**9.28 Particular Rights—Eighth Amendment—Convicted Prisoner’s Claim of Failure to Protect**

 As previously explained, the plaintiff [*insert name*] has the burden of proving that the [act[s]] [failure to act] of the defendant [*insert 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.” In order to prove 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 made an intentional decision with respect to the conditions under which the plaintiff was confined;

 2. those conditions put the plaintiff at substantial risk of suffering serious harm;

 3. the defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and

 4. by not taking such measures, the defendant caused the plaintiff’s injuries.

 With respect to the third element, the defendant’s conduct must be both objectively unreasonable and done with a subjective awareness of the risk of harm. In other words, the defendant must have known facts from which an inference could be drawn that there was a substantial risk of serious harm, and the defendant must have actually drawn that inference.

**Comment**

 The Eighth Amendment imposes on prison officials a duty to “take reasonable measures to guarantee the safety of the inmates.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citing *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). This includes a duty to protect prisoners from violence at the hands of other prisoners. *Id*. at 833. *See also Cortez v. Skol*, 776 F.3d 1046, 1050-53 (9th Cir. 2015) (holding that mother of prisoner who suffered severe brain damage following attack by two other inmates raised genuine issues on Eighth Amendment claim in light of evidence that one guard escorted three hostile, half-restrained, high-security prisoners through isolated prison passage in contravention of prison policy and practice). “A prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.” *Farmer*, 511 U.S. at 828 (citing *Helling v. McKinney*, 509 U.S. 25 (1993); *Wilson v. Seiter*, 501 U.S. 294 (1991); and *Estelle v. Gamble*, 429 U.S. 97 (1976)). “While *Estelle* establishes that deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” *Id*. at 835.

 In *Farmer*, the Supreme Court held that an Eighth Amendment claim based on deliberate indifference must satisfy both an objective and a subjective component test. *Farmer*, 511 U.S. at 834. “The Eighth Amendment imposes a duty on prison officials to protect inmates from violence at the hands of other inmates. A prison official violates this duty when two requirements are met. First, objectively viewed, the prison official’s act or omission must cause a substantial risk of serious harm. Second, the official must be subjectively aware of that risk and act with deliberate indifference to inmate health or safety. In other words, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Cortez*, 776 F.3d at 1050 (9th Cir. 2015) (internal quotations and citations omitted). *See also Castro v. County of Los Angeles*, 833 F.3d. 1060, 1068, 1070-71 (9th Cir. 2016) (en banc) (distinguishing convicted prisoner’s claim of failure to protect under Eighth Amendment from pretrial detainee’s claim under Fourteenth Amendment, and noting that in prison context, “the official must demonstrate a *subjective awareness* of the risk of harm”); *but see Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2476 (2015) (“We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today”).

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.” *Id*. 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.”); *see also Chess v.* *Dovey*, 790 F.3d 961, 974 (9th Cir. 2015) (holding that deference generally should not be given in medical care context absent actual security considerations). The *Shorter* court emphasized that “determinations about whether to defer to jail officials are often fact-intensive and context-dependent.” *Shorter*, 895 F.3d at 1189.

In *Fierro v. Smith*, 39 F.4th 640 (9th Cir. 2022), the Ninth Circuit provided a framework for determining whether a deference instruction should be given. First, the instruction should be given if there is no genuine dispute that two conditions are met: (1) the treatment challenged by the prisoner was provided pursuant to a security-based policy, and (2) the treatment was a necessary, justified, and non-exaggerated response to security needs. *Fierro* *v. Smith*, F.4th at 648. Second, the deference instruction should not be given if there is no genuine dispute that neither of the two conditions are met. *Id.* Third, “if there is a genuine dispute whether deference is appropriate, a court has the option either to give no deference instruction at all or to explain to the jurors that it is their choice whether to give deference.” *Id.*

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