*, 503 U.S. at 8. Although *de minimis* use of physical force is insufficient to prove an Eighth Amendment violation, *Hudson*, 503 U.S. at 8, a prison guard’s use of force violates the Eighth Amendment when the guard acts maliciously for the purpose of causing harm whether or not significant injury is evident. *See Wilkins v. Gaddy*, 559 U.S. 34, 36-38 (2010) (“An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury.”).

 The “malicious and sadistic” standard applies when prison guards “use force to keep order . . . [w]hether the prison disturbance is a riot or a lesser disruption.” *Hudson*,503 U.S. at 6 (citing *Whitley v. Albers*, 475 U.S. 312 (1986)); *see also* *LeMaire v. Maass*, 12 F.3d 1444, 1452-53 (9th Cir. 1993) (finding malicious and sadistic “heightened state of mind” controlling when applied to any “measured practices and sanctions either used in exigent circumstances or imposed with considerable due process and designed to alter [the] manifestly murderous, dangerous, uncivilized, and unsanitary conduct” of repeat offenders housed in disciplinary segregation); *Jordan v. Gardner*, 986 F.2d 1521, 1528 (9th Cir. 1993) (en banc) (noting that “greater showing” than deliberate indifference is required “in the context of a prison-wide disturbance or an individual confrontation between an officer and a prisoner,” when “corrections officers must act immediately and emphatically to defuse a potentially explosive situation”).

 In the appropriate case, the trial court may instruct the jury that in considering the listed

factors, it should give deference to prison officials in the adoption and execution of policies

and practices that in their judgment are needed to preserve discipline and to maintain internal

security in a prison. “It is well established that judges and juries must defer to prison officials’ expert judgments.” *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010). In *Norwood*, the Ninth Circuit approved of an instruction that the jury “should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison.” More recently, however, the Ninth Circuit has cautioned that such deference is not appropriate when the prison practice in question serves no legitimate penological purpose, or plaintiff has produced substantial evidence that the practice was an unnecessary, unjustified, or exaggerated response to officials’ need for prison security. *Shorter v. Baca*, 895 F.3d 1176, 1184 (9th Cir. 2018). (“[W]e reiterate that the [deference] instruction may be given only when there is evidence that the treatment to which the plaintiff objects was provided pursuant to a security-based policy.”). The *Shorter* court

emphasized that “determinations about whether to defer to jail officials are often fact-intensive

and context-dependent.” *Id*. at 1189. Thus, it may be appropriate to let the jury decide, with an additional instruction, *whether* deference to officials is warranted, when there is a genuine dispute of material fact over whether the prison policies or practices were unnecessary, unwarranted, or exaggerated. *See id.* at 1190, citing *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1257 (9thCir. 2016); *see also* *Coston v. Nangalama*, 13 F.4th 729 (9th Cir. 2021) (“If . . . Defendants can show . . . a genuine dispute of material fact over whether . . . actions were (1) taken because of a security-based policy or practice and (2) necessary, justified, and not exaggerated, then a deference instruction might be appropriate—but only if the jury also were instructed that whether deference should be given in these circumstances is a matter for the jury to decide.”).

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