Introduction

- 4th year presenting at this conference
- focus on federal civil rights cases decided in 2012
- mostly section 1983 cases
- no employment cases – unless 1st Amendment
- only USSC and 7th Circuit
- not comprehensive – picked cases of interest

Interesting decisions this past year:

jail strip searches
witness immunity
private attorneys/qualified immunity
flashbang grenades/tear gas/SL6 baton launchers
class of one claims
eavesdropping statute
Federal driver's privacy act
second amendment rights

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Civil Rights Update

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NOTES:

Fourth Amendment – Use of GPS Tracking Device

U.S. v. Jones, 132 S. Ct. 945 (2012)

- police obtain warrant to place GPS tracker on vehicle - suspected drug dealer
- warrant was good for 10 days – waited to 11th day
- then kept it on for 28 days
- Used to track vehicle movements
- Jones charged – data connected him to co-conspirators
- Motion to suppress granted as to data obtained while car was parked in Jones' garage but denied motion as to data obtained while driving around
- "person traveling on public streets had no reasonable expectation of privacy in his movements
- Jones found guilty

CTA DC – reversed - warrantless use of GPS violated 4th Amendment

USSC – affirmed reversal

- central issue: whether 4th Amendment extended to property alone or exclusively a person's "reasonable expectation of privacy"
- Gov't: no expect. Privacy in undercarriage
- USSC: 4th applied to "persons, houses, papers and effects"
- Vehicle = effect
- Installing the GPS - government physically occupied private property
- Installation and use of GPS device = search

Fourth Amendment – Use of GPS Tracking Device

U.S. v. Jones, 132 S. Ct. 945 (2012)

Police obtained a warrant to place an electronic tracking device on a vehicle of a suspected drug dealer. The warrant was good for 10 days. On the 11th day, the police attached the device to the undercarriage of the defendant's car and tracked his movements for 28 days. Defendant was ultimately charged and his motion to suppress the data from the device was denied.

- U.S. Appellate Court for District of Columbia reversed finding that the warrantless use of the GPS device violated Fourth Amendment.

- USSC affirmed:

  - Installation of the GPS device was a search under Fourth Amendment.

  - Government's physical occupation of private property in order to obtain information, without a warrant, is what the Fourth Amendment is intended to protect.

NOTES:

Jail Strip Searches

Florence v. Cnty. Burlington

Cottage industry for class actions in last 10 years - $$$$$

Florence arrested on bench warrant for FTA

Visually strip searched – meaning that:

- Shower w/ delousing agent
- Checked for scars, tattoos, etc. and contraband as he disrobed
- Had to open mouth, lift tongue, hold out arms and lift genitals
- Cough while squatting

Filed suit –persons arrested for minor offenses cannot be subjected to invasive searches w/o individualized suspicion of weapons, drugs or other contraband

USSC disagreed:

- Jail officials have legitimate interest and duty to keep jail safe
- Defer to expertise – in absence of evidence policies unjustified
- Distinguishing between minor/serious offenders was unworkable
- Minor offenders still can be violent, smuggle drugs, etc.
- blanket strip search policy does not violate 4th Amendment
- don't need individualized suspicion
- Questions left open if person held without being placed in general population or substantial contact with other inmates
- left open question regarding manner of the search

Jail Strip Searches

Florence v. Cnty. Burlington, 132 S. Ct. 1510 (2012)

Albert Florence was arrested on a bench warrant issued because he failed to appear in court on delinquent restitution payments from prior offenses. Per jail blanket policy, he was visually strip searched before being admitted to the general population. He sued under Section 1983, claiming that the policy of strip searching non-indictable offenders without reasonable suspicion violated his Fourth Amendment rights.

- USSC held that the blanket visual strip search policy was constitutional given the broad deference accorded jail officials to operate safe and secure detention facilities.

- However, the Court left open the questions whether it is reasonable to strip search when a detainee is held without assignment to general population or substantial contact with other inmates, and whether the manner of the strip search (i.e., intentional humiliation and other abusive practices, or physical strip searches) are reasonable.

NOTES:

Fourth Amendment – Qualified Immunity - Warrantless Entry

Ryburn v. Huff

Report of letter written by high school student who wanted to shoot up the school

Student had been absent few days and victim of bullying

Fit classic characteristics common to school shootings

Police visit home – talk with mom and student at door

Refused to let police in house

When police ask about guns in home, mom and student immediately run into house

Police follow without warrant or consent

Able to determine report was false

Suit for 4th Amendment violation

USSC: exception to warrant requirement for warrantless, nonconsensual entry of home based on imminent fear of violence

No case on point – officers entitled to QI

Fourth Amendment – Qualified Immunity - Warrantless Entry

Ryburn v. Huff, 132 S. Ct. 987 (2012)

Police officers investigating a report of a letter written by a high school student threatening to shoot up the school. The student had been absent from school for a few days and was reported to be a victim of bullying, both characteristics common to school shootings. The police went to the student's home and spoke with the student and his mother on the front porch. The mother refused to allow the police to enter the home. When asked if there were any guns in the home, the mother ran into the house. The police followed her and later determined that the rumor was false. The parents sued under Section 1983 claiming that the warrantless entry violated the Fourth Amendment.

- The Supreme Court held that officers had a reasonable basis for fearing that violence was imminent thus justifying the warrantless entry, and that no decision of the Court had found a Fourth Amendment violation on facts even roughly comparable; therefore, the officers were entitled to qualified immunity.

NOTES:

Qualified Immunity – Private Contractor

Filarsky v. Delia

Issue: whether private attorney hired to conduct internal investigation of a firefighter could assert qualified immunity as a defense in Section 1983 suit

- firefighter took sick leave
- suspected abuse of sick leave policy
- hired PI to follow firefighter
- saw him buying fiberglass rolls at store
- Believed he was doing work at home
- City hired private employment lawyer
- Interviewed - atty advised chief to order inspection
- firefighter objected but complied
- filed suit – 4th Amendment

9th Circuit: order violated 4th but no QI b/c not city employee

USSC: reversed

–QI=anyone whose actions fairly attributable to state

-QI = historical look at common law when 1983 passed

-at common law, gov't not staffed like today but rather private citizens who were professionals performed gov't functions

--QI served same purpose – ensure talented persons not deterred from public service by lawsuits

Qualified Immunity – Private Contractor

Filarsky v. Delia, 132 S. Ct. 1657 (2012)

City hired a private employment lawyer to conduct an interview of a firefighter who was seen purchasing rolls of fiberglass insulation from a store. The City believed the firefighter was missing work to do home construction rather than because of illness. The attorney advised the Fire Chief to order the firefighter to produce the fiberglass roles for inspection. The firefighter objected on Fourth Amendment grounds, but complied with the order. The firefighter sued under Section 1983, and the district court granted summary judgment to all defendants on qualified immunity grounds. The Ninth Circuit affirmed as to the city employees but reversed as to the lawyer because he was not a public employee.

- The Supreme Court reversed, holding that historically at common law private citizens, including lawyers, regularly engaged in public duties; therefore, qualified immunity was available as a defense.

NOTES:

Absolute Witness Immunity

Rehberg v. Paulk

Issue: whether a complaining witness in a grand jury proceeding is entitled to same immunity under Section 1983 as a witness who testified at trial?

11th Circuit said yes, and the USSC agreed

- Enactment of Section 1983 did not eliminate common law immunities
- Trial witnesses granted absolute immunity, like judges and legislators and prosecutors
- No difference between trial and grand jury testimony
- purpose of immunity served both – to prevent witnesses from being reluctant to testify for fear of being sued – w/o immunity the truth seeking process would be impaired

Exception: complaining witness = one who procures arrest/prosecution – not function of grand jury witness

May compromise grand jury secrecy

Absolute Witness Immunity

Rehberg v. Paulk, 132 S. Ct. 1497 (2012)

Plaintiff was indicted based on testimony of district attorney investigator's grand jury testimony. Following dismissal of the indictment, the plaintiff sued the investigator under Section 1983 alleging that the investigator conspired to present false grand jury testimony. The district court denied the investigator's motion to dismiss on absolute immunity grounds, but the Eleventh Circuit reversed.

- The Supreme Court affirmed the Eleventh Circuit and held that grand jury witnesses, like trial witnesses, were entitled to absolute immunity for claims based on their testimony, and that the immunity cannot be circumvented by alleging that the witness conspired to present false testimony.

- Labeling the investigator as a "complaining witness" does not preclude immunity because a grand jury witness has no power to initiate a prosecution.

NOTES:

Section 1988 Prevailing Attorney's Fees

Lefemine v. Wideman

Pro life demonstrators filed First Amendment suit seeking nominal damages, declaratory and injunctive relief

DC denied nominal damages but granted permanent injunction

Plaintiffs sought prevailing attorneys fees under 42 USC 1988

DC denied the fees and 4th Circuit affirmed

USSC reversed – standard for 1988 fees is whether the actual relief on the merits materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits plaintiffs

Here, sheriff threatened to arrest protestors if they carried pictures of aborted fetuses

DC permanently enjoined Sheriff from his conduct.

Demonstrators were prevailing parties – did not matter that they were not awarded monetary damages

This term – 2 interesting cases to watch

- Florida v. Jardines: Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause?
- Florida v. Harris: Whether an alert by a well-trained narcotics detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle.
- Missouri v. McNeely: Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream.
- Maryland v. King: Whether the Fourth Amendment allows the states to collect and analyze DNA from people arrested and charged with serious crimes.

Section 1988 Prevailing Attorney's Fees

Lefemine v. Wideman, 133 S. Ct. 9 (2012)

Pro-life demonstrators carrying pictures of aborted fetuses were ordered by police to discard signs under threat of arrest for breach of peace. Demonstrators objected but complied. A year later, demonstrators advised police by letter that they would return to same site with disputed signs. Police again threatened arrest. Demonstrators filed Section 1983 suit for violation of First Amendment rights, seeking nominal damages and declaratory and injunctive relief. Court found for demonstrators and entered permanent injunction, but denied prevailing attorney's fees. The Fourth Circuit affirmed.

- The Supreme Court reversed. Fees were warranted because plaintiffs succeeded in removing threat of arrest through injunction. Thus, demonstrators obtained actual relief on merits of claim that materially altered defendant's behavior in a way that directly benefitted the plaintiffs.

NOTES:

Fourth Amendment – Warrantless Entry, Seizure and Excessive Force

Fitzgerald v. Santoro

Police dispatched to home of woman who had called police department and made suicidal statements

Officers were told that she sounded intoxicated and had hung up phone abruptly

Police and paramedics entered w/o warrant or consent

Spent 30 minutes trying to convince her to hospital for mental health evaluation

She refused – taken by force

Tried to walk her to gurney – she resisted verbally and physically

Arm bar/wrist lock techniques used – handcuffed to gurney

Ambulance – tried to wriggle out of handcuff and get up

Officer used wrist lock again – she yanked her wrist away – comminuted fracture

- entry – lawful based on exigent circumstances
- use of force – reasonable based on minimal restraint techniques
- court stopped short of saying plaintiff's caused own injuries but stated that "broken wrist was more evidence of her own force than the officer's"

Fourth Amendment – Warrantless Entry, Seizure and Excessive Force

Fitzgerald v. Santoro, ____ F.3d ___ (7th Cir. 2013)

Plaintiff called police dispatcher and made suicidal statements. Police and paramedics entered her home without warrant or consent. She was intoxicated and said she took anti-depressants, but denied suicide to the officers. They spent 30 minutes trying to talk her into going to the hospital, but she refused. They finally decided to take her by force, using arm bar and wrist lock techniques and handcuffs. In the ambulance she tried to slip her wrist out of the handcuff and leave. One of the officers used a wrist lock to restrain her. She took her left hand and grabbed the wrist held by the officer and jerked her wrist away, causing her wrist to break in multiple locations. She sued and the district court granted summary judgment for the officers and paramedic.

Seventh Circuit affirmed:

- Warrantless entry into Fitzgerald's home was based on the exigent circumstances given the information that the officers knew at the moment of entry
- Officers/paramedics had an objectively reasonable basis for believing that Fitzgerald required immediate hospitalization justifying removal.
- Plaintiff's active resistance justified minimal techniques to restrain her.

NOTES:

Qualified Immunity – Excessive Force

Phillips v. Cmty. Ins. Corp.

Another use of force case – involving SL6 baton launcher

- "shoulder fired, semi-automatic firearm that fires polyurethane bullets with a force equivalent of a .44 magnum pistol"
- considered to be "less than lethal" use of force akin to bean-bag shotgun or hand baton
- to be used on persons showing resistive, assaultive or other dangerous behavior

Here,

- police respond to intoxicated person in stolen car (turned out not to be stolen)
- car parked on sidewalk, backed into bushes and door ajar
- plaintiff feet up through window on door
- ordered to exit – refused
- shot her 4 times with SL6
- 6 inch gash on her leg requiring 30 stitches

Jury returned verdict for officers --- 7th Circuit reversed

- undisputed that plaintiff was not actively resisting, assaultive or dangerous
- shooting SL6 multiple times was not reasonable

Excessive force cases turn on

- Level of resistance by plaintiff – court more likely to justify force option when plaintiff actively resisting/posing threat of harm
- Appropriate level of force chosen by officers
- Multiple/gratuitous deployments = liability

Qualified Immunity – Excessive Force

Phillips v. Cmty. Ins. Corp., 678 F.3d 513 (7th Cir. 2012)

Responding to dispatch of an intoxicated driver in a stolen vehicle, police locate a vehicle with its door ajar parked on a sidewalk and backed into some bushes. Multiple officers surround the vehicle and ordered the driver to show her hands and exit the car. She does not comply and, instead, lights a cigarette, places her feet out of the window and leans back. After 10 minutes, police fired a warning shot with a SL6 baton launcher. She moves her feet on the ground outside of the vehicle but still does not exit. Police shoot the launcher four times, striking her in the leg. She suffered a six inch gash in her leg that required 30 stitches and filed a Section 1983 suit for excessive use of force. Jury returned a verdict for the defendant officers.

- The Seventh Circuit reversed.
- It was clearly established that multiple shots of a SL6 baton launcher on a subject who was not actively resisting arrest or fleeing violated the Fourth Amendment.

NOTES:

Fourth Amendment – Warrantless Search of Cell Phone
USA v. Abel Flores-Lopez

Issue: do the police need a warrant to search the cell phone of a person arrested for selling meth?

7th Circuit says no warrant was needed

Here, police arrest plaintiff on drug charges and recover cell phone during search incident to arrest

Obtained cell phone number from phone and then subpoena call history records to establish drug conspiracy with others

7th Circuit

- police may search w/o warrant person and containers found on person for safety reasons and b/c they may be evidence of or lead to evidence of criminal activity

- Search was minimal and trivial in and of itself - search w/o warrant was justified

Fourth Amendment – Warrantless Search of Cell Phone

USA v. Abel Flores-Lopez, 670 F.3d 803 (7th Cir. 2012)

Officers arrested three known drug dealers and, pursuant to those arrests, seized their cell phones. Without a warrant, an officer searched each cell phone for its telephone number and this information was later used to subpoena cell phone records. At trial, the district court overruled defense objection to admission of call history records (used to establish conspiracy between defendants).

- Seventh Circuit affirmed because the warrantless search of the cell phone as an incident to an arrest was minimally invasive and justified in order to find or lead to evidence of the crime.

NOTES:

Fourth Amendment – Excessive Force – Qualified Immunity

Estate of Rudy Escobedo v. Martin

Drug induced and suicidal person barricaded in apartment

Armed with firearm

Police spend hours trying to talk him out to no avail

Deploy tear gas, flashbang grenades and eventually tactical response team

Hiding in closet with gun to head

Police shoot and kill him

District Court:

- Jury verdict for commanders who made decision to send in ERT and use tear gas and flashgrenades
- District found Qualified Immunity for officers – unusual but proper

7th Circuit affirmed:

- Law was not clearly established that decision to end negotiations and use ERT, tear gas and flashgrenades under similar circumstances was unconstitutional
- In other words, not patently obvious that these decisions violated decedent's rights
- Although decedent did not make any verbal threats to harm anyone but himself, he was high on drugs, mentally unstable, wielding a firearm, barricaded in apartment, and therefore posed an actual threat of harm

Fourth Amendment – Excessive Force – Qualified Immunity

Estate of Rudy Escobedo v. Martin, 702 F.3d 388 (7th Cir. 2012)

Escobedo ingested cocaine and became suicidal. He locked himself in his closet with a gun to his head. Negotiations between himself and the police were unsuccessful. The police opted to deploy a tactical response team, who deployed two volleys of tear gas and stormed the residence. Six officers found Escobedo in the closet with a gun to his head. The officers ordered him to put down the weapon, but he did not comply. The officers shot him twice in the chest and killed him. His estate filed a Section 1983 suit alleging excessive use of force. The district court granted summary judgment to the officers on qualified immunity grounds.

- The Seventh Circuit affirmed, because the law was not clearly established that the deployment of the Emergency Services Team, the use of tear gas, or the use of flashbang grenades was unconstitutional.

NOTES:

Fourth Amendment – False Arrest

Fleming v. Livingston County,

Deputy sheriff stopped on street by man who said that someone had broken into his house and fondled his daughters

Description given – camouflage shorts, light tshirt and dark baseball cap

Deputy saw a man wearing camouflage shorts, dark tshirt and cap and arrested him.

Charges were dropped for lack of evidence.

Section 1983 suit – dismissed on MSJ qualified immunity grounds

7th Circuit affirmed:

- Even if there was no probable cause for arrest, the officer could have mistakenly believed there was probable cause
- Called "arguable" probable cause and supported qualified immunity defense

Fourth Amendment – False Arrest

Fleming v. Livingston County, 674 F.3d 874 (7th Cir. 2012)

A deputy sheriff was stopped by a father who stated that a man had just broken into his home and fondled his two young daughters. The officer spoke with the girls who told him that the suspect was wearing camouflage shorts, light colored t-shirt and a dark baseball cap. The officer began searching the area in his police cruiser and saw the plaintiff walking a dog. Plaintiff largely matched the description given by the girls but wearing a dark colored t-shirt. Plaintiff was arrested but the charges were eventually dropped for a lack of evidence. The plaintiff then sued the county and deputy for false arrest and imprisonment. The district court granted summary judgment, based on qualified immunity.

- Seventh Circuit affirmed.

- Despite the factual disputes, the officer could have mistakenly believed there was probable cause based on girls' description thus entitling the officer to qualified immunity.

NOTES:

Equal Protection – Class of One

Del Marcelle v. Brown County

Hot topic in the 7th Circuit and around the country

2000 – Olech v. Willowbrook – plaintiff need not belong to a suspect class

individually based discrimination - if the person is treated differently than others similarly situated based on irrational or arbitrary grounds

Battleground since Olech – whether plaintiffs needed to allege and prove personal animus

- Why?– fear that garden variety squabble over municipal services will turn into a federal case and litigation floodgates will open

Here, plaintiff alleged that police failed to protect him from harassment by biker gang – led to plaintiff having to move to another town

Sued Sheriff for "class of one" violation

DC: dismissed claim

7th Circuit: heard case en banc – purpose was to agree on appropriate standard of culpability

3 opinions – could not agree

tie vote – therefore dismissal affirmed

Equal Protection – Class of One

Del Marcelle v. Brown County, 680 F.3d 887 (7th Cir. 2012)

Plaintiff complained to the police about harassment by biker gang, forcing him to move away. Plaintiff sued under "class of one" theory alleging that police failed to provide protection afforded other residents. District court dismissed the suit.

Appeal heard *en banc* in attempt to develop a standard of liability in "class of one" claims.

Per curiam decision – writing 3 separate opinions, Seventh Circuit failed to agree on appropriate standard.

- Judge Posner, writing for four judges, wrote that a "class of one" plaintiff must plead and prove both the absence of a rational basis and personal animus.
- Suits against police for failure to protect or investigate should not be permitted w/o facts that police acted for reasons wholly unrelated to his public duties
- Judge Easterbrook held that motive should play no role at all in "class of one" Equal Protection claims.
- No reason for personal motive standard b/c any reasonably conceivable rational basis
- Judge Wood, writing for five judges, wrote that a "class of one" plaintiff must only allege a plausible theory based on the absence of a rational basis which, depending on how much official discretion is involved, may require more facts.
- i.e. improper motive

NOTES:
Equal Protection – Class of One
Geinosky v. City of Chicago, 675 F.3d 743

Issue: Is the plaintiff always required to identify someone similarly situated who was treated better?

This case involved some unique facts:

- 24 parking tickets by mail - 3 to 4 at a time - over 14 month period
- some issued after he sold vehicle
- some implied vehicle was in two places at same time
- some issued by same officer on different dates at exactly same time
- some issued when estranged wife had the vehicle

all tickets dismissed - Plaintiff sued police under Section 1983 alleging "class of one" equal protection violation

Case dismissed b/c plaintiff did not identify someone who was similarly situated but treated better

7th Circuit reversed:

- s/s required to help distinguish constitutional claims and ordinary tort claims

- But requiring s/s here would not serve that purpose here b/c harassment was so obvious

- requiring s/s - simple task – any phone book would give him hundreds of people in Chicago who have not received dozens of bogus parking tickets from same police unit in a short period of time?

- Unnecessary here b/c pattern and nature of the police misconduct alone was enough to show that the police harrassed him for no conceivable legitimate purpose

Equal Protection – Class of One

Geinosky v. City of Chicago, 675 F.3d 743 (7th Cir. 2012)

Plaintiff received 24 parking tickets by mail, 3-4 at a time, over 14-month period, issued by same police unit. Some were issued after he sold the vehicle, and others implied the vehicle was in two places at once or was simultaneously double parked or parked on sidewalk. Many issued by same officer on different dates at exactly same time. Many were issued when his estranged wife had the car. He sued for "class of one" discrimination under Section 1983, but the suit was dismissed because he failed to identify someone who was similarly situated, but treated differently.

- On appeal, the Seventh Circuit reversed.

- Forcing the Plaintiff to name a similarly situated person was unnecessary in light of the straight forward official harassment to which he was subjected.

NOTES:

Federal Driver's Privacy Protection Act

Senne v. Vill. of Palatine

Class action under the Federal Driver's Privacy Protection Act

- Parking citation on windshield w/ personal information

- police departments w/ access to DMV records restricted from redisclosing personal information from DMV database

Village argued that issuing a parking ticket with the personal information was not a disclosure under the Act, and that even it was, it was permitted

DC granted MTD - 7th Circuit panel affirmed – en banc – reversed

Held:

- Placing citation on windshield = disclosure under Act
- Even though no one actually saw information
- Even though officer did not intend that anyone else see it

- Rejected Village argument that disclosure permissible b/c related to use by law enforcement in carrying out its functions or use in connection with administrative proceedings
- Disclosure of name, address, DL #, sex, height, weight, on parking citations left on windshield did not serve those purposes
- Effect: actual damages, but less than liquidated damages, not to exceed $2,500 – 4 year S/L - $80m liq. Damages to Palatine

Federal Driver's Privacy Protection Act

Senne v. Vill. of Palatine, 695 F.3d 597 (7th Cir. 2012)

Police placed a parking citation on the windshield of plaintiff's vehicle, containing personal information, i.e., name, address, printed on the citation. Plaintiff brought class action claiming that the village's practice of printing personal obtained from DMV on parking tickets violated the the Federal Driver's Privacy Protection Act, 18 U.S.C. 2721-25. District court dismissed claim.

- Seventh Circuit held that the parking citation constituted a disclosure of protected private information in violation of the Act.

NOTES:

First Amendment – Political Retaliation

Embry v. City of Calumet

First Amendment prohibits public employees from being fired for their political speech and/or association – unless they occupy positions for which politics is an essential requirement of the job

- those positions are typically policymaking or confidential positions

This case presents the policymaking exception

Facts:

- Commissioner of streets and alleys backed the mayor in a recent election.

- Turned out to be the wrong decision

- After the election the city council merged the commissioner's department with the water department and appointed someone else as the new commissioner

Plaintiff sued under section 1983 claiming that employment action was politically motivated

DC granted MSJ – plaintiff occupied policy making position and could be removed for political reasons

7th Circuit affirmed –

- position involved supervising day to day operations
- preparation of annual budget of $4m
- managed payroll and scheduling for 40 employees
- consulted with mayor and other department heads on policy issues

Hallmarks of a policy making position therefore could be removed for political reasons

First Amendment – Political Retaliation

Embry v. City of Calumet, 701 F.3d 231 (7th Cir. 2012)

City Commissioner of Streets and Alleys supported the mayor in a recent election. Following the election, the city council (majority of whom opposed the mayor) merged the plaintiff's department with the Sewer and Water Department and refused to appoint plaintiff as new commissioner. He filed a Section 1983 lawsuit claiming that the council's actions were politically motivated. The district court granted defendants' motion for summary judgment, finding that the commissioner is a policy making position and thus plaintiff could be removed because of his political affiliation.

- The Seventh Circuit affirmed, because the position was a policymaking position, and government employer's need for political allegiance outweighed the employee's First Amendment rights.

NOTES:

First Amendment – Freedom of Association

Benedix v. Village of Hanover Park

This case presents the other type of lawful political firing – confidential employees

Facts:

- New village mayor and board fired long time village manager
- Restructured the work force eliminating three positions
- Including plaintiff's position - executive assistant to the former village manager

She sued for violation of her First Amendment rights - claimed she was fired b/c of her friendship with the former village manager

DC granted MTD and 7th Circuit affirmed

- village board members could not be sued b/c restructuring took place via ordinance and therefore was a legislative act – absolute immunity
- but village also sued – could be liable for policy decisions
- nonetheless, court found that friendship is not constitutionally protected
- plaintiff occupied a confidential position for which politics could play a role in removal

First Amendment – Freedom of Association

Benedix v. Village of Hanover Park, 677 F.3d 317 (7th Cir. 2012)

Village President and Board fired the village manager and, in restructuring the work force, abolished three positions, including one held by the plaintiff, who was the Executive Coordinator to the village manager. In that capacity, she reported directly to and worked closely with the ousted village manager. Plaintiff sued claiming that the village violated her First Amendment right to freedom of association based on her friendship with the ousted village manager. Because the village restructured the work force through an ordinance, the district court dismissed the complaint on grounds of legislative immunity.

- The Seventh Circuit agreed with the legislative immunity finding but noted that individuals were sued as well.

- Affirmed. Friendship is not constitutionally protected and plaintiff occupied a confidential position such that she could be lawfully terminated whether motivated by politics or friendship with the ousted village manager.

NOTES:

First Amendment – Eavesdropping Statute

ACLU v. Alvarez

Illinois Eavesdropping statute made it a felony to record a conversation with a police officer w/o his or her consent

ACLU challenged the statute – arguing that persons who openly record police officers performing their official duties in public have First Amendment protections

DC granted MTD

7th Circuit affirmed

- State's attorney argued that the government had an overriding interest in protecting private conversations

- but, this interest not implicated when police are performing their duties in public places and engaging in communications audible to persons who witness the events

First Amendment – Eavesdropping Statute

ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012)

ACLU sought to enjoin enforcement of the Illinois Eavesdropping statute, which made it a felony to record a conversation with police officer absent consent. ACLU claimed that the statute violated the First Amendment rights of persons who openly record police officers performing their official duties in public. The district court dismissed complaint, finding that the First Amendment did not protect a right to audio record.

- Seventh Circuit reversed, because the government's interest in protecting private conversation is not implicated when the police are performing their duties in public places and engaging in communications audible to persons who witness events.

NOTES:

First Amendment – Free Speech

Bell v. Keating, 697 F.3d 445 (7th Cir. 2012)

War protestor arrested for violating a "failure to disperse" ordinance

Ordinance made it an offense not to disperse where three or more persons engage in acts which are likely to cause substantial harm or serious inconvenience, annoyance or alarm

Facts:

- Saw another protestor arrested and placed in squadrol
- approached the squadrol with two other demonstrators chanting to set him free
- ordered to leave area but refused

7th Circuit

- first found that plaintiff had standing to sue
- struck down ordinance as unconstitutional
- the language "serious inconvenience, annoyance or alarm" was vague and overbroad
- could be triggered peaceful or other peaceful speech

First Amendment – Free Speech

Bell v. Keating, 697 F.3d 445 (7th Cir. 2012)

Bell was protesting against the Iraq War in downtown Chicago. Upon seeing another protester get arrested and placed in a squadrol, Bell and two other protestors approached the squadrol in the street and demanded that the first man be set free. The police ordered them to the sidewalk but they refused. Bell was arrested and charged under a city ordinance which criminalized the failure to disperse where three or more persons are committing acts of disorderly conduct in close vicinity, "*which acts are likely to cause substantial harm or serious inconvenience, annoyance or alarm*." Bell sued for injunctive relief under Section 1983, alleging that the ordinance was vague and overbroad under First Amendment. The district court dismissed the action based on lack of standing.

- The Seventh Circuit found the plaintiff had standing and then addressed constitutionality of the "failure to disperse" ordinance.

- Reversed, because the language "serious inconvenience, annoyance or alarm" is vague and overbroad in that it could be triggered by peaceful or otherwise protected speech.

NOTES:

Race Discrimination – City Towing Contractor

Smith v. Wilson

This is what I call the 7th Circuit's most "reluctant decision"

It involved a Wisconsin police chief who refused to put the plaintiff towing company on the police tow list because of the towing operator's race

- chief's own employees testified that the chief regularly used racial slurs in everyday conversation, even when he was talking about the plaintiff

Jury found that race was a motivating factor in the decision

But, also found that plaintiff would not have been added anyway even if race did not play a role

- there was information that the plaintiff suspected of drug dealing by another police department and that he overcharged his clients

Unlike Title VII claims, where mixed motive liability is allowed, the standard in Section 1983 Equal Protection claims is "but for" causation

- once the plaintiff showed evidence that race played a role in the decision
- burden shifts to defendant to show that the decision would have been made absent the impermissible motive
- if defendant can carry that burden, it is a complete defense to the action

7th Circuit wrote that no one should have to experience the kind of racial bigotry that the plaintiff endured and suggested that the defendant waive the costs assessed against the plaintiff for losing

Race Discrimination – City Towing Contractor

Smith v. Wilson, __F.3d__, 2013 WL 238721 (7th Cir. 2012)

African American towing operation made several requests to police chief to be placed on city "tow list." His requests were denied. The chief's subordinates came forward with information the chief often used racial slurs generally and referring specifically to plaintiff. Plaintiff filed suit. Evidence emerged that the plaintiff was suspected of drug dealing by another police department and that he overcharged clients. The jury returned a verdict for the defendant, finding that race was a motivating factor in the chief's decision not to add plaintiff to the tow list, but that he would not have been added even if race did not play a role.

- The Seventh Circuit affirmed the jury verdict.
- Once plaintiff shows that race was a motivating factor in the decision, the burden shifted to the defendant to prove that the same decision would have resulted even had the improper motive not been considered; thus, the jury was entitled to believe the defense.
- Rejected plaintiff's argument that he was entitled to partial recovery because the jury found that race was a motivating factor.

NOTES:

Due Process and Takings – Wind Farm Zoning

Muscarello v. Winnebago County

Winnebago County passed ordinance making it a permitted use to build wind farms on agricultural property

Although no one had applied for a permit yet, plaintiff feared it would happen next to her property

She sued alleging a host of detrimental effects that would occur if a wind farm was built

- reduction of wind and air
- noise
- ice throw

DC granted MTD and 7th Circuit affirmed:

- no physical or regulatory taking had occurred
- ordinance had a rational basis in the county wanting to promote cleaner sources of electrical energy and energy independence

Due Process and Takings – Wind Farm Zoning

Muscarello v. Winnebago County, 702 F.3d 909 (7th Cir. 2012)

Plaintiff, who owned land zoned agricultural, challenged amendment to county's zoning ordinance that allowed wind farms as permitted uses. Plaintiff argued that if a wind farm was built on adjacent land it would damage her property, i.e., reduction of wind and air, severe noise and "ice throw." No company had yet applied to operate a wind farm. The district court dismissed the complaint.

- Seventh Circuit affirmed, because no physical or regulatory taking occurred and the county-wide ordinance had a rational basis rooted in national interest in wind power as a clean source of electrical energy and as a contribution to energy independence.

NOTES:

Qualified Immunity – Due Process

Paine v. Cason

This is a "failure to protect" case brought under the due process clause and Section 1983

Facts:

- Plaintiff was arrested for disorderly conduct at Midway Airport
- Transported to police station
- Parents called and told the police that she was bipolar – ignored
- She exhibited signs of bipolar – going from calm and manic episodes at the station
- Released into an area near public housing project with high crime rate
- 7 miles from airport
- Wearing provocative clothing
- Entered an apartment and raped and either jumped or pushed out a window
- Permanent brain injuries

She sued claiming that police failed to protect her from harm

Usually, "failure to protect" claims fail under USSC precedent, namely DeShaney v. DCFS which holds that the Constitution does not create a right to be protected from criminal predators

DC denied qualified immunity to officers

7th Circuit affirmed

- First stated that police did not owe a constitutional duty to keep her in custody to get her medical care
- Had they released her at the airport in the same condition they found her, there would no claim against the police if she was hurt by private violence
- But, police can't make her situation worse by

    - releasing her 7 miles from the airport
    - into a high crime area at night
    - having information that she was mentally ill
    - knowing that she was wearing provocative clothing
    - that she was white
    - could not protect herself

- It was clearly established that the police violate the Due Process Clause Constitution by needlessly creating a risk of harm

Qualified Immunity – Due Process

Paine v. Cason, 678 F.3d 500 (7th Cir. 2012)

Police arrested a white female outside of the airport for aggressive behavior toward others. Her parents telephoned the police station and stated she was bipolar. Plaintiff alternated between calm and manic conduct at the station, but was released in the evening hours near public housing project wearing a cutoff top with bare midriff, shorts and boots. She entered an apartment where she was sexually assaulted. Trying to escape, she jumped from window and suffered permanent brain injuries. She filed a Section 1983 due process claim, arguing that police put her in danger when she was unable to protect herself. District Court denied officers' qualified immunity defense.

- On interlocutory appeal by officers, the Seventh Circuit affirmed.

- It was a clearly established constitutional violation to increase the plaintiff's risk of harm by releasing her from custody into a dangerous situation while unable to protect herself.

NOTES:

Second Amendment Rights

Moore v. Madigan

Issue: does the Second Amendment create a conceal and carry a firearm outside the home?

7th Circuit: yes

- Bailey v. U.S.: Whether, pursuant to *Michigan v. Summers*, police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed.

- Univ. Texas Southwestern Medical Center v. Nassar: Whether the retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and similarly worded statutes require a plaintiff to prove but-for causation (*i.e.*, that an employer would not have taken an adverse employment action but for an improper motive), or instead require only proof that the employer had a mixed motive (*i.e.*, that an improper motive was one of multiple reasons for the employment action).

Second Amendment Rights

Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012)

Consolidated cases challenging the constitutionality of Illinois' concealed carry ban on Second Amendment grounds.

Issue: Does the Second Amendment create a right of self-defense outside the home? The district courts said no and dismissed the cases.

- Seventh Circuit reversed and held that the Second Amendment is more based upon a desire for self-preservation, and the court held the desire for self-preservation extends outside the home.

Biography

- Michael D. Bersani is a partner with Hervas, Condon & Bersani, P.C., located in Itasca, Illinois. Mike received an undergraduate degree from the University of Illinois, Urbana-Champaign in 1985 and a law degree from John Marshall Law School, Chicago, Illinois in 1988. Following law school, Mike served two years as a judicial clerk to the Honorable Judge Edward T. Barfield, First District Appellate Court, State of Florida. Upon entering private practice in 1990, Mike has concentrated his practice in defending local governments and local governmental officials and employees in both federal civil rights and state court tort litigation. Mike is admitted to practice law in Illinois and Florida, as well as the U.S. Supreme Court, Seventh Circuit Court of Appeals, and the U.S. District Courts for the Northern and Central Districts of Illinois. On a personal note, Mike and his family reside in Bartlett, Illinois, where he has served as an elected village trustee and appointed fire commissioner, and has been active in little league and high school hockey and booster organizations.