# 9.26A Particular Rights—Eighth Amendment—Convicted Prisoner’s Claim of Sexual Assault

As previously explained, the plaintiff has the burden of proving that the act[s] of the defendant deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] [other pronoun] of [his] [her] [other pronoun] 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 prove the defendant deprived the plaintiff of this Eighth Amendment right, the plaintiff must establish the following elements by a preponderance of the evidence:

First, the defendant acted under color of law;

Second, the defendant acted without penological justification; and

Third, the defendant [touched the prisoner in a sexual manner] [engaged in sexual conduct for the defendant’s own sexual gratification] [acted for the purpose of humiliating, degrading, or demeaning the prisoner].

**Comment**

 “We now hold that a prisoner presents a viable Eighth Amendment claim where he or she proves that a prison staff member, acting under color of law and without legitimate penological justification, touched the prisoner in a sexual manner or otherwise engaged in sexual conduct for the staff member’s own sexual gratification, or for the purpose of humiliating, degrading, or demeaning the prisoner.” *Bearchild v. Cobban*, 947 F.3d 1130, 1144 (9th Cir. 2020).

 “Sexual harassment or abuse of an inmate by a corrections officer is a violation of the Eighth Amendment” as “sexual contact between a prisoner and a prison guard serves no legitimate role and is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’” *Wood v. Beauclair*, 692 F.3d 1041, 1046, 1050 (9th Cir. 2012) (internal citations omitted). Because there is no “legitimate penological purpose” served by sexual assault, the subjective component of “malicious and sadistic intent” is presumed if an inmate can demonstrate that a sexual assault occurred. *Bearchild,* 947 F.3d at 1143 *(*quoting *Wood*, 692 F.3d at 1050-51. Further, “our cases have clearly held that an inmate need not prove that an injury resulted from sexual assault in order to maintain an excessive force claim under the Eighth Amendment.” *Bearchild*, 947 F.3d at 1144 (“Any sexual assault is objectively ‘repugnant to the conscience of mankind’ and therefore not *de minimis* for Eighth Amendment purposes.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (“A sexual assault on an inmate by a guard—regardless of the gender of the guard or of the prisoner—is deeply offensive to human dignity.”). Allegations of sexual harassment that do not involve touching have routinely been found “not sufficiently serious” to sustain an Eighth Amendment claim. *Austin v. Terhune*, 367 F.3d 1167, 1172 (9th Cir. 2004) (“[Officer] was in an elevated, glass-enclosed control booth when he exposed himself to [plaintiff] and this isolated incident lasted for a period of no more than 30–40 seconds. [Officer] never physically touched [plaintiff].”).

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