5 Civil Rights Liability

THOMAS G. DICIANNI
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.
Chicago
MICHAEL D. BERSANI
Hervas, Condon & Bersani, P.C.
Itasca

The contributions of Robert W. Funk, Stephanie J. Luetkehans, and Brian J. Armstrong to prior editions of this chapter are gratefully acknowledged.

VIII. Insurance Considerations and Indemnification of Public Employees

IX. Miscellaneous Matters

I. [5.1] SCOPE OF CHAPTER

This chapter discusses the various claims, defenses, and immunities that are available in federal civil rights suits alleging violations of federal constitutional and statutory rights. The primary vehicle for asserting federal claims against local public entities and their officials and employees is the Civil Rights Act of 1871, ch. 22, 17 Stat. 13. See 42 U.S.C. §1983. Other federal statutory remedial provisions may also be available, particularly in the employment context, such as Title VII of the Civil Rights Act of 1964 (Title VII), Pub.L. No. 88-352, Title VII, 78 Stat. 253. See 42 U.S.C. §2000e, *et seq.* This chapter covers common defenses and immunities, police and jail litigation, employment, land use disputes, and other issues arising in federal civil rights suits.

II. [5.2] CIVIL RIGHTS ACT OF 1871 — OVERVIEW

The primary vehicle for asserting federal claims against local public entities and local public officials and employees is the Civil Rights Act of 1871. See 42 U.S.C. §1983. The legislation was originally intended to provide an enforcement mechanism for the rights of former slaves established by the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. The broad language of 42 U.S.C. §1983, however, has led to its present status as the primary source of redress for a wide variety of governmental abuses. Specifically, §1983 provides:

> **Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.**

Section 1983 is a remedial statute only and does not, itself, create any substantive rights. Section 1983 supplies a remedy for the violation of constitutional and federal statutory rights. *Gonzaga University v. Doe,* 536 U.S. 273, 153 L.Ed.2d 309, 122 S.Ct. 2268, 2276 (2002). The remedies under §1983 are not limited to damages. Claims for declaratory and injunctive relief are also available. *Los Angeles County, California v. Humphries,* 562 U.S. 29, 178 L.Ed.2d 460, 131 S.Ct. 447 (2010) (holding that municipal liability under §1983 applied to declaratory and injunctive relief).

The proper role of §1983 has spawned considerable controversy and a wide divergence of opinions. For 90 years, from 1871 until 1961, the legislation lay substantially dormant, and most civil rights cases against state officials arose under 18 U.S.C. §242, the criminal counterpart to §1983.

However, in 1961 the Supreme Court gave teeth to §1983 by holding that governmental officials acting under color of law are liable for violations of the Fourteenth Amendment even when their conduct is also violative of state law. *Monroe v. Pape,* 365 U.S. 167, 5 L.Ed.2d 492,

81 S.Ct. 473 (1961). In addition, the court ruled that a specific intent to violate constitutional rights is not required. In 1978, the court overruled that portion of *Monroe* that had afforded sovereign immunity to municipalities under §1983 and held local governmental bodies may be liable for their customs, practices, or policies that cause constitutional deprivations. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018, 2035 – 2036 (1978).

As noted by the court in *Connick v. Thompson,* ___ U.S. ___, 179 L.Ed.2d 417, 131 S.Ct. 1350, 1359 (2011):

> **A municipality or other local government may be liable under this section if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation. . . . But, under §1983, local governments are responsible only for "their *own* illegal acts." . . . They are not vicariously liable under §1983 for their employees' actions. . . .**
>
> **Plaintiffs who seek to impose liability on local governments under §1983 must prove that "action pursuant to official municipal policy" caused their injury. . . . Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. . . . These are "action[s] for which the municipality is actually responsible." [**Emphasis in original.**] [**Citations omitted.**]** Quoting *Monell, supra,* 98 S.Ct. at 2036, and *Pembaur v. City of Cincinnati,* 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292, 1297 – 1298 (1986).

Pleading a civil rights claim in a manner sufficient to survive a motion to dismiss is not as simple as it might appear. Any attorney handling a civil rights claim should be cognizant of the degree of specificity demanded of pleadings alleging civil rights violations. *Compare City of Oklahoma City v. Tuttle,* 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985) (single incident of police misconduct does not generally give rise to municipal liability), *with Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 122 L.Ed.2d 517, 113 S.Ct. 1160, 1163 (1993) (rejecting "heightened pleading standard" for claims against municipalities). *See also Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 152 L.Ed.2d 1, 122 S.Ct. 992, 998 (2002) (no heightened pleading standard in employment discrimination claims).

The Supreme Court issued two decisions that have had a significant impact on pleading civil rights cases and created some vigorous debate. The decisions in *Ashcroft v. Iqbal,* 556 U.S. 662, 173 L.Ed.2d 868, 129 S.Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 167 L.Ed.2d 929, 127 S.Ct. 1955, 1973 – 1974 (2007), require plaintiffs to plead more detailed facts than previously if they want to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Specifically, a plaintiff's complaint must contain allegations that "state a claim to relief that is plausible on its face." *McCauley v. City of Chicago,* 671 F.3d 611, 616 (7th Cir. 2011), quoting, *Iqbal, supra,* 129 S.Ct. at 1949. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* As noted by the court in *McCauley,* in order to state a facially plausible equal-protection claim under *Monell, supra,* the factual allegations of a complaint must

allow a court to draw the plausible versus conceivable inference that a municipality established a policy or practice of intentional discrimination. At least one author has suggested that the Court's decisions in *Iqbal, supra,* and *Twombly, supra,* and the heightened pleading standards set forth therein have resulted in a "disproportionate" number of dismissals in civil rights cases. Patricia A. Seith, *Civil Rights, Labor, and the Politics of Class Action Jurisdiction,* 7 Stan.J.C.R. & C.L. 83, 121 (Apr. 2011), quoting Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases,* 158 U.Pa.L.Rev. 517, 520 (2008).

Although municipalities are not entitled to immunities from §1983 compensatory damages liability (*Owen v. City of Independence, Missouri,* 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398, 1415 (1980)), they may not be saddled with an award of punitive damages (*City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 69 L.Ed.2d 616, 101 S.Ct. 2748 (1981)). *See also Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 146 L.Ed.2d 836, 120 S.Ct. 1858, 1870 (2000). Indeed, in Illinois, punitive damages are not recoverable against local public entities (745 ILCS 10/2-102), and local public entities may not indemnify their employees for punitive damages (745 ILCS 10/2-302).

In addition, the various immunities and other affirmative defenses available to individual defendants in civil rights litigation make summary judgment a very common means of disposition. See Edmund L. Carey, Jr., Note, *Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness,* 38 Vand.L.Rev. 1543 (1985). Finally, §1983 is viewed against a background of tort law so that, in addition to the numerous defenses related solely to §1983, common-law tort principles such as causation, duty, and breach of duty are essential prerequisites to §1983 liability. *See Monroe, supra,* 81 S.Ct. at 484. For a comprehensive analysis of §1983, see generally Martin A. Schwartz and John E. Kirklin, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES (4th ed. 2003).

III. COMMON DEFENSES

A. [5.3] Immunities

All civil rights defendants sued in their "individual capacities" are entitled to assert either a qualified or an absolute immunity from damages. These immunities, however, are not available to units of local government themselves or to public officials sued in their "official capacities." *Owen v. City of Independence, Missouri,* 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980) (units of local government); *Brandon v. Holt,* 469 U.S. 464, 83 L.Ed.2d 878, 105 S.Ct. 873 (1985) (official capacity suits). A substantial body of caselaw has wrestled with the reach of these immunities and the various classes of public officials to which absolute, as opposed to qualified, immunity extends. Absolute immunity defeats a claim at the outset, whereas qualified immunity is typically, though not always, resolved on summary judgment following some discovery.

The defenses of qualified immunity and absolute immunity are designed in part to protect public officials from harassing and vexatious litigation. In addition, unlike most other interlocutory orders, a denial of a motion for summary judgment in federal court on grounds of

official immunity is immediately appealable, at least to the extent the decision was decided exclusively on legal grounds. *Mitchell v. Forsyth*, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985); *Johnson v. Jones*, 515 U.S. 304, 132 L.Ed.2d 238, 115 S.Ct. 2151, 2158 (1995); *Jones v. Clark*, 630 F.3d 677, 679 (7th Cir. 2011). During the pendency of an interlocutory appeal on grounds of qualified immunity, all discovery should cease in the district court. *See, e.g., Criss v. City of Kent*, 867 F.2d 259 (6th Cir. 1988); *Dominque v. Telb*, 831 F.2d 673 (6th Cir. 1987). Once an interlocutory appeal is properly taken under *Mitchell*, the federal district court is stripped of jurisdiction to set the case for trial. *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989); *Auriemma v. Montgomery*, 860 F.2d 273 (7th Cir. 1988). It has been held that a trial court lacks jurisdiction even to accept an amended complaint during the pendency of an interlocutory appeal. *May v. Sheahan*, 226 F.3d 876 (7th Cir. 2000). The appeal of an order denying qualified immunity to an individual public official should stay all proceedings in the district court, even a claim against the city which may survive the appeal. *Allman v. Smith*, 764 F.3d 682, 685 (7th Cir. 2014).

The immunities available under 42 U.S.C. §1983 are equally available to public officials in civil rights cases litigated in state court. *See, e.g., Roddy v. Catto*, 143 Ill.App.3d 176, 491 N.E.2d 961, 96 Ill.Dec. 682 (5th Dist. 1986) (qualified immunity for police officer); *Illinois Traffic Court Driver Improvement Educational Foundation v. Peoria Journal Star, Inc.*, 144 Ill.App.3d 555, 494 N.E.2d 939, 98 Ill.Dec. 817 (3d Dist. 1986) (absolute immunity for judges); *People v. Patrick J. Gorman Consultants, Inc.*, 111 Ill.App.3d 729, 444 N.E.2d 776, 67 Ill.Dec. 540 (1st Dist. 1982) (absolute immunity for prosecutors). However, when defendants face §1983 claims in state court, they do not have a federally guaranteed right to this interlocutory appeal. *Johnson v. Fankell*, 520 U.S. 911, 138 L.Ed.2d 108, 117 S.Ct. 1800 (1997).

1. [5.4] Absolute Immunity

Because the integrity of the judicial process depends on judges making controversial decisions and acting on their convictions free of the threat of personal liability, judges are absolutely immune from liability for their judicial acts, even when they act maliciously or corruptly. *Stump v. Sparkman*, 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978). The defense of absolute immunity is also available to regional legislators (*Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979)), prosecutors (*Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976)), public officials testifying in criminal trials even if they commit perjury (*Briscoe v. LaHue*, 460 U.S. 325, 75 L.Ed.2d 96, 103 S.Ct. 1108 (1983)), and witnesses who testify before grand juries (*Rehberg v. Paulk*, 566 U.S. ___, 182 L.Ed.2d 593, 132 S.Ct. 1497 (2012)).

In addition, the Seventh Circuit Court of Appeals has extended absolute immunity to local legislators for core legislative acts, *i.e.*, introducing, debating, and voting on legislation. *Rateree v. Rockett*, 852 F.2d 946, 949 – 950 (7th Cir. 1988); *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983). However, absolute immunity for local legislators may not be available for all decisions they make. *See Rateree, supra*, 852 F.2d at 950 (absolute immunity is not available for administrative or executive acts of legislators). In *Chicago Joe's Tea Room, LLC v. Village of Broadview*, No. 07 C 2680, 2009 WL 3824723 (N.D.Ill. Nov. 12, 2009), the village officials argued they were entitled to absolute immunity as legislators when they denied plaintiffs a special-use permit to operate an adult business. The court, however, disagreed and found that,

under Illinois law and the village's zoning code, the officials' actions were not legislative in nature and legislative immunity did not apply. 2009 WL 3824723 at *2. The court also declined to apply *judicial* immunity to the officials' decision even though the decision on the special-use permit could be characterized as "quasi-judicial." The court noted that the Seventh Circuit had not yet addressed "[w]hether the Trustees who vote for or against the recommendation of the quasi-judicial Planning and Zoning Board act in a judicial capacity." 2009 WL 3824723 at *3. *But see Irshad Learning Center v. County of DuPage,* 804 F.Supp.2d 697 (N.D.Ill. 2011) (applying quasi-judicial immunity to county board members for their decision to deny religious institution conditional use permit).

Absolute immunity of judges is limited to judicial acts unless the acts are taken totally without jurisdiction. Because the hiring and firing of court personnel constitutes an administrative rather than a judicial act, absolute immunity was denied to a judge charged with sexual discrimination in terminating a probationary employee. *Forrester v. White,* 484 U.S. 219, 98 L.Ed.2d 555, 108 S.Ct. 538 (1988). Subsequently, in a case that was remanded for further consideration in light of *Forrester,* the Seventh Circuit concluded that judges who participated in a hearing that resulted in the termination of a probation officer might still be entitled to absolute immunity if the judges could demonstrate independence and impartiality. *Ohse v. Hughes,* 863 F.2d 22 (7th Cir. 1988). The Seventh Circuit has reiterated that "[a]bsolute immunity . . . applies only to judicial acts and does not protect the official from acts that are ministerial or administrative in nature." *Heyde v. Pittenger,* 633 F.3d 512, 517 (7th Cir. 2011), citing *Dawson v. Newman,* 419 F.3d 656, 661 (7th Cir. 2005).

Prosecutors are absolutely immune for acts "intimately associated with the judicial phase of the criminal process," which means those acts taken in the prosecutor's role as an advocate. *Imbler, supra,* 96 S.Ct. at 995. *See Thomas v. City of Peoria*, 580 F.3d 633 (7th Cir. 2009) (prosecutor immune for applying for arrest warrant). *But see Hampton v. City of Chicago, Cook County, Illinois,* 484 F.2d 602 (7th Cir. 1973) (evidence-gathering insufficiently related to trial activities to be clothed with immunity). Prosecutors are not entitled to absolute immunity when engaged in investigative conduct, such as seeking evidence and advising police officers whether they possess probable cause to make an arrest (*Buckley v. Fitzsimmons,* 509 U.S. 259, 125 L.Ed.2d 209, 113 S.Ct. 2606 (1993); *Burns v. Reed,* 500 U.S. 478, 114 L.Ed.2d 547, 111 S.Ct. 1934 (1991)) or when they engage in pre-prosecution fabrication of evidence as an investigator later introduced by them at trial (*Fields v. Wharrie,* 740 F.3d 1107, 1114 (7th Cir. 2014)).

Finally, municipalities are immune from punitive damages under 42 U.S.C. §1983, as are individuals in their official capacities, since suing an individual in his or her official capacity is the same as suing the municipality. *Minix v. Canarecci,* 597 F.3d 824, 830 (7th Cir. 2010).

2. [5.5] Qualified Immunity

When the nature of a public official's act is such that the official may not claim absolute immunity, he or she may still be entitled to a qualified immunity from damages. The defense of qualified immunity protects public officials from civil rights damages liability as long as their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known" at the time the challenged conduct occurred. *Harlow v.*

Fitzgerald, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727, 2738 (1982). In *Harlow*, the Supreme Court recognized the tremendous burden on public officials in defending insubstantial claims and expressly encouraged resolution of the immunity defense on summary judgment by eliminating the previously existing subjective inquiry into the defendant's state of mind. Qualified immunity is available to anyone whose actions are fairly attributable to the state or local government. *Filarsky v. Delia,* ___ U.S. ___, 182 L.Ed.2d 662, 132 S.Ct. 1657 (2012) (holding that qualified immunity was available to private attorney hired by city to conduct disciplinary interview of city firefighter).

The United States Supreme Court, in a broad reading of qualified immunity, has emphasized that, in order to defeat a public official's claim to qualified immunity, the law must have been clearly established in relation to the specific facts confronting the public official at the time he or she acted. *Anderson v. Creighton,* 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987); *Hunter v. Bryant,* 502 U.S. 224, 116 L.Ed.2d 589, 112 S.Ct. 534 (1991). The contours of the right an official is alleged to have violated "must be sufficiently clear such that a reasonable official would understand that what he is doing violates that right." *Bakalis v. Golembeski,* 35 F.3d 318, 323 (7th Cir. 1994), quoting *Anderson, supra,* 107 S.Ct. at 3039. Therefore, public officials are entitled to qualified immunity unless "it has been authoritatively decided that certain conduct is forbidden." *Alliance to End Repression v. City of Chicago,* 820 F.2d 873, 875 (7th Cir. 1987).

The United States Supreme Court has set forth a two-part analysis when reviewing qualified immunity defenses in excessive-force cases. First, based on the facts taken in the light most favorable to the plaintiff, did the officer's conduct violate a constitutional right? *Saucier v. Katz,* 533 U.S. 194, 150 L.Ed.2d 272, 121 S.Ct. 2151 (2001). If a constitutional violation has occurred, then the court must look at whether the officer, nevertheless, could have reasonably — but mistakenly — believed that his or her conduct did not violate a clearly established constitutional right. *Id.* While courts do often examine the two factors in order, the sequence is not mandatory, and trial courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan,* 555 U.S. 223, 172 L.Ed.2d 565, 129 S.Ct. 808, 818 (2009). Courts should look to the particularized circumstances, not the general situation, when considering qualified immunity defenses. *Brosseau v. Haugen,* 543 U.S. 194, 160 L.Ed.2d 583, 125 S.Ct. 596 (2004). If the particular facts fall within the hazy border between proper and improper, then qualified immunity does not apply. *Id.*

The United States Supreme Court in *Johnson v. Jones,* 515 U.S. 304, 132 L.Ed.2d 238, 115 S.Ct. 2151 (1995), held that defendants cannot seek an immediate interlocutory appeal of a denial of summary judgment when an issue of fact remains for the trier of fact (as opposed to an issue of law). *See Tolan v. Cotton,* 572 U.S. ___, 188 L.Ed.2d 895, 134 S.Ct. 1861, 1866 (2014) (in determining qualified immunity on motion for summary judgment, court may not resolve questions of fact in favor of moving party). This broad proposition, however, was limited when the court subsequently held that an immediate interlocutory appeal can be taken when the appeal is based solely on "whether the [factual] evidence could support a finding that particular conduct occurred." *Behrens v. Pelletier,* 516 U.S. 299, 133 L.Ed.2d 773, 116 S.Ct. 834, 842 (1996). *See also Ashcroft v. Iqbal,* 556 U.S. 662, 173 L.Ed.2d 868, 129 S.Ct. 1937, 1946 (2009). In so holding, the court remanded the case to the Ninth Circuit to allow the "petitioner to claim on

appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.'" *Behrens, supra,* 16 S.Ct. at 842. The appellate court is not prohibited from considering an abstract legal question of whether a given set of undisputed facts, viewed in the light most favorable to the nonmoving party, demonstrates a violation of clearly established constitutional law. See *Gibbs v. Lomas,* 755 F.3d 529, 536 (7th Cir. 2014); *Guiterrez v. Kerman,* 722 F.3d 1003, 1009 (7th Cir. 2013). *See also Plumhoff v. Rickard,* 572 U.S. ___, 188 L.Ed.2d 1056, 134 S.Ct. 2012, 2019 (2014) (holding that whether police officer's conduct violated clearly established Fourth Amendment law was legal question that appellate courts have jurisdiction to review on appeal from interlocutory order denying summary judgment).

B. [5.6] Issue and Claim Preclusion

"[A] federal court must give the judgments of state courts 'the same full faith and credit . . . as they have by law or usage in the courts of such State.'" *Torres v. Rebarchak,* 814 F.2d 1219, 1222 (7th Cir. 1987), quoting *Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373, 84 L.Ed.2d 274, 105 S.Ct. 1327, 1331 (1985). The state law of res judicata (also called claim preclusion) often determines whether a federal suit is barred by a state court judgment. *Button v. Harden,* 814 F.2d 382, 384 (7th Cir. 1987), *abrogated by Spiegla v. Hull,* 371 F.3d 928, 942 (7th Cir. 2004). The essential elements of the doctrine under Illinois law are "(1) identity of parties or their privies in the two suits; (2) identity of causes of action in the prior and current suit; and (3) a final judgment on the merits in the prior suit." *Pirela v. Village of North Aurora,* 935 F.2d 909, 911 (7th Cir. 1991), quoting *Schlangen v. Resolution Trust Corp.,* 934 F.2d 143, 146 (7th Cir. 1991). Res judicata bars not only those claims that were actually decided in the prior suit but also claims that could have been brought. *Matrix IV, Inc. v. American National Bank & Trust Company of Chicago,* 649 F.3d 539, 547 (7th Cir. 2011).

Claim preclusion often arises when a plaintiff tries to split his or her claims between state and federal court. For example, the Seventh Circuit has held that a claim of unconstitutionality would have been an affirmative defense of a condemnation order and, hence, was barred because it was not raised on the state court proceedings. *Vandenplas v. City of Muskego,* 753 F.2d 555 (7th Cir. 1985). Claim preclusion often comes up in employment cases. Plaintiffs who pursue their rights in state court for administrative review may be precluded from bringing federal constitutional or statutory claims in federal court. *See also Lolling v. Patterson,* 966 F.2d 230, 235 (7th Cir. 1992) (later civil rights claim dismissed on res judicata grounds when plaintiff failed to raise claim of unconstitutional retaliation in previous disciplinary proceeding); *Southern Jam, Inc. v. Robinson,* 675 F.2d 94 (5th Cir. 1982) (42 U.S.C. §1983 claim based on First Amendment right to association and assembly barred because not raised as defense in prior state proceeding); *Dookeran v. County of Cook, Illinois,* 719 F.3d 570, 575 (7th Cir. 2013) (prior unsuccessful administrative review suit precluded subsequent federal suit based on same facts); *Abner v. Illinois Department of Transportation,* 674 F.3d 716, 721 – 722 (7th Cir. 2012) (same); *Walczak v. Chicago Board of Education,* 739 F.3d 1013 (7th Cir. 2014) (same).

In *Czarniecki v. City of Chicago,* 633 F.3d 545 (7th Cir. 2010), a dismissed probationary police officer sued her employer and the chief of police in federal court under §1983 for discrimination. The city was granted summary judgment, and the plaintiff voluntarily dismissed

the chief. The plaintiff then filed a second suit under Title VII, again claiming discrimination. The Seventh Circuit upheld dismissal of the second suit on claim preclusion grounds. The court admonished the plaintiff that he could have asked the court to stay the first suit pending receipt of a right-to-sue letter by the Equal Employment Opportunity Commission (EEOC) in the Title VII administrative proceeding, asked the EEOC to expedite its ruling, or delayed filing the §1983 suit until the right-to-sue letter was issued. However, he could not permissibly split his cause of action by filing the two lawsuits.

One area of much litigation arises out of prior criminal cases. Often, a plaintiff who sues for false arrest or illegal search and seizure was a defendant in a criminal proceeding arising out of the incident giving rise to the civil rights case. In such cases, Fourth Amendment issues that were resolved during the criminal proceeding may often have collateral estoppel or issue-preclusive effect against a plaintiff in the subsequent civil rights claim. Accordingly, a determination in a criminal proceeding of the validity of a search warrant or the applicability of an exception to the warrant requirement may preclude a civil rights claim challenging the search. Similarly, a determination of probable cause at a pretrial motion to suppress may bar a plaintiff's false arrest claim. *Guenther v. Holmgreen,* 738 F.2d 879 (7th Cir. 1984). Unlike claim preclusion, the issue that the defendant seeks to bar must have been actually litigated and decided on the merits in the prior suit. *See Wells v. Coker,* 707 F.3d 756, 761 (7th Cir. 2013). Thus, collateral estoppel can apply if the criminal proceeding determined that probable cause existed for a warrantless arrest and the §1983 plaintiff had a full and fair opportunity to litigate the issue in the state court case. *Patterson v. Leyden,* 947 F.Supp. 1211, 1217 (N.D.Ill. 1996). Collateral estoppel applies if it can be shown "that the fact of the arresting officer's having probable cause to arrest . . . was litigated and was essential to judgment." 947 F.Supp. at 1218. *See Wells, supra.* In addition, a criminal conviction of the underlying offense serves as prima facie evidence of the facts on which the conviction was based. *Brown v. Green,* 738 F.2d 202 (7th Cir. 1984). *See also Cameron v. Fogarty,* 806 F.2d 380, 386 – 389 (2d Cir. 1986) (criminal conviction bars §1983 claim even though collateral estoppel inapplicable). A guilty plea is afforded even greater preclusive effect than a conviction and is construed as a binding admission "of the facts alleged in the [criminal] complaint that may be used against the defendant in a subsequent proceeding." *Rodriguez v. Schweiger,* 796 F.2d 930, 933 (7th Cir. 1986), quoting *Brown, supra,* 738 F.2d at 206.

However, a guilty plea does not preclude a subsequent federal civil rights claim when there is uncertainty as to whether a specific factual finding was absolutely necessary for the prior judgment. *Wells, supra,* 707 F.3d at 762. In *Wells,* the plaintiff sued a police officer for excessive use of force when the officer shot him three times. The plaintiff had previously pleaded guilty to reckless conduct based on a charge that he had shot his gun three times in the air and then pointed his gun at the officer. Since both facts could have independently formed the basis for the guilty plea, it was not certain whether the latter fact controlled or was necessary to disposition of the criminal case. *Id.* Therefore, the guilty plea did not preclude the excessive force suit.

A finding of probable cause for arrest in a criminal proceeding does not bar a civil rights claim for false arrest if the arrestee is ultimately acquitted in the criminal trial or if the conviction is overturned. *Montgomery v. De Simone, PTL,* 159 F.3d 120 (3d Cir. 1998); *Stevenson v. City of Chicago,* 638 F.Supp. 136 (N.D.Ill. 1986). *See also Williams v. Stevens,* No. 84 C 1257, 1986 WL 15108 (N.D.Ill. Dec. 17, 1986). This is because the criminal defendant who is acquitted has no

opportunity for appellate review of the finding of probable cause. For the same reason, this exception may also apply when criminal defendants have pleaded guilty after a finding of probable cause. *Stevenson, supra,* 638 F.Supp. at 139. Moreover, when an appellate court either affirms or reverses on one ground and declines to rule on other grounds, those unreviewed matters are no longer entitled to preclusive effect. *Thomas v. Riddle,* 673 F.Supp. 262, 265 – 266 (N.D.Ill. 1987); *Reighley v. Continental Illinois Nat. Bank & Trust Co. of Chicago,* 323 Ill.App. 479, 56 N.E.2d 328, 332 (1st Dist. 1944). However, the mere fact that a criminal conviction is expunged following the successful completion of supervision does not deprive the conviction of its preclusive effect. *Turner v. Green,* 704 F.Supp. 139 (N.D.Ill. 1988).

Though collateral estoppel is often invoked by civil rights defendants to establish probable cause, the opposite does not necessarily ring true. A finding of no probable cause in favor of a criminal defendant does not entitle him or her to use that determination offensively in the subsequent civil rights matter. First, because of the higher burden of proof in the criminal proceeding, the police officer may still be able to show in the civil proceeding by a preponderance of the evidence that the search or arrest was valid. *See Kunzelman v. Thompson,* 799 F.2d 1172, 1176 – 1177 (7th Cir. 1986). *See also Wilson v. City of Chicago,* 707 F.Supp. 379 (N.D.Ill. 1989). In addition, the officer may invoke the defense of qualified immunity, which precludes damages liability even in the absence of probable cause if the law enforcement official had a reasonable belief that the search or arrest was valid.

C. [5.7] *Rooker-Feldman* Doctrine

The Seventh Circuit Court of Appeals has relied heavily on the *Rooker-Feldman* doctrine (*see Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 68 L.Ed. 362, 44 S.Ct. 149 (1923); *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 75 L.Ed.2d 206, 103 S.Ct. 1303 (1983)) to dismiss cases it sees as being inextricably intertwined with a prior state judgment. *Wright v. Tackett,* 39 F.3d 155, 157 (7th Cir. 1994). A federal claim is inextricably intertwined with the state court judgment "if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 95 L.Ed.2d 1, 107 S.Ct. 1519, 1533 (1987).

When a federal plaintiff complains about or seeks to set aside a prior state judgment, the Seventh Circuit has consistently held that the district court lacks jurisdiction. *Gash Associates v. Village of Rosemont, Illinois,* 995 F.2d 726, 728 (7th Cir. 1993) (federal court lacked jurisdiction when plaintiff alleged injury arising from filing of condemnation suit and separate judgment confirming sale of property). *See also Ritter v. Ross,* 992 F.2d 750, 754 – 755 (7th Cir. 1993) (*Rooker-Feldman* doctrine barred litigation when plaintiff's injuries stemmed from possible erroneous judgments).

The *Rooker-Feldman* doctrine stands "for the proposition that 'lower federal courts lack jurisdiction to engage in appellate review of state-court determinations.' " *Garry v. Geils,* 82 F.3d 1362, 1365 (7th Cir. 1996), citing *Rooker, supra,* 44 S.Ct. at 150, and quoting *Ritter, supra,* 992 F.2d at 753.

> **In order to determine the applicability of the *Rooker-Feldman* doctrine, the fundamental and appropriate question to ask is whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment.** *Garry, supra,* 82 F.3d at 1365.

See also Fayyumi v. City of Hickory Hills, 18 F.Supp.2d 909 (N.D.Ill. 1998) (when plaintiff brought claim under Fair Housing Amendments Act of 1988 (FHAA), Pub.L. No. 100-430, 102 Stat. 1619, stemming from condemnation, *Rooker-Feldman* doctrine barred claim). The dismissal of a case for lack of jurisdiction based on *Rooker-Feldman* doctrine is without prejudice. *T.W. v. Brophy,* 124 F.3d 893, 898 (7th Cir. 1997).

However, the *Rooker-Feldman* doctrine is a narrow doctrine and is concerned only when the prior state court decision is the source of harm that the federal suit is brought to remedy. *Dookeran v. County of Cook, Illinois,* 719 F.3d 570, 575 (7th Cir. 2013). Thus, in *Dookeran,* the *Rooker-Feldman* doctrine did not bar federal court jurisdiction over an employment discrimination suit based on a prior unsuccessful state court administrative review suit. In the federal suit, the plaintiff did not seek redress for harm caused by the prior state court judgment (although the federal suit was barred by claim preclusion, or res judicata, principles). *See also Simmons v. Gillespie,* 712 F.3d 1041 (7th Cir. 2013) (principal difference between claim preclusion and *Rooker-Feldman* is source of harm that federal suit is designed to redress).

D. [5.8] Abstention

Civil rights plaintiffs sometimes file in federal court to obtain some relief from an ongoing action in state court. In these types of cases, the federal courts look favorably on dismissing or staying the federal action under the doctrine of abstention until the state court action is final. The primary concern of the court is whether the federal litigants would be bound by the results of the state court proceedings under the principles of collateral estoppel. *Harris Trust & Savings Bank v. Olsen,* 745 F.Supp. 503, 507 (N.D.Ill. 1990). *See also Ericksen v. Village of Willow Springs,* 876 F.Supp. 951 (N.D.Ill. 1995). The Supreme Court in *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 47 L.Ed.2d 483, 96 S.Ct. 1236, 1246 – 1248 (1976), held that a district court may dismiss or stay an action when there is an ongoing parallel action in state court. "[T]he principles underlying [the *Colorado River* abstention] doctrine 'rest on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " *LaDuke v. Burlington Northern R.R.,* 879 F.2d 1556, 1558 (7th Cir. 1989), quoting *Colorado River, supra,* 96 S.Ct. at 1246. The determination of whether such exceptional circumstances exist to warrant abstention rests in the discretion of the district court. *LaDuke, supra,* 879 F.2d at 1558.

The *Colorado River* abstention doctrine requires a two-step analysis. First, the actions must be parallel. Suits are parallel if "substantially the same parties are contemporaneously litigating substantially the same issues simultaneously in another forum." *Tyrer v. City of South Beloit, Illinois,* 456 F.3d 744, 752 (7th Cir. 2006), quoting *Interstate Material Corp. v. City of Chicago,* 847 F.2d 1285, 1287 (7th Cir. 1988). However, the two cases do not have to be identical. *Interstate Material, supra.*

Once a court determines that the state and federal cases are parallel, it must then decide whether it should defer to the state court. The factors to be considered include

> **(1) whether the state has assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) the source of governing law, state or federal; (6) the adequacy of state court action to protect the federal plaintiff's rights; (7) the relative progress of state and federal proceedings; (8) the presence or absence of concurrent jurisdiction; (9) the availability of removal; and (10) the vexatious or contrived nature of the federal claim.** *Ericksen, supra,* 876 F.Supp. at 958 – 959.

No single factor is determinative. *Colorado River, supra,* 96 S.Ct. at 1247. Further, an examination of these factors "does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 74 L.Ed.2d 765, 103 S.Ct. 927, 937 (1983). However, there is a "general presumption against abstention." *AXA Corporate Solutions v. Underwriters Reinsurance Corp.,* 347 F.3d 272, 278 (7th Cir. 2003).

When the pendency of a criminal action is pointed out and properly documented, the federal court generally stays its proceeding until the criminal case has terminated. *Younger v. Harris,* 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971); *Deakins v. Monaghan,* 484 U.S. 193, 98 L.Ed.2d 529, 108 S.Ct. 523 (1988). The United States Supreme Court further minimized the prospect of federal interference with ongoing state criminal proceedings in *Heck v. Humphrey,* 512 U.S. 477, 129 L.Ed.2d 383, 114 S.Ct. 2364 (1994). In *Heck,* the court held that a plaintiff cannot proceed with a 42 U.S.C. §1983 claim if an element of that claim would invalidate an underlying criminal conviction or sentence. Thus, until the plaintiff can show that the conviction or sentence has been reversed on direct appeal, expunged, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus, a court must abstain from hearing the §1983 claim. *Id.*

The Seventh Circuit subsequently held, in *Antonelli v. Foster,* 104 F.3d 899, 901 (7th Cir. 1997), that *Heck, supra,* applies only to cases premised "on the invalidity of confinement pursuant to some legal process, whether a warrant, indictment, information, summons, parole revocation, conviction or other judgment, or disciplinary punishment for the violation of a prison's rules." The *Antonelli* court emphasized that *Heck* would not bar

> **a suit that complains of official misconduct unrelated to legal process — an unconstitutional arrest without a warrant, the gratuitous beating of the arrested person, his confinement in the Black Hole of Calcutta whether pre- or postconviction [**because in**] none of the cases of . . . official misconduct unrelated to legal process — is the unlawfulness of the plaintiff's being confined pursuant to legal process an implicit or explicit ingredient of his case. [**Citations omitted.**]** *Id.*

See Booker v. Ward, 94 F.3d 1052, 1056 (7th Cir. 1996) (false arrest claim "does not inevitably undermine a conviction [because] one can have a perfectly successful wrongful arrest claim and still have a perfectly valid conviction"); *Reed v. City of Chicago,* 77 F.3d 1049, 1051 – 1053 (7th

Cir. 1996). Note, however, that the court, in *Patterson v. Leyden,* 947 F.Supp. 1211, 1218 (N.D.Ill. 1996), held that whether a false arrest claim would undermine the plaintiff's conviction could not properly be determined on a motion to dismiss. *But see Crooms v. P.O. Mercado, No. 41,* 955 F.Supp. 985, 988 (N.D.Ill. 1997) (*Heck, supra,* barred plaintiff's excessive force claim "because a successful prosecution of his section 1983 claim would necessarily imply that his criminal conviction for resisting a peace officer was wrongful").

In determining whether a §1983 claim is barred by *Heck,* the courts must consider the factual basis for the claim and whether it necessarily implied the validity of the connection. *Helman v. Duhaime,* 742 F.3d 760, 762 (7th Cir. 2014). In *Helman,* the plaintiff pleaded guilty to a Class D felony of resisting arrest based on his act of attempting to draw a handgun during an arrest. Since the only viable theory of his §1983 claim was that he did not attempt to draw his weapon, his claim was inconsistent with his conviction and, therefore, barred under *Heck.* In contrast, see *Evans v. Poskon,* 603 F.3d. 362 (7th Cir. 2010), in which the court held that a §1983 excessive force claim was not barred by the plaintiff's prior conviction for resisting arrest because the claim was premised on the plaintiff's allegation that the police used excessive force against him after he was subdued.

E. [5.9] Statute of Limitations

A two-year statute of limitations period applies to federal civil rights claims brought under 42 U.S.C. §1983, whether in federal or state court. *Anton v. Lehpamer,* 787 F.2d 1141 (7th Cir. 1986); *Thomas v. Universal Health Services, Inc.,* 145 Ill.App.3d 663, 495 N.E.2d 1186, 1187, 99 Ill.Dec. 451 (1st Dist. 1986). Generally, a §1983 claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. *Serino v. Hensley,* 735 F.3d. 588, 591 (7th Cir. 2013); *Wallace v. Kato,* 549 U.S. 384, 166 L.Ed.2d 973, 127 S.Ct. 1091, 1095 (2007).

IV. POLICE CASES

A. [5.10] Searches and Seizures Generally

The Fourth Amendment to the U.S. Constitution provides that

> **[**t**]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.**

The touchstone of the Fourth Amendment is reasonableness, and when the police conduct a search to discover evidence of a crime, reasonableness requires a warrant. *Riley v. California,* ___ U.S. ___, 189 L.Ed.2d 430, 134 S.Ct. 2473, 2482 (2014) (holding that warrant is generally required before conducting search of cellphone even when seized incident to arrest); *United States v. Jones,* 565 U.S. ___, 181 L.Ed.2d 911, 132 S.Ct. 945 (2012) (holding that installation of

GPS tracking device on undercarriage of vehicle is search under Fourth Amendment requiring warrant). Of course, there are myriad exceptions to the warrant requirement — too many to explore comprehensively in the scope of this chapter. For an excellent treatise on the Fourth Amendment and its many exceptions to the warrant requirement, see Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th ed. 2012).

Searches and arrests executed by officers armed with a facially valid warrant are far more defensible than those without. "Generally, a person arrested pursuant to a facially valid warrant cannot prevail in a §1983 suit for false arrest; this is so even if the arrest warrant is later determined to have an inadequate factual foundation." *Juriss v. McGowan,* 957 F.2d 345, 350 (7th Cir. 1992). *See also Baker v. McCollan,* 443 U.S. 137, 61 L.Ed.2d 433, 99 S.Ct. 2689, 2694 (1979); *Olson v. Tyler,* 771 F.2d 277, 281 (7th Cir. 1985).

> **A warrant is valid under the Fourth Amendment only where it is based "upon probable cause, supported by Oath or affirmation, and particularly describ[es] the place to be searched, and the persons or things to be seized."** *Jacobs v. City of Chicago,* 215 F.3d 758, 767 (7th Cir. 2000), quoting U.S.CONST. amend. IV.

The Fourth Amendment does not impose stringent requirements on how warrants must describe their intended subjects. An arrest warrant that correctly names the person to be arrested is considered constitutionally sufficient and need not contain any additional identifying information. *White v. Olig,* 56 F.3d 817, 819 – 820 (7th Cir. 1995). "The arrest of a person named in a valid warrant, however, even if it turns out to be the wrong individual, will not violate the Fourth Amendment unless the arresting officer acted unreasonably." 56 F.3d at 820.

Note, however, that a mistake in executing the warrant might be redressable in a false arrest or false imprisonment claim under state law. *Johnson v. Miller,* 680 F.2d 39, 42 (7th Cir. 1982). Moreover, procuring a warrant in advance of an arrest does not insulate a police officer from damages liability when the facts on which the warrant was issued cannot reasonably be interpreted as establishing probable cause. *Malley v. Briggs,* 475 U.S. 335, 89 L.Ed.2d 271, 106 S.Ct. 1092 (1986) (requiring officer applying for warrant to minimize potential for judicial error by exercising reasonable professional judgment). It is also well established that a police officer's motive in applying for a warrant does not invalidate the warrant as long as probable cause existed. *Scherr v. City of Chicago,* 757 F.3d 593, 597 (7th Cir. 2014). It has also been held that the police incur civil rights liability for mistakenly breaking down the door of the wrong apartment pursuant to a warrant and briefly glancing into the apartment but not actually entering. *Balthazar v. City of Chicago,* 735 F.3d 634 (7th Cir. 2013).

B. [5.11] Warrantless Searches and Seizures

Warrantless searches or seizures lacking probable cause may form the basis of a 42 U.S.C. §1983 claim. The sine qua non of such claims is the existence of probable cause. Searches or seizures made with probable cause comply with the Fourth Amendment; those without frequently run afoul of the Fourth Amendment's prohibitions and give rise to liability. *Fernandez v. Perez,* 937 F.2d 368, 371 (7th Cir. 1991) ("[T]he existence of probable cause for an arrest totally precludes any section 1983 claim for unlawful arrest, false imprisonment, or malicious

prosecution." [Emphasis omitted.]). An officer has probable cause to make an arrest when the facts and circumstances — within his or her knowledge and of which he or she has reasonably trustworthy information — suffice to warrant a prudent person's belief that the suspect has committed or is committing an offense. *Jones v. Webb,* 45 F.3d 178, 181 (7th Cir. 1995). The analysis is an objective one; the officer's subjective beliefs do not invalidate a warrantless arrest otherwise supported by probable cause. *Whren v. United States,* 517 U.S. 806, 135 L.Ed.2d 89, 116 S.Ct. 1769, 1774 (1996).

The U.S. Supreme Court has also held that when a police officer has probable cause to believe that a person has committed a very minor offense, he or she may arrest that person without violating the Fourth Amendment. *Atwater v. City of Lago Vista,* 532 U.S. 318, 149 L.Ed.2d 549, 121 S.Ct. 1536, 1557 (2001). This is true even if the minor offense is a traffic violation. *Ray v. City of Chicago,* 629 F.3d 660, 663 (7th Cir. 2011). In fact, as long as probable cause exists that a crime has been committed, it does not matter that the person was actually arrested for another offense. *Id.; Holmes v. Village of Hoffman Estates,* 511 F.3d 673, 682 (7th Cir. 2007); *Devenpeck v. Alfred,* 543 U.S. 146, 160 L.Ed.2d 537, 125 S.Ct. 588, 593 – 594 (2004).

Even in the absence of actual probable cause, a police officer may be protected from a civil rights suit under a qualified immunity defense when he or she has a mistaken but arguable belief in the existence of probable cause. *Huff v. Reichert,* 744 F.3d 999, 1007 (7th Cir. 2014). Probable cause does not require that a police officer be correct, only reasonable. Arguable probable cause exists when a reasonable police officer in the same circumstances and knowing the same facts as the defendant officer could have reasonably believed that probable cause existed under well-established caselaw. *Id.* In *Fleming v. Livingston County, Illinois,* 674 F.3d 874 (7th Cir. 2012), for example, the plaintiff was arrested by a county deputy sheriff based on a description of the victim of sexual attack. In *Reher v. Vivo,* 656 F.3d 772 (7th Cir. 2011), an officer was granted qualified immunity because his arrest was based on credible eyewitness accounts. However, in *Huff, supra,* a police officer did not have arguable probable cause to prolong a traffic stop beyond what was reasonable merely because the driver had the wrong address on his driver's license, a temporary insurance card, a past criminal record, was nervous, and was driving on a stretch of highway known for drug trafficking. 744 F.3d at 1007 – 1008. *See Williams v. City of Chicago,* 733 F.3d 749 (7th Cir. 2013) (rejecting qualified immunity defense because officers did not have arguable probable cause to believe that person's mere presence on front porch of burning home justified his arrest on arson charge).

1. [5.12] Investigative Stops

Investigative stops, permissible under *Terry v. State of Ohio,* 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968), may also give rise to civil rights suits. The temporary detention of a person to investigate criminal activity is a seizure under the Fourth Amendment and must be reasonable under the circumstances. *Huff v. Reichert,* 744 F.3d 999, 1004 (7th Cir. 2014) (temporary detention during traffic stop is justified if officer had observed violation of traffic laws). The officer need only have a reasonable, articulable suspicion that criminal activity is afoot. *Id.* But a *Terry* stop may be converted to a full-blown custodial arrest necessitating probable cause if it extends beyond the time reasonably necessary to complete the purpose for which the stop is

made. 744 F.3d at 1005, citing *Illinois v. Caballes,* 543 U.S. 405, 160 L.Ed.2d 842, 125 S.Ct. 834, 837 (2005). To pass constitutional muster, the stop must be reasonably related in scope and duration to the circumstances that justified the stop in the first place. 744 F.3d at 1006 (once officer handed plaintiff written warning, purpose of stop ended and cannot continue absent probable cause). The critical inquiry is whether the officer's conduct would have communicated to a reasonable person that he or she was free to leave. *Id.*

Certain warrantless restraints of liberty, even if prolonged beyond what is allowed under *Terry , supra,* but falling short of a full custodial arrest, may still be lawful absent probable cause under the Fourth Amendment. In *Hamilton v. Village of Oak Lawn, Illinois,* 735 F.3d 967 (7th Cir. 2013), the plaintiff was hired as an in-home caretaker of a man dying of Parkinson's disease. After she worked for only 88 hours, the man gave her a check for $10,000. The family of the man became suspicious and called the police, who detained the plaintiff for two hours. She was not handcuffed or under arrest or ultimately charged with any crime. The Seventh Circuit affirmed the dismissal of her 42 U.S.C. §1983 lawsuit, holding that not all detentions need to be classified as a *Terry* stop or an arrest. The court reasoned that a stop too intrusive to be justified under *Terry*, but still short of a custodial arrest, may still be reasonable under the Fourth Amendment.

In *Rabin v. Flynn,* 725 F.3d 628 (7th Cir. 2013), a police officer observed the plaintiff carrying a holstered gun in public. He was handcuffed, searched, and detained for one and one-half hours while the officer tried to confirm the validity of the person's concealed carry license. The man subsequently sued the officer for an illegal detention, and the Seventh Circuit upheld the officer's conduct based on a qualified immunity defense. The court reasoned that the time delay, which was caused by government's failure to have an efficient system of license verification, did not violate clearly established law. Nor did handcuffing the plaintiff pending the investigatory stop violate his clearly established rights. *See also Matz v. Klotka*, No. 12-1674, 2014 WL 4960311 (7th Cir. Oct. 6, 2014) (fact that defendants handcuffed plaintiff to secure scene did not transform stop into full-blown arrest when record suggested that defendants were attempting to protect themselves while apprehending third party who was suspect in murder case).

2. [5.13] Warrantless Home Entries

Nonconsensual entries and seizures in a person's home generally require a warrant. However, there are some exceptions. In *Ryburn v. Huff*, 565 U.S. ___, 181 L.Ed.2d 966, 132 S.Ct. 987 (2012), police officers investigating a threatened school shooting followed a woman into her home after she ran into the home suddenly when asked if she had any weapons. The U.S. Supreme Court held that the officers did not violate any clearly established Fourth Amendment rights. "Judged from the proper perspective of a reasonable officer forced to make a split-second decision in response to a rapidly unfolding chain of events that culminated with Mrs. Huff turning and running into the house after refusing to answer a question about guns, [the officers'] belief that entry was necessary to avoid injury to themselves or others was imminently reasonable." 132 S.Ct. at 992.

The Seventh Circuit upheld a nonconsensual warrantless entry into a home based on exigent circumstances involving a person who had called the police station and made suicidal statements. *Fitzgerald v. Santoro,* 707 F.3d 725, 732 (7th Cir. 2013). The police also acted reasonably in

entering a home without a warrant to prevent a plaintiff from harming herself based on information that the police received from her doctor that she might take her own life. *Sutterfield v. City of Milwaukee,* 751 F.3d 542, 561 – 562 (7th Cir. 2014). *Sutterfield* has an excellent discussion of the various exceptions to the warrant requirement for situations in which the police need to check on a person's well being when acting in a community caretaking role as opposed to the investigation of criminal conduct.

In *Stanton v. Sims,* 571 U.S. ___, 187 L.Ed.2d 341, 134 S.Ct. 3 (2013), the Court addressed whether the law was clearly established that a warrantless entry into a home in hot pursuit of a misdemeanor suspect violated the Fourth Amendment. In that case, the officer kicked down a backyard gate in pursuit of a suspect who had threatened someone with a baseball bat. The gate struck and injured the homeowner, who sued for her injures under 42 U.S.C. §1983. The Court found that the law on this topic was not clearly established, and therefore the officer was entitled to qualified immunity from suit. The Court reasoned that the officer may have been mistaken in believing that his actions were justified, but he did not knowingly violate the Fourth Amendment based on the state of the law at the time, which was split across the country on whether the police may enter a home without a warrant in hot pursuit of a misdemeanor suspect.

3. [5.14] Warrantless Body Searches

The U.S. Supreme Court has held that a warrantless draw of blood to determine blood alcohol concentration following a DUI arrest violates the Fourth Amendment. *Missouri v. McNeely,* 568 U.S. ___, 185 L.Ed.2d 696, 133 S.Ct. 1552 (2013). The Court reasoned that the natural dissipation of alcohol in the bloodstream did not establish a per se exigency on its own to justify not getting a warrant. The Court refused to depart from the totality-of-the-circumstances rule by adopting a categorical rule that warrantless blood draws are always permissible merely because of the natural dissipation of alcohol in the blood.

However, in the same term, the Court held in *Maryland v. King,* 569 U.S. ___, 186 L.Ed.2d 1, 133 S.Ct. 1958 (2013), that the warrantless collection of a DNA sample from a person arrested for a serious offense did not violate the Fourth Amendment. Balancing the privacy interests of the individual with the interests of law enforcement, the Court reasoned that collecting a DNA sample by merely swabbing the inside of an arrestee's mouth with a buccal swab is quick, painless, and negligible. The Court also reasoned that, once a person is validly arrested, his or her expectation of privacy diminishes, as does the need for a warrant. The Court stated that swabbing for DNA is a legitimate police booking procedure, much like fingerprinting and photographing, and that individual suspicion of crime was unnecessary under these circumstances.

Strip searches, although mostly arising in the jail or prison settings (see §5.35 below), may give rise to liability for the arresting officer. In *Banaei v. Messing,* 547 Fed.Appx. 774 (7th Cir. 2013), a 60-year-old woman arrested for misdemeanor battery, claimed that she was strip searched in violation of her Fourth Amendment rights at the police station. She was ordered by a female officer to remove her "bulky" sweater, thereby exposing her bra and undergarments to snickering male officers who were also present in the room. 547 Fed.Appx. at 776. The district court granted summary judgment for the officers, finding that there was no full-body strip search, that there was no absolute prohibition on the police participating in the observation of naked

members of the opposition sex, and that the search was justified given the bulkiness of the woman's sweater, which made a pat-down ineffective. The Seventh Circuit disagreed and held that the officers offered no reasonable justification for conducting the search in the manner and place they did and that there were triable issues of fact regarding reasonableness that precluded summary judgment.

4. [5.15] Police Canine Searches

The U.S. Supreme Court held in *Illinois v. Caballes,* 543 U.S. 405, 160 L.Ed.2d 842, 125 S.Ct. 834, 838 (2005), that the use of a well-trained narcotics detention dog during a lawful traffic stop does not implicate legitimate privacy interests and does not rise to the level of a constitutional violation. More recently, the Court addressed police canine searches in *Florida v. Jardines,* 569 U.S. ___, 185 L.Ed.2d 495, 133 S.Ct. 1409 (2013), and *Florida v. Harris,* 568 U.S. ___, 185 L.Ed.2d 61, 133 S.Ct. 1050 (2013), albeit with different results. In *Jardines,* the police responding to an unverified tip that marijuana was being grown in the home brought a police canine onto a front porch and the dog alerted to narcotics. The police then obtained warrant to search the home and found drugs. The Court ultimately affirmed the suppression of the evidence, finding that the front porch is a classic example of curtilage to which the activity of the home life extends and that there is no customary invitation to enter the curtilage to search. In *Harris,* the Court held that a police canine's alert during a traffic stop to drugs in a vehicle can provide probable cause to search the vehicle as long as the state lays a proper foundation as to the dog's satisfactory performance in a certification or training program. The Court rejected the argument that the dog's field performance is a more reliable test.

C. [5.16] Use of Force and Other Areas of Potential Liability

Police officers are frequently subjected to claims for police brutality, the unlawful use of deadly force, and high-speed car chases. Police officers also face liability when they are presented an opportunity to prevent the use of excessive force by fellow officers under certain circumstances and fail to intervene. These claims are frequently brought under 42 U.S.C. §1983 alleging a violation of the Fourth Amendment's unreasonable search and seizure prohibition.

1. [5.17] Use of Force Generally

All use-of-force claims are not governed by the same constitutional standard. Depending on the plaintiff's status in the judicial system at the time of the incident, there are three amendments to the United States Constitution that may apply to 42 U.S.C. §1983 use-of-force litigation. The Fourth Amendment applies at the time of the arrest, investigatory stop, or other seizure. *See Graham v. Connor*, 490 U.S. 386, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989). The Due Process Clause of the Fourteenth Amendment applies in the pretrial detainee setting before conviction and sentencing. *See Lewis v. Downey,* 581 F.3d 467 (7th Cir. 2009). The Cruel and Unusual Punishment Clause of the Eighth Amendment applies after a convicted person is sentenced. *See Whitley v. Albers,* 475 U.S. 312, 89 L.Ed.2d 1078, 106 S.Ct. 1078 (1986). This section addresses solely claims brought under the Fourth Amendment. See §5.31 below for Fourteenth and Eighth Amendment claims.

In *Graham, supra,* the Supreme Court recognized that the right to make an arrest, investigatory stop, or other seizure necessarily carries with it the right to use some degree of physical coercion or threat to use force. Such use of force is governed by the reasonableness standard of the Fourth Amendment. This inquiry requires a balancing of the nature and quality of the intrusion on the plaintiff's Fourth Amendment rights with the legitimate law enforcement interests of the police. The inquiry is an objective one based on the totality of the circumstances. The courts are required to analyze this issue from the perspective of a reasonable police officer on the scene rather than 20/20 hindsight. 109 S.Ct. at 1871 – 1872. Courts should allow for the recognition that officers are often called on to make split-second decisions under tense, uncertain, and rapidly evolving circumstances. In analyzing such claims, the officer's subjective intent or motivation is not relevant. The general factors that should be considered are the severity of the offense, the immediate threat posed to the safety of the officer and the public, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Id.* Further, as discussed in §5.18 below, the use of deadly force is justified if there is an imminent danger of death or great bodily harm. *Tennessee v. Garner,* 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985).

Most excessive force cases present purely factual issues making summary judgment and the defense of qualified immunity typically unwarranted. *See Johnson v. Jones,* 515 U.S. 304, 132 L.Ed.2d 238, 115 S.Ct. 2151 (1995) (holding that qualified immunity determination is not immediately appealable if it was decided merely on question of evidence sufficiency). However, the Supreme Court in *Plumhoff v. Rickard,* 572 U.S. ___, 188 L.Ed.2d 1056, 134 S.Ct. 2012, 2019 – 2020 (2014), held that whether the defendants violated the Fourth Amendment relating to their use of force and/or, alternatively, whether the defendants violated clearly established law, are legal questions appropriate for an immediate interlocutory appeal. *See also Scott v. Harris,* 550 U.S. 372, 167 L.Ed.2d 686, 127 S.Ct. 1769 (2007) (when there was videotaped evidence capturing event and contradicting plaintiff's version, court viewed facts in light as depicted in video).

Given the vast array of use-of-force options and infinite permutations of factual scenarios, it is too overwhelming to cover comprehensively all caselaw involving excessive force claims. A discussion of a few recent cases, however, should give the reader a good snapshot of how the courts address excessive force claims. In *Findlay v. Lendermon,* 722 F.3d 895 (7th Cir. 2013), the officer and the plaintiff both fell to the floor to retrieve a camera memory chip that contained evidence pertinent to a crime, and the officer tackled the plaintiff to prevent him from picking up the chip. Despite some conflicting testimony on exactly what happened, the plaintiff failed to point to a closely analogous case that clearly established his right to be free from the use of force at issue, and the Seventh Circuit held that the force used was not so plainly excessive that, as an objective matter, the officer would have been on notice that he was violating the plaintiff's constitutional rights.

In *Brooks v. City of Aurora, Illinois,* 653 F.3d 478 (7th Cir. 2011), the Seventh Circuit affirmed summary judgment in favor of a police officer on qualified immunity grounds when he used pepper spray on an arrestee who had ceased active, physical resistance for a few seconds but had not submitted to the officer's order to put his hands behind his back to be handcuffed. The suspect was retreating backward toward his house and still arguably posed a threat of flight or

further resistance. The court held that controlling law at the time of the incident would not have communicated to a reasonable officer that applying pepper spray under the circumstances was unlawful.

In *Fitzgerald v. Santoro,* 707 F.3d 725 (7th Cir. 2013), a police officer broke the wrist of a woman who was restrained on a gurney inside an ambulance. The officer employed a wrist-lock technique to restrain her and she jerked her arm away from the officer's grasp, causing the wrist to break in several locations. She sued the officer for excessive force, and the district court granted the officer's motion for summary judgment. The Seventh Circuit affirmed, holding that a wrist-lock was a minimal restraint technique and reasonable given the plaintiff's active resistance.

In contrast, in *Phillips v. Community Insurance Corp.*, 678 F.3d 513 (7th Cir. 2012), the court rejected a qualified immunity defense based on the use of a SL6 baton launcher on a suspect who was not actively resisting and was not assaultive or dangerous at the time of the shooting. The court found that the law was clearly established that using such force on a person who was not actively resisting arrest or fleeing violated the Fourth Amendment.

In *Estate of Rudy Escobedo v. Martin,* 702 F.3d 388 (7th Cir. 2012), the Seventh Circuit held that the law was not clearly established relating to deployment of tear gas, "flashbang grenades," and a tactical response team that stormed a residence and shot and killed a suicidal and mentally unstable man who had ingested cocaine and barricaded himself in his closet. Unlike the facts in *Phillips,* however, the suspect in *Martin* was armed with a firearm and posed an actual threat of harm to the police.

2. [5.18] Deadly Force

Deadly force claims are analyzed under the Fourth Amendment's objective reasonableness standard. *Graham v. Connor,* 490 U.S. 386, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989); *Tennessee v. Garner,* 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694, 1700 (1985). In *Garner,* the Supreme Court struck down a Tennessee statute authorizing the use of deadly force on nonviolent, fleeing felons. The Court held that the use of deadly force is justified if an objectively reasonable police officer in the same circumstances would conclude that the suspect posed an imminent threat of death or serious bodily harm. *See also Marion v. City of Corydon, Indiana,* 559 F.3d 700 (7th Cir. 2009) (affirming summary judgment for officers who shot plaintiff in his truck after he led police on dangerous high-speed chase).

The Supreme Court reaffirmed these standards in *Plumhoff v. Rickard,* 572 U.S. ___, 188 L.Ed.2d 1056, 134 S.Ct. 2012, 2020 (2014). In that case, the decedent led the police on a high-speed car chase on a highway. The decedent left the road and entered a parking lot, where he spun out and struck a squad car as he continued to flee. An officer fired 3 shots into the decedent's car. The decedent managed to drive away and almost struck another squad car in the process. Several officers fired 12 more shots as the decedent sped away. This time both he and his passenger were struck and both died either from the gunshots or car crash. The decedent's mother sued the police under 42 U.S.C. §1983 and the Fourth Amendment, alleging excessive use of force. The district and appellate courts denied summary judgment and the officers' qualified immunity defense, but the Supreme Court reversed. The Court found that the police were justified in using deadly force

and therefore did not violate the Fourth Amendment because the decedent through his outrageously reckless driving posed a grave public safety risk. The Court also found that the officers were justified in firing at the suspect in order to end the threat and did not need to stop shooting until the threat was ended. Finally, the Court found that, even if the officers' had violated the Fourth Amendment, they would still be entitled to qualified immunity because no clearly established law precluded their conduct.

The Fourth Amendment does not require the "use of the least or even a less deadly alternative so long as the use of deadly force is reasonable." *Scott v. Edinburg,* 346 F.3d 752, 760 (7th Cir. 2003), quoting *Plakas v. Drinski,* 19 F.2d 1143, 1149 (7th Cir. 1994). A use of force is not excessive when the police face a fluid situation and appropriately increase their use of force in order to keep a situation under control. *Padula v. Leimbach,* 656 F.3d 595 (7th Cir. 2011).

Note, however, that even when suspects are armed, police officers may not always be entitled to summary judgment on the reasonableness of their use of force. In *Sledd v. Linsday,* 102 F.3d 282, 286 – 288 (7th Cir. 1996), a genuine issue of material fact existed, precluding summary judgment, when the plaintiff claimed that he grabbed his gun only after non-uniformed officers battered down his front door without a prior "knock and announce." *Cf. Maravilla v. United States,* 60 F.3d 1230, 1232 – 1233 (7th Cir. 1995) (summary judgment granted to ATF agents who knocked and announced and then shot resident who appeared to be shooting at backup agents outside house; court found no triable issue of fact regarding whether agents fired to protect themselves or agents outside house); *Soller v. Moore,* 84 F.3d 964, 969 – 970 (7th Cir. 1996) (court rejected estate's self-defense instruction when off-duty, non-uniformed officer shot passenger of erratically driven car after decedent lunged at officer despite officer's identification of himself as officer).

3. [5.19] Electronic Control Devices (*i.e.*, Tasers)

One of the most controversial issues in law enforcement over the last ten years has involved the use of "less than lethal" weapons called by a variety of names, such as electronic control devices (ECDs), conducted energy devices (CEDs), or conducted energy weapons (CEW). TASER International is one of the leading manufacturers of such devices. For simplicity sake, this section refers to these weapons as "Tasers."

A Taser fires dart-like electrodes propelled by compressed nitrogen cartridges connected to the weapon by conducted wire up to 35 feet. The weapon emits a 50,000 volt open circuit arc that overrides the neuromuscular system of a suspect, resulting in momentary incapacitation (called "neuromuscular incapacitation" (NMI)). This makes it theoretically easier to control and subdue an actively resisting suspect. The weapon is deployed at a five-second cycle (although the cycle time may be shortened) and is capable of repeat deployments. The weapon may also be used in a stun gun mode. See TASER International's website, www.taser.com.

Tasers have come under fire (no pun intended) in recent years. Amnesty International has been one of the main critics and has called for stricter limits on Taser use, citing 500 deaths following Taser use since 2001. See Press Release, Amnesty International USA, *Amnesty International Urges Stricter Limits on Police Taser Use as U.S. Death Toll Reaches 500* (Feb. 15,

2012), www.amnestyusa.org/news/press-releases/amnesty-international-urges-stricter-limits-on-police-taser-use-as-us-death-toll-reaches-500. However, according to TASER International, its product has reduced injuries by nearly 80 percent and saved over 100,000 lives, with residual cost savings in civil liability cases. See www.taser.com. A recent independent study conducted by the U.S. Department of Justice concluded that "[t]here is no conclusive medical evidence in the current body of research literature that indicates a high risk of serious injury or death to humans from the direct or indirect cardiovascular or metabolic effects of short-term [Taser] exposure in healthy, normal, nonstressed, nonintoxicated persons." Office of Justice Programs, U.S. Department of Justice, *NIJ Special Report: Study of Deaths Following Electro Muscular Disruption,* p. viii (May 2011), www.ncjrs.gov/pdffiles1/nij/233432.pdf. The study found that short-term use is safe in most cases, that the risk of death less than 0.25 percent, and that Tasers do not cause or contribute to death in the large majority of cases. *Id.*

The U.S. Supreme Court has yet to take a Taser case. However, the federal appellate and district courts across the country increasingly have addressed Taser use over the years. While Taser use is not per se excessive, it is not de minimis force either. *Lewis v. Downey,* 581 F.3d 467, 475 (7th Cir. 2009) ("pain, not injury, is the barometer by which we measure claims of excessive force . . . and one need not have personally endured a taser jolt to know the pain that must accompany it"). Taser use, like any other use of force, is analyzed by the standards enunciated under *Graham v. Connor,* 490 U.S. 386, 104 L.Ed.2d 443, 109 S.Ct. 1865, 1871 – 1872 (1989), and its progeny.

Tasers are categorized as "nonlethal" control devices and have been compared to other nonlethal weapons, such as mace, capture nets, sticky foam, and rubber bullets. *Plakas v. Drinksi,* 19 F.3d 1143 (7th Cir. 1994). Courts are more likely to uphold Taser use when an officer is alone without backup and faced with an aggressive suspect who is too far away to control without weapons. *Id.; Buckley v. Haddock,* 292 Fed.Appx. 791 (11th Cir. 2008). Courts have upheld Taser use when an officer warned the suspect that the Taser would be used (*Parker v. Gerrish,* 547 F.3d 1 (1st Cir. 2008); *Autin v. City of Baytown, Texas,* 174 Fed.Appx. 183 (5th Cir. 2005)), when the offense was severe and violent (*Beaver v. City of Federal Way,* No. 07-35814, 2008 WL 5065620 (9th Cir. Nov. 25, 2008)), when the Taser use resulted in minor or no injuries (*Draper v. Reynolds,* 369 F.3d 1270 (11th Cir. 2004); *Beaver, supra*), and when the suspect was actively resisting or evading arrest (*Hinton v. City of Elwood, Kansas,* 997 F.2d 774 (10th Cir. 1993)). A single shot of a Taser is likely more defensible than multiple deployments. *United States v. Norris,* 640 F.3d 295 (7th Cir. 2011). *But see Lee v. Metropolitan Government of Nashville,* Civil No. 3:06-0108, 2009 WL 2462209 (M.D.Tenn. Aug. 10, 2009) (upholding jury verdict for officers and noting that there was considerable evidence presented showing that multiple Taser applications on decedent who was under influence of drugs were not effective).

In contrast, courts have rejected Taser use when the Taser was deployed after a suspect was subdued (*Orem v. Rephann,* 523 F.3d 442 (4th Cir. 2008); *Roberts v. Manigold,* 240 Fed.Appx. 675 (6th Cir. 2007)), when there was a lack of warning before the Taser was used (*Lewis, supra*), and when the suspect was only passively resisting (*Phillips v. Jack,* No. 06-CV-1041, 2008 WL 4331427 (E.D.Wis. Sept. 19, 2008)). The courts are particularly circumspect when a person dies immediately following multiple uses of a Taser. *Cyrus v. Town of Mukwonago,* 624 F.3d 856 (7th Cir. 2010) (reversing summary judgment when mentally ill person was shot multiple times with Taser and died following incident; question of fact existed on extent of decedent's resistance).

In *Forrest v. Prine,* 620 F.3d 739 (7th Cir. 2010), the police responded to a 911 call about a man hitting his family in his home. The police forcefully entered the home, and an altercation ensued during which the suspect struck an officer in the face. A Taser was used several times to subdue the man after warnings were given. The court held that that the use of force was reasonable given the man's aggressiveness and active resistance and the fact that he posed an immediate danger of harm to the police.

In *Clarett v. Roberts,* 657 F.3d 664 (7th Cir. 2011), the police pursued a fleeing felon into his home and bedroom. A struggle ensued inside the bedroom between the suspect and an officer. The suspect's mother blocked the bedroom door and prevented other officers from entering. She was shot with a Taser three times in the hallway. The court held that the use of the Taser was reasonable because of her physical resistance; her refusal to obey commands to move away from the door; the small, crowded place that made it difficult to physically remove her; and her continued resistance even after being shot with the Taser once.

In *Abbott v. Sangamon County, Illinois,* 705 F.3d 706 (7th Cir. 2013), a suspect was shot with a Taser in the back seat of a squad car. The suspect was handcuffed, but had maneuvered his feet underneath him so that his hands were in front of him. There was no partition between the seats. The suspect fought with the officer, so the officer stepped back and deployed the Taser in stun gun mode several times to subdue his active resistance. The Seventh Circuit found that the officer's use of the Taser under these circumstances did not violate clearly established law and therefore the officer was entitled to qualified immunity from suit. However, at the same time that the suspect was acting up, his mother was trying to interfere with the arrest. She, too, was shot with a Taser in dart mode and fell to the ground. An officer ordered her to roll over but she just laid there. She was shot again. The court held that the law was clearly established that deploying a Taser in dart mode on a nonviolent, noncompliant, misdemeanant who was merely passively resisting violated the Fourth Amendment. *See also Haynes v. Village of Lansing,* 656 F.Supp.2d 783 (N.D.Ill. 2009) (denying summary judgment when police used Taser three times on unarmed woman who weighed 415 pounds and was laying prone on floor following arrest for giving false information about traffic offense).

Furthermore, the failure of a police department to provide Tasers to its officers is not a constitutional violation. As stated by the Seventh Circuit in *Plakas, supra,* 19 F.3d at 1150, "[I]t is clear that the Constitution does not enact a police administrator's equipment list." Nor does the fact that an officer mistakenly drew his firearm instead of his Taser amount to a Fourth Amendment violation. *See Torres v. City of Madera,* 524 F.3d 1053 (9th Cir. 2008); *Henry v. Purnell,* 501 F.3d 374 (4th Cir. 2007).

4. [5.20] Failure To Intervene

Omissions as well as actions can violate an individual's civil rights. "[U]nder certain circumstances a state actor's failure to intervene renders him or her culpable under [42 U.S.C.] §1983." *Yang v. Hardin,* 37 F.3d 282, 285 (7th Cir. 1994). The seminal case in the Seventh Circuit on the duty of an officer to intervene is *Byrd v. Brishke,* 466 F.2d 6 (7th Cir. 1972). In *Byrd,* the court noted that "one who is given the badge of authority of a police officer may not

ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge." 466 F.2d at 11. The court in *Yang, supra,* identified three situations:

> **An officer who is present and fails to intervene to prevent other law enforcement officers from infringing the constitutional rights of citizens is liable under §1983 [**specifically**] if that officer had reason to know: (1) that excessive force was being used, (2) that a citizen has been unjustifiably arrested, or (3) that any constitutional violation has been committed by a law enforcement official; *and* the officer had a realistic opportunity to intervene to prevent the harm from occurring. [**Emphasis in original.**]** 37 F.3d 282 at 285.

See also Meehan v. County of Los Angeles, 856 F.2d 102, 106 (9th Cir. 1988); *Mendez v. Rutherford,* 655 F.Supp. 115 (N.D.Ill. 1986); *Taylor v. City of Chicago, Illinois,* No. 09 CV 7911, 2010 WL 4877797 (N.D.Ill. Nov. 23, 2010).

A police officer need not have been present at the assault to be held liable for failing to intervene if he or she had a realistic opportunity to intervene. *Medley v. Turner,* 869 F.Supp. 567, 576 (N.D.Ill. 1994) (summary judgment inappropriate when there was dispute as to whether " 'realistic opportunity' to intervene" was present when plaintiff claimed that officer saw assault begin and "left the room without saying anything"). *But see Thompson v. Boggs,* 33 F.3d 847, 857 (7th Cir. 1994) (court found that officer did not have realistic opportunity to prevent second officer from tackling fleeing plaintiff).

Police officers are not, however, duty bound to intervene on behalf of a person who is being beaten by a private party unless (a) the refusal to lend assistance is motivated by discriminatory animus (*see, e.g., Tucker v. Callahan,* 867 F.2d 909, 913 – 914 (6th Cir. 1989); *Escamilla v. City of Santa Ana,* 796 F.2d 266 (9th Cir. 1986)) or (b) a special duty has arisen (*see, e.g., Moran v. City of Chicago,* 286 Ill.App.3d 746, 676 N.E.2d 1316, 222 Ill.Dec. 112 (1st Dist. 1997); *Banks v. Chicago Housing Authority,* 13 F.Supp.2d 793 (N.D.Ill. 1998)). For a more complete discussion of the duty to provide police protection, see §5.22 below.

5. [5.21] Vehicular Pursuits

Lawsuits often result from accidents arising from high-speed police vehicular pursuits. Claims have been brought under 42 U.S.C. §1983 for violations of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. Generally speaking, however, plaintiffs have not fared well in federal court under either theory. In a number of cases, the U.S. Supreme Court has laid out the landscape for §1983 liability and vehicular pursuits.

The Supreme Court held, in *California v. Hodari D.,* 499 U.S. 621, 113 L.Ed.2d 690, 111 S.Ct. 1547 (1991), that for a fleeing suspect to be seized for Fourth Amendment purposes

a. the arresting officer must apply force or display a show of authority; and

b. the physical force or show of authority must cause the fleeing subject to stop.

Additionally, the amount of force that is constitutionally permitted to execute a seizure increases with the threat of danger posed by the individual being seized. Further, a police officer cannot create the encounter that leads to the use of deadly force. *Id.* However, to base a claim on the Fourth Amendment, the plaintiff must prove that the pursuing police car struck, rammed, or collided with the fleeing suspect's vehicle; otherwise, there is no seizure. *See Wourms v. Fields*, 742 F.3d 756, 758 (7th Cir. 2014); *Steen v. Myers*, 486 F.3d 1017 (7th Cir. 2007). Even then, the plaintiff still must prove the officer's actions were unreasonable under the circumstances. *Wourms, supra; Scott v. Harris*, 550 U.S. 372, 167 L.Ed.2d 686, 127 S.Ct. 1769, 1778 – 1779 (2007).

In *County of Sacramento v. Lewis*, 523 U.S. 833, 140 L.Ed.2d 1043, 118 S.Ct. 1708, 1721 (1998), the Supreme Court held that under circumstances that "shock the conscience," police officers can be held liable under §1983 for injuries or death resulting from high-speed chases. The Court found that police conduct in such circumstances could violate an individual's constitutional rights under the Due Process Clause of the Fourteenth Amendment. 118 S.Ct. at 1720. Prior to *Lewis*, the Court had held that police pursuit did not amount to a "seizure" under the Fourth Amendment. *Hodari D., supra*, 111 S.Ct. at 1550 – 1551. In *Lewis* the Court held that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressable by an action under §1983." *Lewis, supra*, 118 S.Ct. at 1720. The Court explained that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." 118 S.Ct. at 1718. The standard requires "substantial culpability" and a "purpose to cause harm." *Bublitz v. Cottey*, 327 F.3d 485, 491 (7th Cir. 2003) (use of tire deflation device that caused deaths of bystanders found not to violate Fourteenth Amendment), quoting *Schaefer v. Goch*, 153 F.3d 793, 798 (7th Cir. 1998).

When a suspect ignores a police officer's initial efforts to curb the vehicle and instead begins evasive tactics, the police officer is faced with a difficult choice: (a) chase the vehicle, thereby increasing the risk of injury to the suspect, the officer, and uninvolved third parties; or (b) permit the offender to escape, thereby encouraging such illegal, evasive tactics. If the officer chooses to give chase, he or she must constantly evaluate whether the rapidly changing circumstances warrant discontinuing the chase as speeds increase and/or as the chase progresses from less densely to more densely populated areas. *See Fiser v. City of Ann Arbor*, 107 Mich.App. 367, 309 N.W.2d 552 (1981), *aff'd in part, rev'd in part*, 417 Mich. 461 (1983). Many municipalities have instituted policies that prohibit their police officers from traveling over a certain speed in order to arrest traffic offenders. However, violation of these policies does not implicate due-process protections. *Steen, supra*, 486 F.3d at 1023.

6. [5.22] Failure To Provide Police Protection

42 U.S.C. §1983 lawsuits are sometimes filed over allegations that the police failed to act to prevent an injury caused by another person. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 103 L.Ed.2d 249, 109 S.Ct. 998, 1003 (1989), the Supreme Court made clear that the Due Process Clause of the Fourteenth Amendment is a limitation on the state's power to act, not a guarantee of certain minimal levels of safety and security. *See Kitzman-Kelley v. Warner*, 203 F.3d 454, 457 (7th Cir. 2000) (citing *DeShaney*); *Monfils v. Taylor*, 165

F.3d 511, 516 (7th Cir. 1998) (same). *DeShaney* held that the State of Wisconsin was under no constitutional duty to protect a severely battered child from his father even though it had received reports that the child had been abused. Although the four-year-old boy was beaten so severely that he fell into a life-threatening coma, the court found that the state was not constitutionally duty-bound to remove him from an unsafe environment:

> **[**W**]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. [**Citations omitted.**]** 109 S.Ct. at 1005 – 1006.

In light of *DeShaney*, the Seventh Circuit has frequently rejected efforts to hold law enforcement officials civilly responsible for injuries caused by third persons. In *Archie v. City of Racine,* 847 F.2d 1211 (7th Cir. 1988), the Seventh Circuit affirmed the dismissal of a civil rights case even though a fire department dispatcher told a dying woman to breathe into a paper bag instead of honoring her request for an ambulance. *See also Dykema v. Skoumal,* 261 F.3d 701 (7th Cir. 2001) (no duty to protect paid informant from being shot); *Estate of Stevens v. City of Green Bay,* 105 F.3d 1169, 1175 – 1176 (7th Cir. 1997) (no duty to protect drunken man who stumbled into path of car after police evicted — but never arrested — man from bar); *Ellsworth v. City of Racine,* 774 F.2d 182 (7th Cir. 1985) (no duty owed to witness' wife who was beaten after state-provided bodyguard relieved from duty); *Beard v. O'Neal,* 728 F.2d 894 (7th Cir. 1984) (no duty to prevent contract murder from occurring); *Jackson v. City of Joliet,* 715 F.2d 1200, 1204 (7th Cir. 1983) (no duty to aid passengers in burning car).

However, two exceptions have grown out of *DeShaney, supra.* One exists if the state has a special relationship with a person, *i.e.,* if the state has custody of a person, thus cutting out alternate avenues of aid. *See, e.g., Youngberg v. Romeo,* 457 U.S. 307, 73 L.Ed.2d 28, 102 S.Ct. 2452 (1982) (requiring services to involuntarily committed mental patients); *City of Revere v. Massachusetts General Hospital,* 463 U.S. 239, 77 L.Ed.2d 605, 103 S.Ct. 2979 (1983) (requiring medical care for suspects in police custody); *K.H. ex rel. Murphy v. Morgan,* 914 F.2d 846 (7th Cir. 1990) (child in state custody has liberty interest in not being placed in abusive foster home); *Paine v. Johnson,* 689 F.Supp.2d 1027, 1083 (N.D.Ill. 2010) (denying summary judgment when pretrial detainee with bipolar disorder released from custody into high-crime area without being provided mental health treatment), *aff'd in part, rev'd in part sub nom. Paine v. Cason,* 678 F.3d 500 (7th Cir. 2012). The other exception is the state-created danger exception. *Monfils, supra,* 165 F.3d at 519 – 520 (officer's assurance that information containing identity of informant would be kept confidential, coupled with inaction to protect information, placed victim in position of greater danger). *See also Garagher v. Marzullo,* 478 F.Supp.2d 1008, 1014 (N.D.Ill. 2006).

In *Reed v. Gardner,* 986 F.2d 1122 (7th Cir. 1993), the court held that the police could be held liable to third parties claiming they were injured in a car crash because the officers had allowed an intoxicated passenger to drive away after they had arrested the driver. The *Reed* court

held that liability exists when the state "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." 986 F.2d at 1125, quoting *Gregory v. City of Rogers, Arkansas,* 974 F.2d 1006, 1010 (8th Cir. 1992). *See also Estate of Allen v. City of Rockford,* 349 F.3d 1015 (7th Cir. 2003) (special relationship established between police officers and pretrial detainee arrested for driving under influence of drugs and taken to hospital); *Sadrud-Din v. City of Chicago,* 883 F.Supp. 270, 275 – 276 (N.D.Ill. 1995) (court denied summary judgment to city and officers who allegedly failed to protect fellow officer from her husband — who was also fellow officer — because defendants were aware that husband had violated orders of protection and pointed his service revolver at his wife's head); *Wallace v. Adkins,* 115 F.3d 427 (7th Cir. 1997) (order that prison guard remain at his especially dangerous post, while at same time offering him false assurances that he would be protected, qualified as affirmative act for purposes of state-created danger claim).

The Third Circuit held that *DeShaney, supra,* did not bar a claim brought by a student who was sexually abused by his teacher because the school principal and assistant principal allegedly maintained a policy of condoning sexual misconduct among teachers. *Stoneking v. Bradford Area School District,* 882 F.2d 720 (3d Cir. 1989). However, in *Nabozny v. Podlesny,* 92 F.3d 446, 460 – 461 (7th Cir. 1996), the Seventh Circuit rejected a homosexual student's argument that school administrators were liable under *Stoneking* for maintaining a policy of failing to punish the student's assailants (which allegedly exacerbated his harm). In finding that the school officials had no duty to act, the court stated that it "could [not] conclude that the defendants' conduct increased the risk of harm to Nabozny beyond that which he would have faced had the defendants taken no action." 92 F.3d at 460, citing *Reed, supra,* and *J.O. v. Alton Community Unit School District 11,* 909 F.2d 267, 271 – 272 (7th Cir. 1990) (school had no affirmative duty to protect students absent "special relationship"). While no holding from the Seventh Circuit has relied on a *Stoneking* theory of liability, both *Nabozny* (92 F.3d at 460) and *J.O.* (909 F.2d at 273) have indicated that such a theory is viable. *See T.E. v. Grindle,* 599 F.3d 583, 589 (7th Cir. 2010) (school principal may be held liable for actively concealing and turning blind eye to evidence of student sexual abuse by teacher). Additionally, several district courts within the Seventh Circuit have applied *Stoneking* to establish a claim. *See, e.g., Doe I v. Board of Education of Consolodated School District 230, Cook County, Illinois,* 18 F.Supp.2d 954, 959 (N.D.Ill. 1998); *Doe v. Board of Education of Hononegah Community High School District #207,* 833 F.Supp. 1366, 1377 – 1378 (N.D.Ill. 1993); *Peck v. West Aurora School District 129,* No. 06 C 1153, 2006 WL 2579678 at *4 (N.D.Ill. Aug. 30, 2006); *Doe v. Evanston Township Consolidated School District 202,* No. 93 C 1011, 1994 WL 55652 at **1 – 2 (N.D.Ill. Feb. 23, 1994).

In *Cason, supra,* the court affirmed the denial of a qualified immunity defense in a failure-to-protect case. In *Paine,* the police arrested a mentally disturbed female and brought her to a police lockup. The woman's parents had telephoned the police station and informed the police she was bipolar. The police had also observed her at the station alternating between calm and manic conduct. Nonetheless, she was released outside the police station in the evening hours wearing a cutoff top with a bare midriff, shorts, and boots. She entered an apartment complex, where she was sexually assaulted. She tried to escape by jumping from a window and suffered permanent brain injuries. She filed a §1983 due-process claim against the police, arguing that the police put her in danger when she was unable to protect herself. The Seventh Circuit held that 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 she was unable to protect herself.

It is important to note that *DeShaney, supra,* and its progeny apply only to due-process claims alleging that the police failed to act. Thus, when the plaintiff alleges that the police officers failed to take action because of the plaintiff's race or sex, a cause of action for a violation of equal protection is stated. *Jackson, supra,* 715 F.2d at 1203 ("If the defendants had withheld protection from the plaintiffs' decedents because they were blacks or members of some other vulnerable minority — if the defendants were discriminating in a vicious or irrational fashion — there would be an equal protection issue."). *See also Hawk v. Perillo,* 642 F.Supp. 380, 384 (N.D.Ill. 1985); *Watson v. City of Kansas City, Kansas,* 857 F.2d 690 (10th Cir. 1988).

In *Bond v. Atkinson,* 728 F.3d 690 (7th Cir. 2013), the court rejected an equal-protection challenge brought by a plaintiff who was shot by her husband, who then fatally shot himself. She filed suit alleging that the police failed to enforce an order of protection and failed to seize her husband's weapons on account of her sex. She alleged specifically that the police failed to enforce laws against domestic violence, most of which involved women. The district court denied the officers' qualified immunity defense, but the Seventh Circuit reversed and found that a §1983 equal-protection claim required intentional discrimination and the plaintiff failed to prove that the police acted with discriminatory intent against her. The fact that the police were wrong about the risk that the husband posed did not make them constitutionally liable. The court stated that the Constitution did not guarantee mistake-free police work.

D. [5.23] Malicious Prosecution and Due-Process Claims

A constitutional malicious prosecution claim under 42 U.S.C. §1983 is not recognized in Illinois federal courts because Illinois common law provides a state law remedy for malicious prosecution. *See Newsome v. McCabe,* 256 F.3d 747, 750 (7th Cir. 2001); *Gauger v. Hendle,* 349 F.3d 354, 363 (7th Cir. 2003), *overruled on other grounds by Wallace v. City of Chicago,* 440 F.3d 421 (7th Cir. 2006); *Llovet v. City of Chicago,* 761 F.3d 759, 760 (7th Cir. 2014). The Seventh Circuit has also rejected attempts to expand the Fourth Amendment to include malicious prosecution allegations. *See, e.g., Llovet, supra,* 761 F.3d at 764 (rejecting "continuing seizure" theory of liability under Fourth Amendment). However, when the police are alleged to have deliberately withheld exculpatory evidence from prosecutors in contravention of the principles outlined in *Brady v. State of Maryland,* 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 11194 (1963), a constitutional claim is recognized under §1983 for violation of the Due Process Clause of the Fourteenth Amendment. *Newsome, supra,* 256 F.3d at 752; *Jones v. City of Chicago,* 856 F.2d 985 (7th Cir. 1988).

When the police are alleged to have manufactured or fabricated evidence that they knew was untrue, a due-process claim is recognized. *Whitlock v. Brueggemann,* 682 F.3d 567 (7th Cir. 2012); *Fields v. Wharrie,* 740 F.3d 1107 (7th Cir. 2014). However, if the only claim is that the police coerced a witness to implicate the plaintiff in a crime, this does not state a cognizable due-process violation. *Petty v. City of Chicago,* 754 F.3d 416 (7th Cir. 2014). Furthermore, a due-process *Brady* violation claim exists if exculpatory evidence favorable to the accused is withheld or suppressed deliberately to the accused's prejudice, *i.e.,* either the defendant did not know about it in time to use it at his or her criminal trial, or the evidence was not available to him or her with the exercise of reasonable diligence. 754 F.3d at 423. But if the accused knew about the police misconduct in sufficient time to use any exculpatory evidence at his or her criminal trial, there is no *Brady* violation and therefore no §1983 due-process claim. *Id.*

D. [5.24] Police Perjury

The doctrine of absolute witness immunity prevents a criminal defendant from recovering damages from a police officer alleged to have perjured himself or herself during the criminal pretrial proceedings or trials. *Briscoe v. LaHue,* 460 U.S. 325, 75 L.Ed.2d 96, 103 S.Ct. 1108, 1115 (1983). *See also Jones v. Cannon,* 174 F.3d 1271 (11th Cir. 1999); *Curtis v. Bembenek,* 48 F.3d 281 (7th Cir. 1995). The doctrine also protects witnesses who testify before grand juries. *Rehberg v. Paulk,* 566 U.S. ___, 182 L.Ed.2d 593, 132 S.Ct. 1497 (2012). The doctrine is derived in part from the common-law absolute immunity accorded all persons who played integral roles in the judicial process. In *Briscoe, supra,* the Court rejected a governmental witness exception to traditional witness immunity, reasoning that damages liability under 42 U.S.C. §1983 for perjured testimony could result in public officials being dragged into court every time unhappy criminal defendants charged them with wrongdoing. 103 S.Ct. at 1116. However, there is a "complaining witness" exception to absolute immunity. *Gauger v. Hendle,* 349 F.3d 354, 358 (7th Cir. 2003); *Cervantes v. Jones,* 188 F.3d 805, 809 – 810 (7th Cir. 1999).

F. [5.25] Off-Duty Police Officers — Scope of Employment and Color of Law

The most common issue in cases in which off-duty police officers are sued for civil rights violations is whether the deep pocket of the governmental employer may be reached to satisfy a judgment or facilitate a settlement. A local public entity's duty to indemnify its law enforcement officials on a civil rights or state law civil damages claim is triggered only if the officer was acting within the scope of his or her employment at the time of the occurrence. 745 ILCS 10/9-102. In addition, a prerequisite to liability in a civil rights case is a determination that the officer was acting under color of state law. 42 U.S.C. §1983. If the officer was acting either outside the scope of his or her employment or was not acting under color of state law, the plaintiff's case can be chiseled to a common-law claim against the much shallower pocket of an unindemnified public employee. Under such circumstances, the plaintiff often elects to forgo the claim altogether.

However, a finding that a public employee acted under "color of law" for purposes of §1983 does not automatically establish that the employee acted within the "scope of employment." *Graham v. Sauk Prairie Police Commission,* 915 F.2d 1085, 1093 (7th Cir. 1990) (analyzing Wisconsin statute regarding indemnification of public employees). The "under color of law" category is broader than the "scope of employment" category. *Id. See also Padilla v. Easley,* No. 91 C 4525, 1993 WL 181458 at *3 n.2 (N.D.Ill. May 27, 1993) (finding that defendant was liable under §1983 did not necessarily include finding that city was liable under Illinois law). *But see Wilson v. Price,* 624 F.3d 389 (7th Cir. 2010) (holding than alderman who beat plaintiff for refusing to remove illegally parked car was not acting pursuant to his legislative duties and therefore was not acting under color of law).

Though the concepts of color of law and scope of employment are not identical (*see Coleman v. Smith,* 814 F.2d 1142, 1149 (7th Cir. 1987)), the parameters of both doctrines are sufficiently analogous in many cases of police misconduct to permit a singular analysis. An officer acts under color of law even if he or she violates state or local law, provided that he or she acted within the apparent scope of the office. *Monroe v. Pape,* 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961);

Latuszkin v. City of Chicago, 250 F.3d 502, 505 – 506 (7th Cir. 2001). The mere fact that the officer was off duty is not dispositive. A court's determination of the capacity in which an official was functioning undertakes a commonsense approach that examines the nature of the specific act performed. For instance, a Saturday night barroom brawl involving an off-duty police officer and patron should not give rise to a civil rights claim. When the off-duty police officer causes the barroom opponent to be arrested; however, civil rights liability may ensue. In addition, the officer's use of his or her service revolver, display of official badge, or identification of himself or herself as a police officer is indicative of action under color of state law. *See Gibson v. City of Chicago,* 910 F.2d 1510, 1517 n.10 (7th Cir. 1990) (collecting cases); *Revene v. Charles County Commissioners,* 882 F.2d 870 (4th Cir. 1989) (fact that shooting occurred while deputy sheriff was off duty, out of uniform, and driving personal vehicle not dispositive regarding whether color of law present); *Latuszkin, supra* (§1983 claims dismissed when there were no allegations that off-duty police officer was engaged in police activity, displayed any police power, or possessed any indicia of his office).

In *Pickrel v. City of Springfield, Illinois,* 45 F.3d 1115, 1118 (7th Cir. 1995), the court held that a plaintiff had properly pleaded that the conduct of an off-duty officer working security at a fast-food restaurant was action "under the color of state law" at the time of their altercation when the officer was allegedly wearing his uniform and gun, had flashed his badge, had his marked squad car parked outside, and had arrested the plaintiff for resisting a peace officer. But in *Gibson, supra,* a police officer who had been suspended and thus stripped of all authority before he shot an individual did not act under color of law even though he acted under the apparent authority of his office. The *Gibson* court distinguished police officers who act when they have absolutely no authority from police officers who simply misuse their authority.

Turning to the scope of employment threshold, a public entity is not responsible for acts of an employee who acts purely in his or her own interest. *Sunseri v. Puccia,* 97 Ill.App.3d 488, 422 N.E.2d 925, 930, 52 Ill.Dec. 716 (1st Dist. 1981); *Lyons v. Adams,* 257 F.Supp.2d 1125, 1140 (N.D.Ill. 2003). Thus, a sexual assault that took place during a gynecological exam was outside the scope of employment. *Padilla v. d'Avis,* 580 F.Supp. 403, 409 – 410 (N.D.Ill. 1984). *See also Hoover v. University of Chicago Hospitals,* 51 Ill.App.3d 263, 366 N.E.2d 925, 926 – 929, 9 Ill.Dec. 414 (1st Dist. 1977). Similarly, rapes committed by off-duty police officers are generally considered too outrageous to be within the scope of employment. *Gambling v. Cornish,* 426 F.Supp. 1153, 1154 (N.D.Ill. 1977); *Bates v. Doria,* 150 Ill.App.3d 1025, 502 N.E.2d 454, 104 Ill.Dec. 191 (2d Dist. 1986). *But see Parker v. Williams,* 862 F.2d 1471 (11th Cir. 1989) (civil rights award upheld against chief deputy whose rape of inmate was made possible by deputy's misuse of position).

Off-duty police officers typically act outside the scope of employment when they shoot people for reasons unrelated to the enforcement of the criminal laws. *Dzing v. City of Chicago,* 84 Ill.App.3d 704, 406 N.E.2d 121, 40 Ill.Dec. 420 (1st Dist. 1980) (intoxicated off-duty police officer acted outside scope of employment when he used his service revolver to shoot his way into victim's apartment, believing her to be intruder in his own apartment).

However, if an employee is acting (1) in his or her own interest or (2) with malice or ill will, the conduct may still fall within the scope of employment if motivated, at least in part, to serve

his or her employer. *Copeland v. County of Macon, Illinois,* 403 F.3d 929, 934 – 935 (7th Cir. 2005). For instance, one case involved two police officers who planted evidence, filed false reports, and gave perjured testimony to cover up the actual nature of a fatal shooting. *Bell v. City of Milwaukee,* 536 F.Supp. 462, 478 (E.D.Wis. 1982), *aff'd in part, rev'd in part,* 746 F.2d 1205 (7th Cir. 1984). Although the police officer was unquestionably furthering his personal objective of escaping punishment, he was still performing his duties as a police officer, albeit in a highly improper manner. Accordingly, the city was required to indemnify the individual police officer. *Id.* In another case, three deputy sheriffs framed an innocent citizen for burglaries that they had committed. *Hibma v. Odegaard,* 769 F.2d 1147, 1153 (7th Cir. 1985). Following *Bell,* the Seventh Circuit determined that the deputies were acting in the scope of their employment, thus triggering the indemnification statute. *See also Graham, supra,* 915 F.2d at 1095 – 1096; *Coleman, supra; Argento v. Village of Melrose Park,* 838 F.2d 1483 (7th Cir. 1988). *See also Wilson v. City of Chicago,* 120 F.3d 681 (7th Cir. 1997), in which the court found an officer's misconduct to be within the scope of his employment when he beat the plaintiff to improperly obtain his confession while investigating a crime. In so holding, the court noted that the City of Chicago's claim that the defendant officer was acting outside the scope of his employment "border[ed] on the frivolous [because he] was enforcing the criminal law of Illinois overzealously by extracting confessions from criminal suspects by improper means. He was, as it were, *too* loyal an employee. He was acting squarely within the scope of his employment." [Emphasis in original.] 120 F.3d at 685.

G. [5.26] Negligent Conduct of Police Officers

While 42 U.S.C. §1983 has proved a valuable tool for redressing wrongs committed under color of state law, it is not a panacea for every moral, religious, or even legal affront. *Paul v. Davis,* 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976). Thus, mere negligence is insufficient to state a claim for a deprivation of due process under §1983. *See Daniels v. Williams,* 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986); *Davidson v. Cannon,* 474 U.S. 344, 88 L.Ed.2d 677, 106 S.Ct. 668 (1986); *Pena v. Leombruni,* 200 F.3d 1031, 1033 (7th Cir. 1999).

When injuries arise outside a "seizure" as contemplated by the Fourth Amendment, an injured person "may prosecute a substantive due process claim under section 1983." *County of Sacramento v. Lewis,* 523 U.S. 833, 140 L.Ed.2d 1043, 118 S.Ct. 1708, 1716 (1998), quoting *Evans v. Avery,* 100 F.3d 1033, 1036 (1st Cir. 1996). But compare the Court's ruling in *United States v. Lanier,* 520 U.S. 259, 137 L.Ed.2d 432, 117 S.Ct. 1219, 1228 n.7 (1997), in which it (1) clarified its ruling in *Graham v. Connor,* 490 U.S. 386, 104 L.Ed.2d 443, 109 S.Ct. 1865, 1871 (1989), and (2) held that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." The Court in *Lewis, supra,* went on to find that when a motorcycle rider was killed at the conclusion of a high-speed chase by police, but no seizure occurred, the appropriate standard to apply was "shock the conscience." 118 S.Ct. at 1717. The Court noted that the "constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at ends of the tort law's spectrum of culpability." *Id.*

Though mere negligence is not actionable under the Due Process Clause, it may suffice under other constitutional provisions. *Simons v. County of Marin,* 682 F.Supp. 1463 (N.D.Cal. 1987). For example, Fourth Amendment excessive force claims turn solely on the reasonableness of the challenged conduct regardless of whether the conduct was intentional, reckless, negligent, or otherwise. *See Lester v. City of Chicago,* 830 F.2d 706 (7th Cir. 1987).

H. [5.27] Supervisory Liability

Civil rights suits asserted against supervisory officials often cause considerable confusion because of the distinction between individual and official-capacity lawsuits. A suit against a supervisor in his or her official capacity is the same as a suit against the governmental entity itself. An official-capacity suit is the same as a suit against the entity of which the officer is an agent. *DeGenova v. Sheriff of DuPage County,* 209 F.3d 973, 975 n.1 (7th Cir. 2000), citing *McMillian v. Monroe County, Alabama,* 520 U.S. 781, 138 L.Ed.2d 1, 117 S.Ct. 1734, 1737 n.2 (1997). *See also Wolf-Lillie v. Sonquist,* 699 F.2d 864 (7th Cir. 1983).

When a supervisor is sued in his or her individual capacity, the plaintiff must allege some type of personal involvement in order to state a claim against the supervisor. *Luck v. Rovenstine,* 168 F.3d 323, 327 (7th Cir. 1999) (when sheriff lacked "actual knowledge" of plaintiff's wrongful detention, liability would not attach to sheriff in his individual capacity). Supervisory responsibility cases most often involve allegations of a failure to take some form of action. Common examples are a failure to (1) train properly, (2) supervise properly, (3) implement policies, or (4) discipline subordinates. Allegations that a supervisor was merely remiss in taking action, however, do not generally suffice because negligence is not actionable under the Due Process Clause of the Fourteenth Amendment. *See Daniels v. Williams,* 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986). A defendant is not liable for a constitutional violation under 42 U.S.C. §1983 if the defendant merely exercised supervisory authority over those who violated the plaintiff's rights and otherwise failed to participate in any violation of the plaintiff's rights. *Kelly v. Municipal Courts of Marion County, Indiana,* 97 F.3d 902, 909 (7th Cir. 1996). "In order for a defendant to be held liable under §1983, the plaintiff must establish that the defendant was personally involved or acquiesced in the alleged constitutional violation." *Id.,* citing *Gentry v. Duckworth,* 65 F.3d 555, 561 (7th Cir. 1995). *See also Antonelli v. Sheahan,* 81 F.3d 1422, 1428 (7th Cir. 1996), quoting *Cygnar v. City of Chicago,* 865 F.2d 827, 847 (7th Cir. 1989), for proposition that "official must actually have participated in the constitutional wrongdoing." Viewed against this backdrop, motions to dismiss or for summary judgment are the primary means of resolving suits asserted against supervisory officials in their individual capacities. Indeed, "[c]ourts have exacting standards for establishing supervisory officials' personal liability and hesitate to saddle supervisors with responsibility for decisions they did not make." *Chapman v. Pickett,* 801 F.2d 912, 918 (7th Cir. 1986), *vacated,* 108 S.Ct. 54 (1987), *remanded,* 840 F.2d 20 (7th Cir. 1988).

I. [5.28] Municipal Liability for Acts of Police Misconduct

In civil rights cases alleging police misconduct, the local public entity that employs the police officer is routinely joined as a defendant. The theories asserted against the municipality range from respondeat superior to a failure to discipline, supervise, or train the police officer. Proving a

claim against the local public entity, however, poses difficult, though no longer insurmountable, burdens. Until the Supreme Court's landmark decision in *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), a municipality could not be sued under 42 U.S.C. §1983. *See Monroe v. Pape,* 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961). In *Monell,* the Court opened the door to municipal liability under the Civil Rights Act of 1871 when it declared that a municipality was a "person" within the meaning of §1983. The Court emphasized, however, that a municipality cannot be held liable under a theory of respondeat superior. Rather, a plaintiff must establish that his or her constitutional deprivation was proximately caused by a municipal custom, practice, or policy.

A *Monell* claim generally will not stand unless the plaintiff proves an underlying constitutional violation by a municipal employee. *Sallenger v. City of Springfield, Illinois,* 630 F.3d 499, 504 – 505 (7th Cir. 2010). Thus, when an officer is cleared of constitutional wrongdoing following a jury trial, the city cannot be liable for a failure to train. *Id.; City of Los Angeles v. Heller,* 475 U.S. 796, 789 L.Ed.2d 806, 106 S.Ct. 1571, 1573 (1986). However, this is not an absolute rule. The Seventh Circuit has held that a municipality can be held liable under *Monell* even if its officers are not liable, unless such a finding would create an inconsistent verdict. *Thomas v. Cook County Sheriff's Department,* 604 F.3d 293, 305 (7th Cir. 2010). For example, if an officer is granted qualified immunity because the law was not clearly established at the time of the incident, such a finding might not preclude a finding that a constitutional violation did, in fact, occur and that the municipality's policies caused the violation. *Id.*

The Illinois Supreme Court has held that counties are not liable under respondeat superior for the acts of sheriff's deputies or a sheriff's department. *Moy v. County of Cook,* 159 Ill.2d 519, 640 N.E.2d 926, 928, 203 Ill.Dec. 776 (1994). Specifically, the *Moy* court held that the county had no authority to control the office of sheriff because the sheriff's statutory power to control and operate a jail and the actions of its deputies are "independent of and unalterable by any governing body." 640 N.E.2d at 929. In addition, the court held that because the sheriff was a constitutional officer whose existence did not depend on any employment contract, express or implied, the doctrine of respondeat superior did not apply. 640 N.E.2d at 930. *See also Ryan v. County of DuPage,* 45 F.3d 1090, 1092 (7th Cir. 1995) (county not liable under §1983 claim); *Estate of Drayton v. Nelson,* 53 F.3d 165, 167 – 168 (7th Cir. 1994); *Thompson v. Duke,* 882 F.2d 1180, 1187 (7th Cir. 1989); *Havey v. County of DuPage,* 820 F.Supp. 359, 362 (N.D.Ill. 1993). Even though a county cannot be held liable under a theory of respondeat superior for acts of a sheriff or his or her department, the county is still a necessary party to any litigation against a sheriff's office because the county is responsible for the payment of any expenses or judgment. *Robinson v. Sappington,* 351 F.3d 317 (7th Cir. 2003); *Carver v. LaSalle County, Illinois,* 324 F.3d 947 (7th Cir. 2003).

The United States Supreme Court has also affirmed the Eleventh Circuit's holding that a county sheriff represented the State of Alabama and thus was not a final policy-maker for the county in the area of law enforcement. *McMillian v. Monroe County, Alabama,* 520 U.S. 781, 138 L.Ed.2d 1, 117 S.Ct. 1734 (1997), *aff'g McMillian v. Johnson,* 88 F.3d 1573 (11th Cir. 1996). *See also Board of County Commissioners of Bryan County, Oklahoma v. Brown,* 520 U.S. 397, 137 L.Ed.2d 626, 117 S.Ct. 1382 (1997) (no municipal liability for negligently hiring deputy sheriff unless it was highly likely that deputy would inflict particular injury to plaintiff).

Because a police officer is not a municipal policy-maker (*see Pembaur v. City of Cincinnati,* 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986); *Latuszkin v. City of Chicago,* 250 F.3d 502, 505 (7th Cir. 2001)), a custom, practice, or policy is generally not established by a single act of police brutality. *See City of Oklahoma City v. Tuttle,* 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985); *Dertz v. City of Chicago,* No. 94 C 542, 1997 WL 85169 at *19 (N.D.Ill. Feb. 24, 1997), citing *Ramos v. City of Chicago,* 707 F.Supp. 345, 347 (N.D.Ill. 1989). Though the "single-incident" rule is generally sufficient to dispose of the majority of claims of municipal liability for acts of police misconduct, it is unclear how much more than a single incident is needed to permit an inference of municipal liability. In cases of police brutality, the municipality's liability generally depends on a showing that the city either ignored or failed to respond adequately to a sufficient number of incidents of brutality to support an inference of acquiescence, encouragement, or authorization of brutality. The plaintiff should be required to show a "persistent, pervasive practice" on the part of city officials that "although not officially adopted, was so common and settled as to be considered [a custom or policy]." *Carter v. District of Columbia,* 795 F.2d 116, 125 (D.C.Cir. 1986). *See also Strauss v. City of Chicago,* 760 F.2d 765, 767 (7th Cir. 1985); *Ramos, supra,* 707 F.Supp. at 347 (sporadic incidents of police brutality insufficient to establish widespread custom).

The Supreme Court considered the issue of municipal liability for inadequate training of police personnel in *City of Canton, Ohio v. Harris,* 489 U.S. 378, 103 L.Ed.2d 412, 109 S.Ct. 1197 (1989). The court held that municipalities may be held liable for a police department's failure to train police officers properly only when "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 109 S.Ct. at 1204. *See also Dunn v. City of Elgin, Illinois,* 347 F.3d 641, 645 – 646 (7th Cir. 2003). The federal courts may not, however, impose a "heightened pleading" threshold on claims asserted against municipalities. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 122 L.Ed.2d 517, 113 S.Ct. 1160, 1163 (1993). Accordingly, a conclusory allegation of deliberate indifference would be sufficient to send a municipal liability claim into discovery, and municipalities generally need to rely on summary judgment as opposed to motions to dismiss as the primary means of disposing of such claims. *See Christopher v. Buss,* 384 F.3d 879 (7th Cir. 2004) (deliberate indifference requires only that plaintiff state legal claim and some indication of time and place).

The Ninth Circuit has broadly interpreted *Harris, supra,* to permit a claim against a municipality based on a single incident of false arrest when city officials were blamed for failing to train police officers properly. *Tanner v. Heise,* 879 F.2d 572 (9th Cir. 1989). *Accord Clipper v. Takoma Park, Maryland,* 876 F.2d 17 (4th Cir. 1989) (municipality could be liable for false arrest of bank robbery suspect when training was deficient in probable-cause analysis); *Meade v. Grubbs,* 841 F.2d 1512 (10th Cir. 1988) (municipality potentially liable for single incident of excessive force caused by practice of improper hiring, training, supervising, and disciplining of sheriff's deputies).

On the other hand, many courts have been less willing to expand the parameters of municipal liability. For instance, the Seventh Circuit has held that deliberate indifference for §1983 liability may be shown only when (1) the municipality fails to train its employees to handle a recurring situation that presents an obvious potential for a constitutional violation or (2) the municipality

fails to provide further training after learning of a pattern of constitutional violations by the police. *Dunn, supra,* 347 F.3d at 645 – 646. *See also Williams v. Heavener,* 217 F.3d 529, 532 (7th Cir. 2000). Additionally, municipal liability could not be sustained on the basis of two separate instances of excessive force absent proof of an official policy of harassment or nonintervention. *Meehan v. County of Los Angeles,* 856 F.2d 102 (9th Cir. 1988). *See also Brooks v. Scheib,* 813 F.2d 1191 (11th Cir. 1987) (narrow avenue of relief against municipality in excessive force cases). Similarly, municipal liability was not appropriate based on a town's failure to conduct a background investigation of a police applicant who subsequently perpetrated an act of police brutality. *Stokes v. Bullins,* 844 F.2d 269 (5th Cir. 1988). On the other hand, in *Donovan v. City of Milwaukee,* 17 F.3d 944, 955 (7th Cir. 1994), the Seventh Circuit held that the mere fact that the city did not include express reference to the safety of a pursued motorist among considerations when deciding to terminate chase did not rise to the level of deliberate indifference to the motorcyclist's constitutional rights to support municipal liability.

With respect to municipal liability for a police officer's use of deadly force, two decisions from the Eleventh Circuit illustrate the importance of written policy directions. In *Brown v. City of Clewiston,* 848 F.2d 1534 (11th Cir. 1988), the city was not liable because it maintained written guidelines authorizing the use of deadly force only as a last resort. However, the same court also held that a city could be held liable for a fatal shooting when its police department adhered to an unwritten policy of deliberately overlooking police brutality in order to foster a shoot-to-kill attitude. *Samples v. City of Atlanta,* 846 F.2d 1328 (11th Cir. 1988).

J. [5.29] Negligent Hiring, Retention, and Referral

Civil rights liability may attach to a city in a negligent hiring case, but only in limited instances. In a sharply divided ruling, the United States Supreme Court held that a municipality could not be held liable for negligently hiring an officer even when a deputy allegedly had a history of physical assaults and arrests before being hired. *Board of County Commissioners of Bryan County, Oklahoma v. Brown,* 520 U.S. 397, 137 L.Ed.2d 626, 117 S.Ct. 1382 (1997). In a five-four vote, the Court held that plaintiffs must demonstrate that, through its deliberate conduct, the municipality was the " 'moving force' behind the injury alleged." 117 S.Ct. at 1386, quoting *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018, 2027 (1978).

> **Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."** 117 S.Ct. at 1392.

In so concluding, the Court found that although the deputy's misdemeanor infractions, including one incident in which the deputy pleaded guilty to an assault and battery charge, indicated that he had been "an extremely poor candidate," the record did not indicate that the deputy's allegedly excessive use of force was "a plainly obvious consequence of the hiring decision." 117 S.Ct. at 1393.

The Eighth Circuit has also held that a former police chief could not be held liable under 42 U.S.C. §1983 for failing to decertify a former police officer who had continued to engage in coerced sexual relations with civilians while on duty for a subsequent employer. *Doe v. Wright,* 82 F.3d 265, 268 – 269 (8th Cir. 1996). In dismissing the claim, the court held that the plaintiff's assault at issue occurred 17 months after the officer left his previous employment, thus making his action "too remote" to make the former police chief "liable for every subsequent action . . . while on duty at a different law enforcement agency." 82 F.3d at 268. The court also held that two recommendation letters written by fellow officers were too attenuated to be actionable under §1983. 82 F.3d at 269.

K. [5.30] Equal Protection "Class-of-One" Claims

Another potential claim against the police is for a violation of the Equal Protection Clause of the Fourteenth Amendment under a "class-of-one" theory. Acknowledged generally in *Village of Willowbrook v. Olech*, 528 U.S. 562, 145 L.Ed.2d 1060, 120 S.Ct. 1073 (2000), the Seventh Circuit has extended the potential for such a claim against the police. *See Hilton v. City of Wheeling,* 209 F.3d 1005, 1007 – 1008 (7th Cir. 2000) (complaint of unequal police protection cognizable under Equal Protection Clause if done out of sheer malice). As stated by the court in *Scherr v. City of Chicago,* 759 F.3d. 597, 598 (7th Cir. 2014), the limits of the class-of-one theory is unclear (citing *Del Marcelle v. Brown County Corp.,* 680 F.3d. 887 (7th Cir. 2012) (en banc) (split opinions about whether plaintiff needs to allege and prove personal animus to state class-of-one claim), but a claim can be stated if the defendant deliberately deprives the plaintiff of equal protection for personal reasons unrelated to the defendant's official duties.

Typically, equal-protection claims require the plaintiff to show that he or she was treated less favorably than someone who was similarly situated. However, the "similarly situated" requirement is not a per se rule. *See Geinosky v. City of Chicago,* 675 F.3d 743 (7th Cir. 2012) (forcing plaintiff to identify similarly situated person was unnecessary when pattern and nature of police harassment was obvious and alone showed that there was no conceivable legitimate purpose for treatment).

V. [5.31] JAIL CASES

The availability of legal materials to inmates, including those incarcerated in county jails, has contributed to a proliferation of pro se actions filed by incarcerated individuals. Cases filed by prisoners present peculiar problems because of the more liberal pleading standards applied to pro se filings. *Haines v. Kenner,* 404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972). However, the requirements of the Prison Litigation Reform Act of 1995 (PLRA), Pub.L. No. 104-134, Title VIII, 110 Stat. 1321-66 (1996), particularly the requirement that prisoners exhaust internal prison or jail grievance procedures before filing suit (see 42 U.S.C. §1997e), have gone a long way to effectively addressing many of these issues. See §5.34 below.

The Due Process Clause of the Fourteenth Amendment typically provides the constitutional basis for a 42 U.S.C. §1983 claim involving pretrial detainees. *Lewis v. Downey,* 581 F.3d 467, 473 – 474 (7th Cir. 2009). Prior to a probable-cause determination, the Fourth Amendment

governs. *Currie v. Chhabra,* 728 F.3d 626 (7th Cir. 2013). After conviction and sentencing, the Eighth Amendment Cruel and Unusual Punishment Clause is triggered. *See Lewis, supra.* Another class of plaintiffs is "pre-sentencing detainees," *i.e.,* detainees who have been convicted but not yet sentenced. *Lewis, supra,* 581 F.3d at 473. The law is a little murkier here, but the Seventh Circuit has indicated that the Fourteenth Amendment Due Process Clause provides the applicable constitutional protection. 581 F.3d at 474.

A. [5.32] Pro Se Considerations

Though meritorious claims are certainly encouraged, the courts are sensitive to the large number of frivolous claims filed by litigious prisoners. *See, e.g., Linhart v. Glatfelter,* 584 F.Supp. 1369, 1371, 1372 n.4 (N.D.Ill. 1984). *See also Green v. McKaskle,* 788 F.2d 1116, 1119 (5th Cir. 1986) ("prisoners have everything to gain and nothing to lose by filing frivolous suits"). Accordingly, a comprehensive motion to dismiss addressing all potential claims or a properly supported motion for summary judgment is often sufficient to dispose of a substantial number of pro se claims. Defense costs in pro se civil rights cases in federal court make this summary resolution very attractive.

Indigent pro se prisoners often file petitions to proceed in forma pauperis under 28 U.S.C. §1915. Only natural persons, rather than associations or other artificial entities, are entitled to proceed in forma pauperis. *Rowland v. California Men's Colony, Unit II Men's Advisory Council,* 506 U.S. 194, 121 L.Ed.2d 656, 113 S.Ct. 716 (1993).

If the court finds that the pro se litigant's action is frivolous, it is subject to dismissal under 28 U.S.C. §1915(e), regardless of whether the plaintiff satisfies the indigency requirements. *Jones v. Morris,* 777 F.2d 1277 (7th Cir. 1985). In addition, the courts sometimes will sanction prisoners for filing frivolous lawsuits. *See, e.g., Robinson v. Moses,* 644 F.Supp. 975, 981 – 983 (N.D.Ind. 1986) ($3,600 for frivolous claims alleging brutality and inadequate medical treatment); *Dominguez v. Figel,* 626 F.Supp. 368, 373 – 374 (N.D.Ind. 1986) (single hour spent on case by federal judge costs government $600). Further, the Supreme Court has repeatedly restricted the use of §1915 when a pro se prisoner has demonstrated a pattern of abusive filings. *See, e.g., Martin v. District of Columbia Court of Appeals,* 506 U.S. 1, 121 L.Ed.2d 305, 113 S.Ct. 397 (1992).

Inmates are also subject to the "three strikes" rule of the Prison Litigation Reform Act and may thereby be barred from proceeding in forma pauperis if a court determines that "on 3 or more prior occasions, while incarcerated or detained in any facility, [the prisoner] brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. §1915(g). *See Turley v. Gaetz,* 625 F.3d 1005, 1013 (7th Cir. 2010) (holding that strike is incurred when action is dismissed in its entirety but is not incurred with partial dismissal of claims).

In cases in which the pro se litigant's matter proceeds to discovery, defense counsel is encouraged to correspond with the plaintiff and advise him or her regarding the various obligations required of a plaintiff under the Federal Rules of Civil Procedure and applicable local rules.

B. [5.33] Merit Review Screening

District courts are required to screen prisoner civil rights lawsuits for the purpose of identifying those that have arguable merit. 28 U.S.C. §1915A. This so-called "merit review" allows the court to identify cognizable claims or to dismiss the complaint or portions of the complaint that are frivolous. *Id.* Most district courts have enacted local rules governing the merit review process, including not allowing service of a lawsuit or entry of a case management order until the merit review is completed and the court recognizes a claim. The U.S. District Court for the Central District of Illinois, for example, has enacted such a local rule and further provided that any claims not defined in the case management order will not be included in the case. C.D.Ill. Local Rule 16.3(C). The Seventh Circuit has held that any claim not mentioned in the case management order following merit review cannot be considered in the case. *Lewis v. Downey,* 581 F.3d 467, 480 (7th Cir. 2009).

C. [5.34] Prison Litigation Reform Act of 1995

One of the primary components of the Prison Litigation Reform Act is the exhaustion requirement, which provides:

> **No action shall be brought with respect to prison conditions under §1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.** 42 U.S.C. §1997e(a).

The purpose of §1997e(a) is "to provide correctional officials time and an opportunity to address complaints internally before allowing the initiation of a federal lawsuit." *Annoreno v. Sheriff of Kankakee County,* 823 F. Supp. 2d 860, 863 (C.D.Ill. 2011), citing *Woodford v. Ngo,* 548 U.S. 81, 165 L.Ed.2d 368, 126 S.Ct. 2378, 2387 – 2388 (2006). Exhaustion is mandatory by inmates, "even if the requested relief, such as monetary damages, is beyond the power of the administrative review board or if the prisoner believes that exhaustion will be futile." *Annoreno, supra,* 823 F.Supp.2d at 863, citing *Dole v. Chandler,* 438 F.3d 804, 808 – 809 (7th Cir. 2006).

"Conditions of confinement" relate to the "environment in which prisoners live, the physical conditions of that environment, and the nature of the services provided therein." *Booth v. Churner,* 206 F.3d 289, 294 (3d Cir. 2000), *aff'd,* 121 S.Ct. 1819 (2001). In *Porter v. Nussle,* 534 U.S. 516, 152 L.Ed.2d 12, 122 S.Ct. 983, 992 (2002), the Supreme Court held that "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Actions based on a single event as well as "complaints about medical treatment in prison" are considered to be about "prison conditions" for PLRA purposes. *Witzke v. Femal,* 376 F.3d 744, 750 – 751 (7th Cir. 2004), quoting *Perez v. Wisconsin Department of Corrections,* 182 F.3d 532, 534 (7th Cir. 1999).

To exhaust administrative remedies under §1997e, an inmate must take all steps prescribed by that particular prison's grievance system. *Ford v. Johnson,* 362 F.3d 395, 397 (7th Cir. 2004). This means that a prisoner must submit grievances in the place and at the time required by the

prison's administrative rules. *Pozo v. McCaughtry,* 286 F.3d 1022 (7th Cir. 2002). "[A] strict compliance approach must be used when considering whether a prisoner has properly used the prison's grievance process to exhaust administrative remedies." *Annoreno, supra,* 823 F.Supp.2d at 863, citing *Dole, supra,* 438 F.3d at 809.

Whether there has been exhaustion sometimes presents an issue of fact. Under these circumstances, the Seventh Circuit requires the district court to hold an evidentiary hearing prior to a trial on the merits. *Pavey v. Conley,* 544 F.3d 739, 741 – 742 (7th Cir. 2008). The purpose of the hearing is to determine whether a prisoner has exhausted administrative remedies, as required by the PLRA. *Id.; White v. Bukowski,* Case No. 11-CV-2221, 2014 WL 1612650 at *1 n.1 (C.D.Ill. Apr. 22, 2014). At a *Pavey* hearing, the district court "is permitted to make findings of fact and credibility assessments of witnesses at the hearing." 2014 WL 1612650 at *5.

All dismissals under §1997e(a) for failure to exhaust must be without prejudice, even if exhaustion is no longer possible (*i.e.,* the inmate has been released since filing suit or transferred to another institution). *See Fluker v. County of Kankakee,* 741 F.3d 787, 791 – 792 (7th Cir. 2013). However, there is nothing that prohibits a district court also granting summary judgment on the merits with prejudice as long as the court first addresses the PLRA exhaustion defense. 741 F.3d at 792 – 793.

The PLRA also forbids compensatory damages for "mental or emotional injury . . . without a prior showing of physical injury." 42 U.S.C. §1997e(e). *See Calhoun v. Detella,* 319 F.3d 936, 940 (7th Cir. 2003). This limitation, however, does not preclude a prisoner from seeking nominal or punitive damages, which a prisoner is entitled to seek, notwithstanding the absence of a physical injury. 319 F.3d at 941 – 942. *See Henderson v. Belfueil,* 197 Fed.Appx. 470 (7th Cir. 2006). This is a limitation on the relief available, not a prerequisite to filing a claim. *Smith v. Peters,* 631 F.3d 418, 421 (7th Cir. 2011). The Seventh Circuit has held that the limitation in §1997e(e) does not apply to claims by prisoners for violation of their First Amendment rights. *Rowe v. Shake,* 196 F.3d 778, 781 (7th Cir. 1999). *But see Meade v. Plummer,* 344 F.Supp.2d 569, 573 (E.D.Mich. 2004) (disagreeing that First Amendment claims are excluded from §1997e(e)). Additionally, one district court has held §1997e(e) unconstitutional, as applied, to the extent it precludes mental or emotional damages resulting from a violation of an inmate's First Amendment rights. *Siggers-El v. Barlow,* 433 F.Supp.2d 811, 816 (E.D.Mich. 2006).

D. [5.35] Conditions of Confinement Generally

Some of the more common cases filed by prisoners involve wide-ranging challenges to various conditions of their confinement (*e.g.,* overly burdensome restrictions on mail, inadequate access to legal materials, denial of access to the courts, absence of contact visits, double bunking, confiscation of property). The variety of conditions challenged is limited only by the imaginations of the prisoners. *See, e.g., Jackson v. Whitman,* 642 F.Supp. 816 (W.D.La. 1986) (challenge to between 25 and 30 separate jail conditions). The majority of such claims are advanced by convicted prisoners incarcerated in state institutions who are subjected to the challenged conditions over an extended period of time. Cases filed by convicted prisoners are properly considered under the Eighth Amendment. *Bell v. Wolfish,* 441 U.S. 520, 60 L.Ed.2d 447, 99 S.Ct. 1861, 1872 n.16 (1979). A number of cases, however, are instituted by individuals incarcerated in

county jails maintained by local public entities. County jails generally house pretrial detainees who are unable to make bail and convicted prisoners serving terms of less than one year. Cases involving pretrial detainees are properly considered under the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment (*Id.; Lewis v. Downey*, 581 F.3d 467 (7th Cir. 2009)), although the constitutional culpability standards are, in many instances, indistinguishable.

The United States Supreme Court has had several occasions to consider inmate challenges to the conditions of their confinement. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 153 L.Ed.2d 666, 122 S.Ct. 2508 (2002); *Helling v. McKinney*, 509 U.S. 25, 125 L.Ed.2d 22, 113 S.Ct. 2475 (1993); *Bell, supra; Block v. Rutherford*, 468 U.S. 576, 82 L.Ed.2d 438, 104 S.Ct. 3227 (1984); *Schall v. Martin*, 467 U.S. 253, 81 L.Ed.2d 207, 104 S.Ct. 2403 (1984) (pretrial detention of juveniles). Inmates who challenge their living conditions must show that jail officials were "deliberately indifferent" to the risk of harm posed by the particular condition. *Wilson v. Seiter*, 501 U.S. 294, 115 L.Ed.2d 271, 111 S.Ct. 2321 (1991). This requires inquiry into the defendant's state of mind. *Id.* See §5.5 above. An inmate need not demonstrate a present injury resulting from the challenged condition as long as he or she can show that exposure to a particular condition placed the inmate at an unreasonable risk of harm to his or her health. *Helling, supra.*

As for pretrial detainees, the key is that conditions of confinement may not be imposed against detainees for purposes of punishment, but, rather, the conditions must be reasonably related to another legitimate governmental purpose. *Bell, supra.* In essence, the courts have a limited role in the administration of jails; prison administrators are accorded "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell, supra*, 99 S.Ct. at 1878. *See Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. ___, 182 L.Ed.2d 566, 132 S.Ct. 1510 (2012).

Against this backdrop, the Court in *Bell* sustained a jail practice of conducting routine body cavity searches following contact visits. 99 S.Ct. at 1884 – 1885. Five years later, the Court held that a comprehensive ban on contact visits for pretrial detainees was permissible when prison officials determined that such visits could jeopardize jail security. *Block, supra. Block* also reaffirmed the holding in *Bell, supra,* that permits random shakedown cell searches while detainees are away at meals or recreation.

In *Florence,* the Supreme Court held that a blanket visual strip search policy, without an individualized suspicion of weapons, drugs, or other contraband and notwithstanding the severity of the offense charged, is constitutional when an inmate is going to be housed in the general population or will have substantial contact with other inmates. However, the court left open the question of whether it is constitutional to apply the policy to inmates being held without assignment to the general population or not having substantial contact with other inmates. Also left open was the question of whether the manner of strip search (*i.e.,* potentially involving intentional humiliation or other abusive practices or physical touching) was reasonable.

The Seventh Circuit Court of Appeals held that overcrowding and a denial of contact visitation did not constitute punishment in the constitutional sense. *Jordan v. Wolke,* 615 F.2d

749 (7th Cir. 1980). *See also Martin v. Tyson*, 845 F.2d 1451 (7th Cir. 1988). On the other hand, confinement for 22 hours per day in cells measuring eight feet by four feet for an average length of confinement of 60 days did constitute punishment. *Lock v. Jenkins*, 641 F.2d 488 (7th Cir. 1981). Similarly, a question of fact existed as to whether conditions violated the Eighth Amendment when an inmate claimed his cell was constantly cold and that he was not given adequate supplies to keep warm. *Dixon v. Godinez*, 114 F.3d 640 (7th Cir. 1997).

In *Prude v. Clarke*, 675 F.3d 732 (7th Cir. 2012), the court reversed summary judgment based on a county jail inmate's claim regarding the jail's policy of serving only "nutriloaf" to inmates in segregation. The inmate claimed that the nutriloaf made him vomit and experience stomach pains and constipation, after which he was diagnosed with an anal fissure (a tear in his rectum). The count found that it was probable that the jail knew that the nutriloaf was sickening inmates, yet did nothing about it.

In *Budd v. Motley*, 711 F.3d 840, 842 (7th Cir. 2013), the plaintiff complained that his conditions were not "livable" in that he was confined with eight inmates in a space intended for three, he had to sleep on the floor alongside broken windows and cracked toilets, the heating and air-conditioning system did not work, and other unsanitary conditions existed. When he scratched his leg on an unsanitary condition, he developed an ulceration that worsened over time. The Seventh Circuit reversed dismissal of his suit, finding that he stated a valid claim for challenging the conditions of his confinement.

The federal courts have proved willing to order wide-ranging and long-term relief when they confront local officials unwilling to remedy unacceptable jail conditions. In a striking example, a Pennsylvania federal district judge ordered the State of Pennsylvania and the County of Allegheny to close the Allegheny County Jail and submit a plan to the court for construction of a new facility. *Inmates of Allegheny County Jail v. Wecht*, 699 F.Supp. 1137 (W.D.Pa. 1988), *appeal dismissed*, 873 F.2d 55 (3d Cir. 1989). In so doing, the court concluded that the 102-year-old structure, although orderly and clean, was severely overcrowded and so physically deficient that only a new facility would pass constitutional muster. The Third Circuit Court of Appeals affirmed the district court's power to impose such a burdensome remedy on a unit of local government. *Inmates of Allegheny County Jail v. Wecht*, 874 F.2d 147 (3d Cir.), *vacated*, 110 S.Ct. 355 (1989), *on remand*, 893 F.2d 33 (3d Cir. 1990).

E. [5.36] Denial of Right to Access to Courts

A common challenge to conditions of confinement involves the alleged denial of the First Amendment right of access to the courts. Prisoners have a constitutional right to access the courts to challenge the conditions of their confinement. *Campbell v. Miller*, 787 F.2d 217, 225 (7th Cir. 1986). The test to be followed is one of "meaningful access" to the courts. Meaningful access to the courts is grounded in the First Amendment right to petition and the Fifth and Fourteenth Amendment Due Process Clauses. *Snyder v. Nolen*, 380 F.3d 279, 291 (7th Cir. 2004), citing *Johnson v. Atkins*, 999 F.2d 99, 100 (5th Cir. 1993).

In *Bounds v. Smith*, 430 U.S. 817, 52 L.Ed.2d 72, 97 S.Ct. 1491, 1498 (1977), the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison

authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." However, in *Lewis v. Casey*, 518 U.S. 343, 135 L.Ed.2d 606, 116 S.Ct. 2174, 2180 (1996), the Supreme Court sharply limited *Bounds*, specifically noting:

> **Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. That would be the precise analog of the healthy inmate claiming constitutional violation because of the inadequacy of the prison infirmary. Insofar as the right vindicated by *Bounds* is concerned, "meaningful access to the courts is the touchstone," . . . and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.** Quoting *Bounds, supra,* 97 S.Ct. at 1495.

The Supreme Court in *Lewis* disclaimed statements in *Bounds* that "appear[ed] to suggest that the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court." [Emphasis in original.] 116 S.Ct. at 2181. *See also Pruitt v. Mote*, 503 F.3d 647, 657 – 658 (7th Cir. 2007) ("The right of access to the courts protects prisoners from being 'shut out of court' . . . it does not exist to 'enable the prisoner . . . to litigate effectively once in court.' "), quoting *Christopher v. Harbury*, 536 U.S. 403, 153 L.Ed.2d 413, 122 S.Ct. 2179, 2187 (2002), and *Lewis, supra*, 116 S.Ct. at 2181. Jails are not required to "guarantee[ ] [a] particular methodology but rather the conferral of a capability — the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis, supra,* 116 S.Ct. at 2182. "[I]t is that capability, rather than the capability of turning pages in a law library, that is the touchstone." *Id.* A "prison need not provide any more than that which will facilitate claims in their 'preliminary stages in the courts.' " *Higgason v. Farley*, 83 F.3d 807, 810 (7th Cir. 1996), quoting *Smith v. Shawnee Library System*, 60 F.3d 317, 322 (7th Cir. 1995).

Meaningful access to the courts "does not require any specific resources such as a law library or a laptop with a CD-ROM drive or a particular type of assistance. . . . Instead, a prisoner must show that a prison's policy actually hampered her pursuit of a legal claim." [Citation omitted.] *Lehn v. Holmes*, 364 F.3d 862, 868 (7th Cir. 2004). The Seventh Circuit has established a two-part test for access-to-court claims. "First, the prisoner must prove that prison officials failed to assist in the preparation and filing of meaningful legal papers. . . . Second, he must show some quantum of detriment caused by the challenged conduct of state officials." *Id.*, quoting *Brooks v. Buscher*, 62 F.3d 176, 179 (7th Cir. 1995).

In *Ortiz v. Downey*, 561 F.3d 664, 671 (7th Cir. 2009), the court noted that the Constitution protects a prisoner's right of access to the courts and that "state actors must respect that right by not impeding prisoners' efforts to pursue legal claims." The court held "[t]hat right is violated when a prisoner is deprived of such access and suffers actual injury as a result." *Id.* Similarly, in *Campbell v. Clarke*, 481 F.3d 967, 968 (7th Cir. 2007), the court held that a prisoner must allege that "a lack of access to legal materials has undermined," or caused to founder, "a concrete piece of litigation."

In many cases, the availability of a public defender should also satisfy the prisoner's right of access. *See Corgain v. Miller,* 708 F.2d 1241 (7th Cir. 1983). A bare statute requiring the services of a public defender, however, is insufficient to satisfy *Bounds* absent evidence that the public defender was, in fact, actually available to assist the prisoner. *See Buise v. Hudkins,* 584 F.2d 223 (7th Cir. 1978). *See also Jackson v. Elrod,* 881 F.2d 441 (7th Cir. 1989) (blanket prohibition on hardcover books unconstitutional). A jail may be required to provide an inmate with foreign-state legal materials if failure to do so hampers his or her ability to access the foreign courts and the jail is imposing additional adverse conditions on him or her because of the foreign-state proceedings. *Lehn, supra.*

F. [5.37] Inadequate Medical Treatment

Inmates often file 42 U.S.C. §1983 lawsuits alleging inadequate medical treatment. Liability in cases involving convicted prisoners is governed by the Eighth Amendment's Cruel and Unusual Punishment Clause and is conditioned on a finding of "deliberate indifference" to the inmate's "serious medical needs." *Estelle v. Gamble,* 429 U.S. 97, 50 L.Ed.2d 251, 97 S.Ct. 285, 291 (1976). Liability in cases involving a pretrial detainee, or an individual who has been convicted but not sentenced, is governed by the Fourteenth Amendment's Due Process Clause. *Lewis v. Downey,* 581 F.3d 467, 473 – 474 (7th Cir. 2009). However, the distinction is immaterial with regard to medical care claims, as the standard of care that is applied to pretrial detainees under the Fourteenth Amendment is the same deliberate indifference standard that is applied to prisoners under the Eighth Amendment. *de La Paz v. Danzl,* 646 F.Supp. 914, 920 – 922 (N.D.Ill. 1986).

Thus, there are two prongs to a claim of inadequate medical care. The detainee must satisfy an objective and a subjective element, that (1) there was an objectively serious injury or medical need and (2) the official acted with deliberate in difference to that need, *i.e.*, the defendant knew that the risk of injury was substantial but nevertheless failed to take reasonable measures to prevent it. *Estelle, supra; Chapman v. Keltner,* 241 F.3d 842, 845 (7th Cir. 2001).

Under the first prong, an objectively serious injury or medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." 241 F.3d at 845, quoting *Zentmyer v. Kendall County, Illinois,* 220 F.3d 805, 810 (7th Cir. 2000). *See also Gutierrez v. Peters,* 111 F.3d 1364 (7th Cir. 1997).

Often, the district courts and litigants will assume for the sake of summary judgment that a condition is objectively serious and go straight to the deliberate indifference prong because it is the easier of the two prongs to understand and the harder for the inmate to prove. The Seventh Circuit in *Jackson v. Pollian,* 733 F.3d 786 (7th Cir. 2013), however, took a district court and defense attorneys to task for glossing over the first prong. In that case, the inmate claimed that prison officials had delayed medication for his hypertension. The district court granted summary judgment and found, without any analysis, that the condition was objectively serious but that the prison had not acted with deliberate indifference. The Seventh Circuit affirmed but addressed the lower court's and defendants' reluctance to address the first prong, stating that it was indicative of a widespread and increasingly troublesome discomfort among lawyers and judges to confront

scientific or other technological issues. The court found that, had the defendants done some basic medical research, they would have learned that a slight elevation in an inmate's blood pressure from not having his medication for a few weeks did not endanger his long-term health. The court concluded that "[t]he legal profession must get over its fear and loathing of science." 733 F.3d at 790.

Inadequate medical treatment claims generally do not reach federal juries when the prisoner's complaint does not involve a substantial injury. For instance, a claim that prison officials failed to treat a split lip and back bruise was not actionable because the injury was not sufficiently serious. *Williams-EL v. Johnson*, 872 F.2d 224 (8th Cir. 1989). Similarly, a 14-hour delay before treatment of a small cut over the eye, shoulder and elbow bruises, and a quarter-inch piece of glass in the palm was not actionable. *Martin v. Gentile*, 849 F.2d 863 (4th Cir. 1988). The court in *Anderson-El v. O'Keefe*, 897 F.Supp. 1093 (N.D.Ill. 1995), held that a light abrasion on the chest and a 3-hour delay in transporting the inmate to a hospital were not the type of serious medical needs that could establish a due-process violation. On the other hand, an allegation that an inmate's broken hand was not set for nine days was sufficient to state a claim for deliberate indifference in *Senisais v. Fitzgerald*, 940 F.Supp. 196 (N.D.Ill. 1996).

Once an inmate presents sufficient evidence of an objectively serious medical need, he or she still must satisfy the second prong of the claim "that the official was aware of the risk and consciously disregarded it nonetheless." *Chapman, supra*, 241 F.3d at 845, quoting *Mathis v. Fairman*, 120 F.3d 88, 91 (7th Cir. 1997). Stated otherwise, the official both must be aware of the facts from which the inference can be drawn that a substantial risk of serious harm exists and must draw that inference. *Zentmyer, supra*, 220 F.3d at 811. Neither negligence nor even gross negligence is a sufficient basis for liability. *Chapman, supra; Cavalieri v. Shepard*, 321 F.3d 616, 620 (7th Cir. 2003).

The deliberate indifference standard presents a very difficult hurdle for an inmate to overcome on a motion for summary judgment. In *Gruenberg v. Gempeler*, 697 F.3d 573 (7th Cir. 2012), for example, the Seventh Circuit affirmed summary judgment for prison officials who had restrained an inmate naked in his cell for five days until he passed a set of keys that he took from a prison guard. The court found that the prison defendants closely watched the inmate and continually assessed his need for medical attention during the five-day period and that there were strong penological interests given the threat to security posed by the inmate's possession of the keys.

In those rare cases in which deliberate indifference claims survive summary judgment, the facts usually point to a complete disregard for the inmate's health or safety. For instance, in *Gonzalez v. Feinerman*, 663 F.3d 311 (7th Cir. 2011), summary judgment was reversed because prison medical staff ignored two years of complaints by an inmate about a hernia condition. Deliberate indifference was also present when a jailer refused to summon medical attention for an arrestee (ultimately hospitalized) who had complained of severe abdominal pain and an inability to urinate. *Wright v. Stickler*, 523 F.Supp. 193 (N.D.Ill. 1981). Deliberate indifference may also be shown by " 'repeated examples of negligent acts which disclose a pattern of conduct' . . . or by showing 'systematic or gross deficiencies in staffing, facilities, equipment, or procedures.' " *Freeman v. Fairman*, 916 F.Supp. 786, 791 (N.D.Ill. 1996), quoting *French v. Owens*, 777 F.2d 1250, 1254 (7th Cir. 1985).

One of the strongest defenses for correctional officers is their reasonable reliance on judgments made by medical professionals. A claim of deliberate indifference is generally defeated by the fact of treatment. *Wells v. Franzen*, 777 F.2d 1258, 1264 (7th Cir. 1985). Furthermore, "[w]hen the defendants are not themselves physicians or other trained medical practitioners, deference to the advice or treatment of a physician generally will not constitute deliberate indifference." *Stokes v. Sood*, No. 01 C 3778, 2001 WL 1518529 at *3 (N.D.Ill. Nov. 29, 2001). Nonmedical officers and jail administrators are entitled to rely on the advice, judgment, and treatment provided by jail health professionals. *See Greeno v. Daley,* 414 F.3d 645, 656 (7th Cir. 2005); *Berry v. Peterman,* 604 F.3d 435, 440 (7th Cir. 2010); *King v. Kramer,* 680 F.3d 1013 (7th Cir. 2012); *Moore v. Kankakee County,* Case No. 12-CV-2002, 2013 WL 6283718 at *9 (C.D.Ill. Dec. 4, 2013). Nonaction by a jail administrator in reliance on the medical judgment of jail health professionals does not amount to deliberate indifference. *Berry, supra,* 604 F.3d at 440. As stated by the Seventh Circuit in *Berry*, it would not only be unwise to require more of nonmedical jail administrators, but "the law encourages [them] to defer to the professional medical judgments of the physicians and nurses treating the prisoners in their care without fear of liability for doing so." *Id.*

Similarly, medical professionals who exercise medical judgments on the appropriate course of care and treatment, including medications, do not act in a deliberately indifferent manner as long as their conduct does not depart substantially from accepted medical standards. In *Holloway v. Delaware County Sheriff,* 700 F.3d 1063 (7th Cir. 2012), the plaintiff claimed that the jail doctor and nurses acted with deliberate indifference by the jail doctor's decision to divert from the inmate's own doctor's opinion that he needed Oxycontin for the treatment of chronic pain conditions. Upon booking, the jail's medical unit, including a jail doctor, provided for the plaintiff's primary care. Before detention, the plaintiff was seeing his personal physician, who had prescribed Oxycontin to treat chronic pain caused by various illnesses. The jail doctor did not believe that Oxycontin was medically necessary and, instead, prescribed nonnarcotic pain medications to prevent narcotic withdrawal symptoms.

The Seventh Circuit in *Holloway* affirmed summary judgment for the doctor and the jail nurses, holding that while the inmate "would have preferred to have been treated by a doctor who would have prescribed Oxycontin . . . rather than the nonnarcotic substitutes," he was "not entitled to receive 'unqualified access to healthcare.'" 700 F.3d at 1073, quoting *Hudson v. McMillianm* 503 U.S. 1, 117 L.Ed.2d 156, 112 S.Ct. 995, 1000 (1992). "Instead, prisoners are entitled only to 'adequate medical care.'" 700 F.3d at 1073, quoting *Johnson v. Doughty,* 433 F.3d 1001, 1013 (7th Cir. 2006). Since there is more than one way to practice medicine in jails and prisons and a range of acceptable courses of treatment, a medical professional does not act with deliberate indifference unless he or she substantially departs from acceptable professional standards or practices. The Seventh Circuit held in *Holloway* that the jail doctor was not deliberately indifferent to the inmate's medical needs because there was no evidence that the doctor, in prescribing pain medication, substantially departed from accepted professional standards. The Court stated:

> **[**We do**] not suggest that prison doctors must always defer to the judgment of a doctor who treated an inmate prior to his detention. Rather, the prison physician, as**

> **the inmate's acting primary doctor, is free to make his own, independent medical determination as to the necessity of certain treatments or medications, as long as the determination is based on the physician's professional judgment and does not go against accepted professional standards.** 700 F.3d at 1074.

The court also affirmed summary judgment for the jail nurses, finding that they gave the inmate his medication as prescribed by the jail doctor and, therefore, were not deliberately indifferent to his medical needs. 700 F.3d at 1075.

Further, a private physician under contract to provide medical services to inmates at a state prison may act under color of law within the meaning of §1983 when treating an inmate:

> **Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner. Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights.** *West v. Atkins,* 487 U.S. 42, 101 L.Ed.2d 40, 108 S.Ct. 2250, 2259 (1988).

However, a private corporation that has contracted to provide health services to prisoners cannot be held liable under §1983 unless the constitutional violation was caused by an unconstitutional policy or custom of the private corporation itself. *Shields v. Illinois Department of Corrections,* 746 F.3d 782, 789 (7th Cir. 2014) (applying principles of *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978) to private corporations sued under §1983, but strongly criticizing rationale for doing so). "*Respondeat superior* liability does not apply to private corporations under §1983." *Id.*

G. [5.38] Inmate Suicide

When a local public entity has someone under arrest, a special duty may arise to prevent the inmate from taking his or her own life. When the detainee expresses a desire to take his or her life, jail officials should make every effort to maintain constant observation of the inmate and to remove all articles of clothing that might be shredded to form a noose. Claims of jail suicide can be based on a wide variety of alleged deficiencies, such as (1) understaffing, (2) underfunding, (3) lack of adequate training and supervision of staff members, (4) unsafe and unkempt facilities, (5) improper screening procedures and policies, and (6) insufficient supervision of the at-risk detainee.

Claims arising from jail suicides are generally asserted under 42 U.S.C. §1983, as well as under the Wrongful Death Act, 740 ILCS 180/0.01, *et seq*. Though a prisoner or pretrial detainee is clearly owed certain duties of protection under state law, the precise constitutional underpinnings of jail suicide cases has spawned considerable divergence. Some courts have considered pretrial detainee suicide claims under the Eighth Amendment Cruel and Unusual Punishment Clause, even though that constitutional guarantee applies only to convicted criminals. *See, e.g., State Bank of St. Charles v. Camic,* 712 F.2d 1140 (7th Cir. 1983). Notwithstanding its

reference to the Eighth Amendment, the court in *Camic* applied a procedural-due-process analysis and determined that a civil rights claim of jail suicide was barred because of the existence of an adequate state remedy under the Wrongful Death Act.

The Fourteenth Amendment's Due Process Clause should govern cases involving pretrial detainees, while the Eighth Amendment Cruel and Unusual Punishment Clause should govern convicted prisoners. *See Cavalieri v. Shepard,* 321 F.3d 616, 620 (7th Cir. 2003); *Williams v. City of Lancaster, Pennsylvania,* 639 F.Supp. 377, 382 – 383 (E.D.Pa. 1986). Under either scenario, deliberate indifference to an at-risk detainee's life and safety is the appropriate model for determining a constitutional violation. *See, e.g., Matos v. O'Sullivan,* 335 F.3d 553, 556 – 557 (7th Cir. 2003).

The first prong of a medical care claim is whether the medical need at issue is objectively serious. The courts have consistently held that an inmate's suicide, or attempted suicide, satisfies the objectively serious element of the claim. *Collins v. Seeman,* 462 F.3d 757 (7th Cir. 2006). In order to prove the second prong — deliberate indifference — the plaintiff must show that jail officials (1) must have known about a substantial risk of suicide, *i.e.,* must have been cognizant of a significant likelihood that an inmate might imminently seek to take his or her own life, and (2) must have intentionally disregarded a known risk, *i.e.,* failed to take reasonable steps to prevent the suicide. *Id.*

The Seventh Circuit and its district courts have dismissed or granted summary judgment in favor of defendants when the evidence failed to reveal jail officials' knowledge of the detainee's suicidal tendencies or deliberate indifference to those tendencies. *See, e.g., id.* (officer passed along inmate's request to see crisis counselor to address suicidal feelings and checked on inmate several times each hour and was told by inmate that he felt okay and could wait until counselor arrived); *Wells v. Bureau County,* Case No. 08-1128, 2010 WL 2670892 (C.D.Ill. July 2, 2010) (no liability absent actual knowledge of suicidal risk); *Minix v. Canarecci,* 597 F.3d 824 (7th Cir. 2010) (same); *Estate of Novack v. County of Wood,* 226 F.3d 525 (7th Cir. 2000) (mere knowledge that inmate was acting strangely insufficient to incur liability); *Matos v. O'Sullivan,* 335 F.3d 553 (7th Cir. 2003) (inmate denied present suicidal ideation, and no depression or inappropriate mood or affect were observed).

Other courts are in accord. *See Williams v. Borough of West Chester, Pennsylvania,* 891 F.2d 458 (3d Cir. 1989) (no liability when prison officials did not have knowledge of plaintiff's suicidal tendencies); *Edwards v. Gilbert,* 867 F.2d 1271 (11th Cir. 1989) (failing to prevent suicide rarely constitutes deliberate indifference absent prior suicide attempt or threat); *Beddingfield v. City of Pulaski, Tennessee,* 861 F.2d 968 (6th Cir. 1988) (city's negligent failure to remove arrestee's belt not constitutionally redressable); *Freedman v. City of Allentown, Pennsylvania,* 853 F.2d 1111 (3d Cir. 1988) (failure to allege facts rising above mere negligence warranted dismissal of claim).

Courts have upheld claims or potential claims when questions of fact existed as to the defendants' subjective knowledge of suicidal tendencies and/or deliberate indifference to known risks. In *Pittman v. County of Madison, Illinois,* 746 F.3d 766 (7th Cir. 2014), a pretrial detainee reported that he had no suicidal thoughts or mental health conditions upon intake and admission

into a county jail. Within weeks, he stated that he was suicidal and was placed on suicide watch. He was removed from suicide watch but continued to act out and complain about problems at home. He was often found crying in his cell. He attempted suicide and ended up severely brain damaged as a result. The Seventh Circuit reversed summary judgment, finding that the correctional staff's failure to act on his requests for mental health treatment amounted to deliberate indifference. However, summary judgment was affirmed for the medical staff because plaintiff could not prove that they had knowledge of any imminent suicide risk. *But see Estate of Miller v. Tobiasz,* 680 F.3d 984 (7th Cir. 2012) (medical defendants had actual knowledge of suicide risk and failed to take steps to prevent self-harm).

Other cases have found deliberate indifference under similar circumstances. *See Carpenter v. Office of Lake County Sheriff,* No. 04 C 2275, 2007 WL 1296998 (N.D.Ill. May 2, 2007) (inmate was not placed on suicide watch despite officers' knowledge that inmate had been placed on suicide watch at city lockup due to attempted overdose and was suicidal in past and combative when arrested); *Woodward v. Correctional Medical Services of Illinois, Inc.,* 368 F.3d 917 (7th Cir. 2004) (medical providers failed to place inmate on suicide watch pending psychological evaluation knowing that he had expressed suicidal thoughts and had history of psychiatric treatment and prior suicide attempts); *Mombourquette v. Amundson,* 469 F.Supp.2d 624 (W.D.Wis. 2007) (jail nurse's knowledge of inmate's previous attempts to hang herself and hospital discharge note that she should be placed on suicide watch); *Cavalieri, supra* (affirming denial of summary judgment to defendant when question of fact existed as to defendant's knowledge of plaintiff's suicidal tendencies); *Heflin v. Stewart County, Tennessee,* 958 F.2d 709 (6th Cir. 1992) (upholding jury verdict in favor of plaintiff based on jailer's failure to assist hanging victim promptly); *Simmons v. City of Philadelphia,* 947 F.2d 1042 (3d Cir. 1991) (affirming $1 million verdict based on city's deliberately indifferent failure to train jailers in suicide prevention and detention).

H. [5.39] Fellow Inmate Assault

Inmate violence in a prison setting is inevitable, and prevention is difficult. *See Shrader v. White,* 761 F.2d 975, 978 (4th Cir. 1985). For these reasons, liability cannot generally be imposed on prison officials for a single incident or isolated instances of inmate assault. However, failure to prevent a prison assault may constitute a deprivation of constitutional magnitude under some limited circumstances.

In general, "[t]he Due Process Clause of the Fourteenth Amendment protects pre-trial detainees from punishment and places a duty upon jail officials to protect pre-trial detainees from violence." *Fisher v. Lovejoy,* 414 F.3d 659, 661 (7th Cir. 2005). Specifically, the plaintiff is required to establish objectively that there was a serious risk of harm or attack (objective prong) and then deliberate indifference to the need for protection (subjective prong). *Farmer v. Brennan,* 511 U.S. 825, 128 L.Ed.2d 811, 114 S.Ct. 1970 (1994); *Grieveson v. Anderson,* 538 F.3d 763, 775 (7th Cir. 2008); *Brown v. Budz,* 398 F.3d 904, 911 (7th Cir. 2005). "Conduct by [a] correctional officer that is simply negligent or inadvertent is not actionable under [42 U.S.C. §1983]. Instead, the correctional officer must know of a substantial risk of serious harm and he must fail to take reasonable measures to prevent that harm from occurring." *Shields v. Dart,* No.

09 C 8077, 2011 WL 1897407 at *5 (N.D.Ill. May 11, 2011). *See Haley v. Gross*, 86 F.3d 630 (7th Cir. 1996) (officials were deliberately indifferent to inmate who asked to be removed when official overheard inmate's bunkmate threaten to burn inmate alive).

To satisfy the objective prong, the inmate must demonstrate that there was a "strong likelihood," as opposed to a mere possibility, that an attack was imminent. *Watts v. Laurent*, 774 F.2d 168, 172 (7th Cir. 1985); *Pinkston v. Madry*, 440 F.3d 879, 889 (7th Cir. 2006). This threshold is satisfied by showing either (1) that the defendants had advance warnings of threats or prior attacks on the particular plaintiff or (2) that previous prison attacks had occurred so frequently that there was a pervasive risk of attack in the particular prison. *Goka v. Bobbitt*, 625 F.Supp. 319 (N.D.Ill. 1985) (prior threats to plaintiff). *See also Walsh v. Brewer*, 733 F.2d 473 (7th Cir. 1984) (previous attacks); *Benson v. Cady*, 761 F.2d 335 (7th Cir. 1985) (pervasive risk). The plaintiff must demonstrate not only that he or she experienced, or was exposed to, a serious harm but also that there was a substantial risk beforehand that serious harm might actually occur. *Brown, supra*, 398 F.3d at 910 – 911. "When [Seventh Circuit] cases speak of a 'substantial risk' that makes a failure to take steps against it actionable under the Eighth or Fourteenth Amendment, they also have in mind risks attributable to detainees with known 'propensities' of violence toward a particular individual or class of individuals; to 'highly probable' attacks; and to particular detainees who pose a 'heightened risk of assault to the plaintiff.' " 398 F.3d at 911. This general definition of "substantial risk" includes "risks so great that they are almost certain to materialize if nothing is done." *Id.*, quoting *Delgado v. Stegall*, 367 F.3d 668 (7th Cir. 2004).

In *Golden v. McGuire*, No. 07 C 3304, 2009 WL 971416 at *3 (N.D.Ill. Apr. 8, 2009), the district court applied *Brown* and found that the plaintiff was not incarcerated under conditions posing a serious risk of harm. There, the plaintiff described troubles he had with a particular gang, including having gang members call him names, being subjected to extra physical contact during basketball games, and having requests made of him for food and drink items. The court reasoned that the incidents the plaintiff described were "at most, a generalized, subjective fear of being assaulted, and not a specific risk of serious harm." *Id.* The court held that "[t]he mere presence of shady characters in the plaintiff's environs is not, alone, enough to create an objectively serious risk of harm." *Id.*

Conversely, in *Abney v. Monahan*, 458 F.Supp.2d 614, 620 – 621 (N.D.Ill. 2006), the district court applied *Brown* and found that the plaintiff was incarcerated under conditions posing a serious risk of harm. There, the plaintiff's roommate asked if the two of them could have sex together. When the plaintiff declined the sexual advance, his roommate said that he was disappointed and would physically harm the plaintiff. The court held that based on those facts there was a substantial risk that the plaintiff would be harmed.

As stated above, the second prong of a failure-to-protect claim — considered the subjective prong — has two subparts; it requires a plaintiff to show that a defendant (1) had knowledge of the substantial risk of harm and (2) disregarded that risk. *Golden, supra*, 2009 WL 971416 at *3, citing *Brown, supra*, 398 F.3d at 913, 916. The defendant "must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference." *Farmer, supra*, 114 S.Ct. at 1979. "The relevant inquiry is whether correctional officials actually knew about the danger that the plaintiff faced, not whether a reasonable official

should have known." *Golden, supra,* 2009 WL 971416 at *3, citing *Qian v. Kautz,* 168 F.3d 949, 955 (7th Cir. 1999). "Awareness of a specific, impending and substantial threat to the plaintiff's safety is necessary to support a failure to protect claim." *Cirilla v. Kankakee County Jail,* 438 F.Supp.2d 937, 944 (C.D.Ill. 2006), citing *Pope v. Shafer,* 86 F.3d 90, 92 (7th Cir. 1996).

In *Grieveson, supra,* the plaintiff was attacked seven times over an approximately four-month period of time. Nonetheless, the court found that the plaintiff failed to prove that the defendants knew of the risk the plaintiff faced. 538 F.3d at 776. The court noted that the defendants did not know the risk faced by the plaintiff because the plaintiff did not adequately inform them of the risk. The plaintiff told jail officials only "that he was afraid and that he wanted to be moved," but he did not inform them of a "specific" threat to his safety. *Id.* The court found that "[s]uch vague information did not put the jail officers on notice of a specific threat to [the plaintiff's] safety." *Id.* In grievances the plaintiff filed with jail officials, "he fail[ed] to identify a tangible threat to his safety or wellbeing," only asking to be moved to "safer" housing, and the court then again noted that the plaintiff "did not put the jail officials on notice of specific threats to his safety." 538 F.3d at 777.

Shortly after the Seventh Circuit issued its opinion in *Grieveson,* it provided further clarification in *Klebanowski v. Sheahan,* 540 F.3d 633 (7th Cir. 2008). There, after the plaintiff suffered an attack from other detainees, he told correctional officers "that he was afraid for his life and he wanted to be transferred off the tier," but the officers took no action, and the plaintiff suffered a second attack. 540 F.3d at 639. The court noted that the plaintiff needed to show that the officers "were actually aware of a substantial risk of harm" and that "statements like those made by [the plaintiff were] insufficient to alert [the] officers to a specific threat." *Id.,* citing *Butera v. Cottey,* 285 F.3d 601, 606 (7th Cir. 2002). A plaintiff must provide "more than general allegations of fear or the need to be removed [from a housing unit]." 540 F.3d at 639. The court held that because the plaintiff did not provide the officers with any additional details of a threat, "there was nothing leading the officers to believe that [the plaintiff] himself was not speculating regarding the threat he faced out of fear based on the first attack he suffered," and the lack of specific details given by the plaintiff therefore fell "below the required notice an officer must have for liability to attach for deliberate indifference." 540 F.3d at 640. *See also Dale v. Poston,* 548 F.3d 563, 569 (7th Cir. 2008) (finding that detainee's "vague statements that inmates were 'pressuring' him and 'asking questions' were simply inadequate to alert the officers to the fact there was a true threat at play").

I. [5.40] Use of Force

Actions for use of force are also subject to the Prison Litigation Reform Act, including its exhaustion of administrative remedies requirements. 42 U.S.C. §1997e; *McCoy v. Gilbert,* 270 F.3d 503 (7th Cir. 2001). Liability for excessive force on convicted and sentenced prisoners is governed under the Eighth Amendment Cruel and Unusual Punishment Clause. *See Lewis v. Downey,* 581 F.3d 467 (7th Cir. 2009). Pretrial detainees (and those convicted but not yet sentenced) are entitled to the protections under the Due Process Clause of the Fourteenth Amendment. *Id.* However, the courts have yet to enunciate a definitive use-of-force standard under the Fourteenth Amendment and, instead, typically default to the Eighth Amendment

standard. *Id.* (holding that anything that would violate Eighth Amendment, which proscribes cruel and unusual punishment, would violate Fourteenth Amendment, which prohibits punishment entirely).

The unnecessary and wanton infliction of pain violates the Eighth Amendment. *Whitley v. Albers,* 475 U.S. 312, 89 L.Ed.2d 251, 106 S.Ct. 1078, 1084 (1986). The issue is whether force was applied in a good-faith effort to maintain and restore discipline or whether it was applied maliciously or sadistically for the purpose of causing harm. 106 S.Ct. at 1084 – 1085. Prison officials should be accorded wide-ranging discretion to fashion policies and practices needed to maintain order, safety, and security. 106 S.Ct. at 1085. In analyzing whether the force used was excessive, the courts should consider the following factors: (1) the need for force; (2) the amount of force used; (3) the threat reasonably perceived by the officer; (4) the efforts made to temper the severity of force; and (5) the extent of injury caused by the force. *Id.; Lewis, supra,* 581 F.3d at 477. However, the absence of a serious injury does not foreclose an excessive force claim. *Hudson v. McMillian,* 503 U.S. 1, 117 L.Ed.2d 156, 112 S.Ct. 995 (1992).

Use of Tasers has become quite prevalent in the jail and prison setting. As stated by the Seventh Circuit in *Lewis, supra, "*We remain cognizant of the important role that non-lethal, hands-off means — including taser gun — play in maintaining discipline and order within detention facilities." 581 F.3d at 475 – 476. The use of a Taser on an aggressive, disruptive, or physically threatening inmate to compel compliance with an order "is a valid penological justification." 581 F.3d at 477. However, absent aggressive or threatening behavior, the use of a Taser could be viewed by a jury as malicious or sadistic, thus precluding summary judgment. 581 F.3d at 477 – 478. Furthermore, it is clearly established that using a Taser on an inmate who is not aggressive or threatening, especially without any warning that the Taser would be used, would violate the inmate's constitutional rights, thus precluding qualified immunity. 581 F.3d at 479.

VI. CLAIMS BROUGHT BY PUBLIC EMPLOYEES

A. [5.41] Terminable at Will or Property Interest

The most common claims brought by disgruntled public employees arise from the termination of public employment. The first step in defending such suits is to determine whether the employee was terminable at will or had a property interest in his or her job under a statute, ordinance, or agreement. While most public employees are terminable at will, the plaintiff who does enjoy a property interest may not ordinarily be terminated absent a hearing and a determination of "cause." At-will employees, on the other hand, are subject to termination for any or no cause provided that the employer's motivation for discharging the employee is not the employer's protected class or retaliation for some protected conduct.

Whether a public employee has a property interest in his or her position is determined by reference to state law. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701, 2709 (1972). In any due-process case in which a deprivation of property is alleged, the threshold question is whether a protected property interest actually exists. *Cole v. Milwaukee*

Area Technical College District, 634 F.3d 901, 904 (7th Cir. 2011), citing *Buttitta v. City of Chicago,* 9 F.3d 1198, 1201 (7th Cir. 1993). *See also Khan v. Bland,* 630 F.3d 519, 535 – 536 (7th Cir. 2010). "To have a protectable property interest in a benefit, such as continued employment, a plaintiff must have more than an 'abstract need or desire for it' and more than a 'unilateral expectation of it.' " *Cole, supra,* quoting *Roth, supra,* 92 S.Ct. at 2709. Rather, a plaintiff must have a "legitimate claim of entitlement to it." *Id.* For example, many full-time police officers, deputy sheriffs, and correctional officers have property interests in their jobs under state statute. See 65 ILCS 5/10-1-18, 5/10-1-18.1; 55 ILCS 5/3-7012, 5/3-8014. For a discussion of protected property interest in public employment, *see Kiddy-Brown v. Blagojevich,* 408 F.3d 346, 360 – 365 (7th Cir. 2005).

Property interests can also be conferred by ordinances that impose restrictions on the reasons for which certain public employees may be terminated or suspended. *Bishop v. Wood,* 426 U.S. 341, 48 L.Ed.2d 684, 96 S.Ct. 2074 (1976). Thus, a municipal ordinance that confers on part-time employees the statutory protections normally afforded full-time employees could create a property interest, but only to the extent that the ordinance is not inconsistent with state statute. *See also Kyle v. City of Oak Forest,* 637 F.Supp. 980 (N.D.Ill. 1986) (ordinance ineffective because statute specifically exempted part-time firefighters from protections of board of fire and police commissioners).

In addition to statutes and ordinances, property interests can arise through contracts and mutually explicit understandings and agreements. *Perry v. Sindermann,* 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972); *Kiddy-Brown, supra,* 408 F.3d at 361. In the context of public employment, however, many public employees are specifically exempted from civil service protections. Frequently, in such cases, promises of career or continued employment do not overcome the statutory exemption. *Phelen v. City of Chicago,* 347 F.3d 679, 682 (7th Cir. 2003); *Shlay v. Montgomery,* 802 F.2d 918, 921 – 922 (7th Cir. 1986).

In some contexts, even promises made in an employee handbook can give rise to a legitimate claim of entitlement sufficient to be protected as a property interest. *Tatom v. Ameritech Corp.,* 305 F.3d 737 (7th Cir. 2002); *Border v. City of Crystal Lake,* 75 F.3d 270, 273 – 274 (7th Cir. 1996). The Illinois Supreme Court has established that "an employee handbook or other policy statement creates enforceable contractual rights if the traditional requirements for contract formation are present." *Duldulao v. Saint Mary of Nazareth Hospital Center,* 115 Ill.2d 482, 505 N.E.2d 314, 318, 106 Ill.Dec. 8 (1987). *See also Tatom, supra,* 305 F.3d at 743. The requirements for such a contractual obligation are that

1. the language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made;

2. the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer; and

3. the employee must accept the offer by commencing or continuing to work after learning of the policy statement.

Illinois courts have recognized, however, that a disclaimer within an employee handbook can be sufficient to show that no "clear promise" of continuing employment was made, and thus the handbook did not create a legitimate claim of entitlement to employment. *Moss v. Martin,* 473 F.3d 694, 700 (7th Cir. 2007). *See Ivory v. Specialized Assistance Services, Inc.*, 365 Ill.App.3d 544, 850 N.E.2d 230, 233, 302 Ill.Dec. 793 (1st Dist. 2006); *Moore v. Illinois Bell Telephone Co.*, 155 Ill.App.3d 781, 508 N.E.2d 519, 521, 108 Ill.Dec. 358 (2d Dist. 1987) (finding employee promised "nothing" when employee plan stated it was "a statement of management's intent and . . . not a contract or assurance of compensation"). Moreover, public employees often allege the existence of oral contracts guaranteeing continued employment. However, governmental agents are generally not empowered to extend such guarantees absent a prior appropriation for the contract or some other authority for altering the employee's at-will status. *See, e.g., Crull v. Sunderman,* 384 F.3d 453, 466 (7th Cir. 2004); *Cannizzo v. Berwyn Township 708 Community Mental Health Board,* 318 Ill.App.3d 478, 741 N.E.2d 1067, 1071, 251 Ill.Dec. 889 (1st Dist. 2000) (elected board did not have authority to employ persons in positions that were important to effective administration of board beyond its terms). See also 65 ILCS 5/8-1-7(b) ("[n]otwithstanding any provision of this [Illinois Municipal] Code to the contrary, the corporate authorities of any municipality may make contracts for a term exceeding one year and not exceeding the term of the mayor or president holding office at the time the contract is executed, relating to: (1) the employment of a municipal manager, administrator, health officer, land planner [etc.]"). "Furthermore, an informal assurance by an official who is not authorized to make it does not provide the basis for establishing a protectable constitutional property interest." *Burrell v. City of Mattoon,* 378 F.3d 642, 649 (7th Cir. 2004), quoting *Zemke v. City of Chicago,* 100 F.3d 511, 513 (7th Cir. 1996). An employee dealing with a governmental agent has the risk of ascertaining whether the agent is acting within the bounds of his or her authority. *Crull, supra*.

Moreover, a statute, ordinance, rule, regulation, or contract that creates only a procedural guarantee of some type, without some substantive criteria that limits the government employer's discretion, does not create a property interest. *Cromwell v. City of Momence,* 713 F.3d 361, 364 (7th Cir. 2013) For example, in *Miyler v. Village of East Galesburg,* 512 F.3d 896 (7th Cir. 2008), the court held that §3.1-35-10 of the Illinois Municipal Code (65 ILCS 5/3.1-35-10), which sets out procedures for removal of a municipal officer, did not create a property interest in the village police chief's employment. The statute established no criteria that guaranteed some "cause" was necessary to remove the chief from his position. *Id.*

Some courts have criticized the scope of federal court interference in public employee-employer relations by virtue of the Supreme Court's expansive interpretations of property. *See Patterson v. Portch,* 853 F.2d 1399 (7th Cir. 1988). *See also Yatvin v. Madison Metropolitan School District,* 840 F.2d 412 (7th Cir. 1988). Accordingly, the lower federal courts have been reluctant to find property interests in positions that are not specifically protected under state statute or local ordinance. For instance, a city police officer who was found not disabled after on-duty injury and thus ineligible for disability benefits did not have a property interest in or claim of entitlement to reinstatement. Because the officer had a right to an opportunity to demonstrate his fitness for duty, the officer had no 42 U.S.C. §1983 due-process cause of action against the city for failing to reinstate him. *Licari v. City of Chicago,* 298 F.3d 664, 668 (7th Cir. 2002). *See also Petru v. City of Berwyn,* 872 F.2d 1359 (7th Cir. 1989) (applicants who enjoyed high rankings on municipal eligibility lists did not have property interest in being hired to these positions); *United*

States v. City of Chicago, 869 F.2d 1033 (7th Cir. 1989). *But see Demick v. City of Joliet*, 108 F.Supp.2d 1022, 1028 (N.D.Ill. 2000) (under Illinois Municipal Code, person is entitled to remain on eligibility list even if person has reached age 35; thus, person on eligibility list has protected property interest in remaining on list until it expires).

B. [5.42] Procedural Due Process

If an employee enjoys a property interest in his or her job, he or she is entitled to due process in connection with efforts to terminate his or her employment. Due process entails both a substantive and procedural element. In the context of public employment, it is almost always procedural due process that is at issue. *Montgomery v. Stefaniak*, 410 F.3d 933, 939 (7th Cir. 2005) (scope of substantive Due Process Clause is very limited and protects only against arbitrary government action that shocks conscience).

In procedural-due-process claims, the deprivation by state action of a constitutionally protected property interest is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without the requisite due process of law. *Cote v. Village of Broadview*, No. 08 C 6615, 2009 WL 2475117 at *2 (N.D.Ill. Aug. 11, 2009), citing *Zinermon v. Burch*, 494 U.S. 113, 108 L.Ed.2d 100, 110 S.Ct. 975, 983 (1990). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Cote, supra*, 2009 WL 2475117 at *2, quoting *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893, 902 (1976). Procedural due process generally requires that a public employee be afforded notice of the charges against him or her along with an opportunity to present his or her side of the story before dismissal. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985). The scope required of this pretermination hearing depends, to a large degree, on the magnitude of any post-termination hearing procedures. *Baird v. Board of Education for Warren Community Unit School District No. 205, Jo Daviess County, Illinois*, 389 F.3d 685, 690 – 691 (7th Cir. 2004) (when there is opportunity for full post-termination hearing, "due process does not require an employer to provide full 'trial-type rights' such as the right to present or cross-examine witnesses at the pre-termination hearing").

> **[**However,**] when the only available post-termination remedy is the opportunity to bring a state breach of contract suit, the pre-termination hearing . . . must fully satisfy the due process requirements of confrontation and cross-examination in addition to the minimal *Loudermill* requirements of notice and an opportunity to be heard.** 389 F.2d at 692.

The notice must be reasonably calculated to apprise interested parties of the contemplated action and to afford the interested parties an opportunity to present their objections. *O'Bannon v. Chicago Board of Education*, No. 00 C 7547, 2001 WL 1338996 (N.D.Ill. Oct. 30, 2001); *People ex rel. Devine v. $30,700.00 United States Currency*, 199 Ill.2d 142, 766 N.E.2d 1084, 1092, 262 Ill.Dec. 781 (2002). Accordingly, due process was not provided when a local board of fire and police commissioners failed to notify a police officer that a meeting, ostensibly called to discuss residency requirements, was in fact a formal termination hearing. *See Birdsell v. Board of Fire & Police Commissioners of City of Litchfield*, 854 F.2d 204 (7th Cir. 1988).

The frequency of procedural-due-process claims brought by public employees has been significantly curtailed since *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990). In *Easter House*, the court concluded that random and unauthorized deprivations of state-created property rights cannot be redressed via a federal procedural-due-process claim as long as the state provides adequate avenues of redress. *Easter House* has been specifically applied to bar procedural-due-process claims brought by public employees. *Lolling v. Patterson*, 966 F.2d 230 (7th Cir. 1992); *Thornton v. Barnes*, 890 F.2d 1380 (7th Cir. 1989). *Cf. Zinermon, supra* (mental health patient possessed valid procedural-due-process claim because of statutory defect that foreseeably caused false voluntary commitments to mental health facilities).

An important issue in those procedural-due-process cases that escape the reach of *Easter House, supra*, is whether the employer can demonstrate that the plaintiff's employment would have been properly terminated even if a hearing had been granted. The plaintiff may recover only nominal damages (typically $1) unless he or she can show that he or she would not have been terminated if a hearing had been afforded. *See, e.g., Alston v. King*, 231 F.3d 383, 386 (7th Cir. 2000) (when employer can prove that employee would have been terminated even if proper hearing had been given, terminated employee cannot recover damages stemming from termination in action for procedural-due-process violation). However, such an employee may still obtain damages for emotional distress attributable to the deficiencies in procedure if the employee can convince the trier of fact that the distress is attributable to the denial of procedural due process itself rather than to the justified termination. *Id.*

Note also that procedural due process is not violated by summary dismissal of a protected public employee pursuant to a valid reorganization. "When a government eliminates an employee's position in connection with a 'legitimate governmental reorganization,' however, the employee is not entitled to notice or a hearing." *Schulz v. Green County, State of Wisconsin*, 645 F.3d 949, 952 (7th Cir. 2011), quoting *Misek v. City of Chicago*, 783 F.2d 98, 100 – 101 (7th Cir. 1986). "A reorganization thus does not 'exempt' a government from constitutional due process requirements; it simply eliminates the employee's property interest." *Schulz, supra*, 645 F.3d at 952. *See also Conroy v. City of Chicago*, 708 F.Supp. 927 (N.D.Ill. 1989). However, the reorganization exception to a public employee's entitlement to due process does not apply when the reorganization is simply used as a sham or pretext for what was, in essence, a dismissal. *Misek, supra.*

C. [5.43] Constructive Discharge

A plaintiff will sometimes allege that to avoid a lawsuit for wrongful discharge, the public employer made the employee's working conditions so unpleasant that the employee was forced to resign, effecting a constructive discharge.

A constructive discharge results when working conditions are "so intolerable that a reasonable person would [feel] compelled to resign." *Patton v. Keystone RV Co.*, 455 F.3d 812, 818 (7th Cir. 2006), quoting *Pennsylvania State Police v. Suders*, 542 U.S. 129, 159 L.Ed.2d 204, 124 S.Ct. 2342, 2354 (2004). *Suders* addressed the topic of constructive discharge in the context of a Title VII hostile-environment claim. However, the Seventh Circuit has held that the same general approach applies equally to constructive discharge claims brought under the Due Process

Clause. *Witte v. Wisconsin Department of Corrections,* 434 F.3d 1031, 1035 (7th Cir. 2006). Working conditions for constructive discharge must be even more egregious than those that would support a finding of a hostile work environment; absent extraordinary circumstances, an employee is expected to remain employed while seeking redress. 434 F.3d at 1035 – 1036. Thus, when a former chief of detectives was stripped of all duties and forced to merely sit at a desk all day in a windowless former storage closet with no telephone, a valid cause of action for constructive discharge was stated when the officer resigned at the onset of symptoms of a nervous collapse. *Parrett v. City of Connersville, Indiana,* 737 F.2d 690, 694 (7th Cir. 1984).

A plaintiff must satisfy a hefty burden to establish constructive discharge. Not every unfair condition of employment constitutes constructive discharge. For instance, unequal pay scales between men and women, while relevant to a determination of constructive discharge, do not alone constitute such an intolerable condition that a reasonable employee would be forced to resign. *Bourque v. Powell Electrical Manufacturing Co.,* 617 F.2d 61, 64 – 66 (5th Cir. 1980) (acts of discrimination in employment that violate Title VII do not necessarily constitute constructive discharge); *Swearnigen-El v. Cook County Sheriff's Department,* 602 F.3d. 852, 859 (7th Cir. 2010) (plaintiff corrections officer was not constructively discharged when placed on administrative leave after being accused of abusing a prisoner, even though accusation was eventually unfounded); *Muller v. United States Steel Corp.,* 509 F.2d 923, 929 (10th Cir. 1975) (plaintiff not promoted because of Spanish-American origin). *But see Washington v. Illinois Department of Revenue,* 420 F.3d 658, 662 (7th Cir. 2005) (suggesting retaliating against employee for engaging in protected activity by moving him from quiet office to one where Muzak played constantly could be material change if not, indeed, constructive discharge). *Equal Employment Opportunity Commission v. Sears, Roebuck & Co.,* 233 F.3d 432, 440 (7th Cir. 2000) (claim for constructive discharge cognizable under Title VII as well as Americans with Disabilities Act of 1990 (ADA), Pub.L. No. 101-336, 104 Stat. 327). Indeed, some courts have found that an employee has been discriminated against but, nonetheless, have concluded that the discrimination did not render the plaintiff's employment so intolerable that a reasonable person would have quit. *See Steele v. Illinois Human Rights Commission,* 160 Ill.App.3d 577, 513 N.E.2d 1177, 112 Ill.Dec. 568 (3d Dist. 1987); *Brewington v. Department of Corrections,* 161 Ill.App.3d 54, 513 N.E.2d 1056, 112 Ill.Dec. 447 (1st Dist. 1987). *See also Estate of Strocchia v. City of Chicago,* 284 Ill.App.3d 891, 672 N.E.2d 919, 220 Ill.Dec. 102 (1st Dist. 1996) (allegations of constructive discharge did not support cause of action for retaliatory discharge).

Several courts have required a plaintiff claiming constructive discharge to prove that the employer imposed the intolerable working conditions with the very purpose of forcing the employee to resign. *See Muller, supra; Padilla v. Stringer,* 395 F.Supp. 495, 504 (D.N.M. 1974). See also Barbara Lindemann and Paul Grossman, EMPLOYMENT DISCRIMINATION LAW, pp. 838 – 841 (3d ed. 1996); *Katradis v. Dav-El of Washington, DC,* 846 F.2d 1482 (D.C.Cir. 1988).

The Seventh Circuit has held that qualified immunity insulated a police officer who coerced a subordinate's resignation through threats of indictment and humiliation. *Alvarado v. Picur,* 859 F.2d 448 (7th Cir. 1988). In *Alvarado,* the court reasoned that it was not clearly established that such conduct was constitutionally impermissible. *Id.* For a discussion of qualified immunity, see §5.5 above.

D. [5.44] State Claims of Retaliatory Discharge

Generally, an employer may fire an at-will employee for any reason or no reason at all. *Fellhauer v. City of Geneva,* 142 Ill.2d 495, 568 N.E.2d 870, 154 Ill.Dec. 649 (1991); *Barr v. Kelso-Burnett Co.,* 106 Ill.2d 520, 478 N.E.2d 1354, 1356, 88 Ill.Dec. 628 (1985). Nevertheless, the Supreme Court has recognized the limited and narrow tort of retaliatory discharge as an exception to the general rule of at-will employment. *Balla v. Gambro, Inc.,* 145 Ill.2d 492, 584 N.E.2d 104, 107, 164 Ill.Dec. 892 (1991).

In *Kelsay v. Motorola, Inc.,* 74 Ill.2d 172, 384 N.E.2d 353, 23 Ill.Dec. 559 (1978), the Illinois Supreme Court recognized the tort of retaliatory discharge when an employee was fired in retaliation for filing a workers' compensation claim. Concern that employers would undermine the public policy embodied in the Workers' Compensation Act, 820 ILCS 305/1, *et seq.,* led the Illinois Supreme Court to hold that an at-will employee could not be terminated in retaliation for filing a workers' compensation claim. 384 N.E.2d at 357. The tort was extended in 1981 to an employee who was fired in retaliation for reporting the criminal conduct of a coworker. *Palmateer v. International Harvester Co.,* 85 Ill.2d 124, 421 N.E.2d 876, 52 Ill.Dec. 13 (1981). *See also Wheeler v. Caterpillar Tractor Co.,* 108 Ill.2d 502, 485 N.E.2d 372, 376, 92 Ill.Dec. 561 (1985) (plaintiff illegally fired for refusing to work with X-ray unit that was allegedly unsafe and in violation of Nuclear Regulatory Commission regulations).

In *Jacobson v. Knepper & Moga, P.C.,* 185 Ill.2d 372, 706 N.E.2d 491, 492 – 493, 235 Ill.Dec. 936 (1998), the Illinois Supreme Court noted that the tort of retaliatory discharge has been allowed in two settings. The first situation is when an employee is discharged for filing, or in anticipation of the filing of, a claim under the Workers' Compensation Act, and the second is when an employee is discharged in retaliation for the reporting of illegal or improper conduct, otherwise known as "whistleblowing." Attempts to expand the tort's scope have met strong resistance by the courts. *See, e.g., Fellhauer, supra,* 568 N.E.2d at 875.

To establish a cause of action for retaliatory discharge, a plaintiff must demonstrate that (1) he or she was discharged in retaliation for his or her activities and (2) the discharge was in contravention of a clearly mandated public policy. *Zimmerman v. Buchheit of Sparta, Inc.,* 164 Ill.2d 29, 645 N.E.2d 877, 880, 206 Ill.Dec. 625 (1994). Finding no such policy implicated, the tort of retaliatory discharge was not extended to an employee who was fired for filing a claim under an employer's group health insurance plan. *Id.* Similarly, no claim was stated by a medical technician who was fired because he "expressed concern" that a coworker was not certified in violation of a city ordinance. *Gould v. Campbell's Ambulance Service, Inc.,* 111 Ill.2d 54, 488 N.E.2d 993, 994, 94 Ill.Dec. 746 (1986). Employees who were allegedly fired in retaliation for exercising their right of free speech did not state a claim for retaliatory discharge because the constitutionally guaranteed right to free speech is binding only on government and does not limit the hiring and firing decisions of private companies. *Barr, supra. Accord Mein v. Masonite Corp.,* 109 Ill.2d 1, 485 N.E.2d 312, 92 Ill.Dec. 501 (1985) (age discrimination does not give rise to retaliatory discharge claim). *See also Estate of Strocchia v. City of Chicago,* 284 Ill.App.3d 891, 672 N.E.2d 919, 220 Ill.Dec. 102 (1st Dist. 1996) (allegations of constructive discharge, even if true, did not support cause of action for retaliatory discharge).

The Illinois Supreme Court rejected an attempt to exempt municipal corporations from the reaches of the tort of retaliatory discharge. *Smith v. Waukegan Park District*, 231 Ill.2d 111, 896 N.E.2d 232, 237, 324 Ill.Dec. 446 (2008), *overruling Cross v. City of Chicago*, 352 Ill.App.3d 1, 815 N.E.2d 956, 965, 287 Ill.Dec. 312 (1st Dist. 2004) (municipalities are immune from Illinois tort claims based on retaliatory discharge); *Watt v. City of Highland Park*, No. 01 C 6230, 2005 WL 2304790 at *7 (N.D.Ill. Sept. 20, 2005) (tort of retaliatory discharge may not be recognized, however, when plaintiff pursues alternate remedy against municipality or public official under Civil Rights Act of 1871); *Busa v. Barnes*, 646 F.Supp. 615, 617 – 618 (N.D.Ill. 1986). Illinois courts have also resisted efforts to expand the tort of retaliatory discharge to disciplinary actions short of dismissal. *See, e.g., Irizarry v. Illinois Central R.R.*, 377 Ill.App.3d 486, 879 N.E.2d 1007, 1011, 316 Ill.Dec. 619 (1st Dist. 2007); *Bajalo v. Northwestern University*, 369 Ill.App.3d 576, 860 N.E.2d 556, 562, 307 Ill.Dec. 902 (1st Dist. 2006) (collecting cases); *Welsh v. Commonwealth Edison Co.*, 306 Ill.App.3d 148, 713 N.E.2d 679, 683, 239 Ill.Dec. 148 (1st Dist. 1999) (holding that nuclear power plant employees could not maintain action for constructive retaliatory discharge based on allegations that they were demoted, placed in new jobs at different locations, and suffered losses in pay and deterioration of working conditions after they reported safety concerns to management and to Nuclear Regulation Commission). *See also Nickum v. Village of Saybrook*, 972 F.Supp. 1160, 1173 (C.D.Ill. 1997) (drawing distinction between retaliations for exercise of constitutional rights and execution of mandated state policy).

The Whistleblower Act, 740 ILCS 174/1, *et. seq.*, has created a potential cause of action for retaliatory discharge for an employee's reporting of an employer's violation of a state or federal law rule or regulation (740 ILCS 174/15) or the employee's refusal to participate in illegal conduct (740 ILCS 174/20). The statute provides for a wide range of relief to an aggrieved plaintiff, including reinstatement, damages, attorneys' fees, and expert witness costs. 740 ILCS 174/30. The state common-law retaliatory discharge cause of action is available only to an at-will employee, but any employee can state a cause of action under the Whistleblower Act. *Taylor v. Board of Education of City of Chicago*, 2014 IL App (1st) 123744, 10 N.E.3d 383, 381 Ill.Dec. 298. At least one court has held that a cause of action can be stated under the Whistleblower Act for complaints made to the employee's own employer, rather than some outside government agency. *Brame v. City of North Chicago*, 2011 IL App (2d) 100760, ¶3, 955 N.E.2d 1269, 353 Ill.Dec. 458. Such claims may be preempted by the Illinois Human Rights Act (IHRA), 775 ILCS 5/1-101, *et seq.*, if the complaint is about conduct that falls within the classic civil rights violations governed by the IHRA. *Blount v. Stroud*, 232 Ill.2d 302, 904 N.E.2d 1, 16, 328 Ill.Dec. 239 (2009).

E. Constitutional Limitations to Firings of At-Will Employees

1. [5.45] Free Speech

Even a terminable-at-will employee cannot generally be discharged for exercising his or her First Amendment right to speak out on matters of public concern. *See Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684, 1690 (1983).

To determine whether a public employee "spoke as a citizen on a matter of public concern," the Court examines "the content, form, and context of a given statement,

> **as revealed by the whole record."** *Shefcik v. Village of Calumet Park,* 532 F.Supp.2d 965, 974 (N.D.Ill. 2007), quoting *Connick, supra,* 103 S.Ct. at 1690.

The *Connick* public concern element must relate to a matter of "political, social, or other concern to the community." *Shefcik, supra,* 532 F.Supp.2d at 975, quoting *Connick, supra,* 103 S.Ct. at 1690. On the other hand,

> **when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior**. *Id.*

Whether an issue touches on a matter of public concern is a question of law for the court. Thus, in *Rankin v. McPherson,* 483 U.S. 378, 97 L.Ed.2d 315, 107 S.Ct. 2891, 2894 (1987), a public employee should not have been fired after publicly stating in response to the shooting of President Reagan, "If they go for him again, I hope they get him."

The inappropriate or controversial character of a statement is irrelevant:

> **[D]ebate on public issues should be uninhibited, robust, and wide open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.** 107 S.Ct. at 2898, quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710, 721 (1964).

The right of a public employee to speak on issues of public concern is not without limitation. Disciplinary action may be appropriate if the employee's speech is disruptive of certain necessarily close working relationships or of the efficient operation of the particular department or agency. *Pickering v. Board of Education of Township High School District 205, Will County, Illinois,* 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968). "*Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech." *Garcetti v. Ceballos,* 547 U.S. 410, 164 L.Ed.2d 689, 126 S.Ct. 1951, 1958 (2006) (when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and Constitution does not insulate their communications from employer discipline). The first inquiry under *Pickering* requires the court to determine whether the employee spoke as a citizen on a matter of public concern. If the answer is "no," the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is "yes," then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. "A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Id.*

> **When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. . . . Government employers, like private**

> **employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. . . .**
>
> **At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. . . . So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. [**Citations omitted.**]** *Id.*

An employee's motivation in making the speech is a "relevant, but not dispositive, factor" in determining whether the speech addresses a matter of public concern. *Metzger v. DaRosa*, 367 F.3d 699, 702 (7th Cir. 2004), quoting *Sullivan v. Ramirez*, 360 F.3d 692, 700 (7th Cir. 2004).

> **Yet, "where considerations of motive and context indicate that an employee's speech raised a topic of general societal interest merely for personal reasons rather than a desire to air the merits of the issue, or for the sole purpose of bolster[ing] [her] own position in a private personnel dispute with [her] superiors, these factors militate against the conclusion that the employee's speech is entitled to First Amendment protection."** 367 F.3d at 702, quoting *Campbell v. Towse*, 99 F.3d 820, 827 (7th Cir. 1996).

Courts have demonstrated an increasing sensitivity to disruption defenses based on the balancing test set forth in *Pickering, supra. See, e.g., Wales v. Board of Education of Community Unit School District 300*, 120 F.3d 82 (7th Cir. 1997) (school board's interest in operating childhood education center outweighed teacher's free speech interest in advocating tougher discipline and safety standards for children). In conducting this balancing test, the Supreme Court cautions to give substantial weight to government employers' reasonable predictions of disruption, even when the speech involved was on a matter of public concern. *Crue v. Aiken*, 370 F.3d 668, 685 – 686 (7th Cir. 2004), citing *Waters v. Churchill*, 511 U.S. 661, 128 L.Ed.2d 686, 114 S.Ct. 1878, 1888 (1994).

Even if a plaintiff can establish that his or her speech touches on a matter of public concern under *Connick, supra*, and that it is not outweighed by the employer's interest in avoiding disruption under *Pickering, supra*, he or she cannot prevail unless he or she satisfies the but-for causation test enunciated in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977). Under *Mt. Healthy*, a plaintiff must establish that his or her speech was a substantial or motivating factor in the decision to terminate, after which the burden shifts to the employer to show that the plaintiff would have been terminated for constitutionally permissible reasons even in the absence of the protected speech. If the employer sustains that burden, the plaintiff is given a last chance to demonstrate that the employer's proffered justifications are merely a pretext for unconstitutional motivation. *See also Spiegla v. Hull*, 371 F.3d 928, 942 (7th Cir. 2004) ("disavowing" requirement that plaintiff alleging First Amendment retaliation has burden of proving but-for causation; rather, "a plaintiff alleging First

Amendment retaliation must prove by a preponderance of the evidence that his or her protected activity was a motivating factor in the defendant's retaliatory action. To clarify, a motivating factor does not amount to a but-for factor or to the only factor, but is rather a factor that motivated the defendant's actions.").

In *Greene v. Doruff*, 660 F.3d 975, 977 (7th Cir. 2011), the Seventh Circuit clarified its treatment of the U.S. Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 174 L.Ed.2d 119, 129 S.Ct. 2343, 2350 (2009) — which had caused confusion — and held that (a) *Gross* does not affect suits to enforce First Amendment rights and (b) the *Mt. Healthy*, *supra*, standard continues to govern such suits. However, the *Greene* court noted that *Gross* may have implications regarding causation and the shifting burden of proof under other statutes.

Garcetti, *supra*, truly changed the landscape of employment litigation arising out of First Amendment concerns. *Garcetti* excluded a wide range of public employee speech from protection from retaliation. *E.g.*, *Abcarian v. McDonald*, 617 F.3d 931 (7th Cir. 2010) (statements of physician at state university hospital on topics of risk management, fees charged to physicians, and surgeon abuse of prescription medications were not protected as within his position as department head); *Hernandez v. Cook County Sheriff's Office*, 634 F.3d. 906 (7th Cir. 2011) (correction officer's workplace complaints about unsafe conditions and overcrowding at jail within his official duties and unprotected); *Wackett v. City of Beaver Dam, Wisconsin*, 642 F.3d 578 (7th Cir. 2011) (director of public works' complaints about bidding process for front-end loader were within his position); *Trigillo v. Snyder*, 547 F.3d 826 (7th Cir. 2008) (plaintiff's complaints about procurement transactions within her state agency were unprotected as part of her job duties).

Qualified immunity can constitute a successful defense to First Amendment and political firings cases. However, the key elements of a First Amendment retaliation claim

> **have been clear for years: a public employer may not retaliate against an employee who exercises his First Amendment speech rights, including in particular through a transfer to a less desirable position, and speech about police protection and public safety raises a matter of public concern.** *Gustafson v. Jones*, 290 F.3d 895, 912 (7th Cir. 2002).

See also Pearson v. Welborn, 471 F.3d 732, 742 (7th Cir. 2006) (finding that prisoner's right to complain about conditions was sufficiently clear to deny qualified immunity to warden who retaliated in response to complaints). For a further discussion of the defense of qualified immunity, see §5.5 above.

2. [5.46] Political Firings

In addition to freedom of speech, public employees generally cannot be retaliated against for political reasons (*e.g.*, when an employee supports a certain political candidate in an election). *Elrod v. Burns*, 427 U.S. 347, 49 L.Ed.2d 547, 96 S.Ct. 2673 (1976). The First Amendment right to express a political preference is not an unfettered one, however. "If the nature of a public

official's job makes political loyalty a valid qualification for the effective performance of his position, that official may be terminated on the basis of his political affiliation." *Moss v. Martin,* 473 F.3d 694, 698 – 699 (7th Cir. 2007), citing *Riley v. Blagojevich,* 425 F.3d 357, 359 (7th Cir. 2005). Certain public employees serve in positions for which a particular political affiliation is an "appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel,* 445 U.S. 507, 63 L.Ed.2d 574, 100 S.Ct. 1287, 1295 (1980). This exception to the rule against political retaliation applies primarily to employees who serve in positions requiring trust and confidence. *Id.* To determine whether political loyalty is a valid qualification, whether the employee's position entailed "the making of policy and thus the exercise of political judgment" is considered. *Allen v. Martin,* 460 F.3d 939, 944 (7th Cir. 2006), quoting *Riley, supra,* 425 F.3d at 359. For example, in *Benedix v. Village of Hanover Park, Illinois,* 677 F.3d 317 (7th Cir. 2012), the court held that the plaintiff, as an executive coordinator closely aligned with a former village manager, was in a confidential position exempt from protection. For a good synopsis, see the Seventh Circuit's decision in *Riley, supra,* which contains a table of decisions with a description of positions in which political affiliation was held to be — or not to be — a permissible job qualification.

It has been held that employees in the following positions were improperly dismissed because of political affiliation: city court bailiff (*Meeks v. Grimes,* 779 F.2d 417 (7th Cir. 1985)) and bookkeeper (*Grossart v. Dinaso,* 758 F.2d 1221 (7th Cir. 1985)). *See also Horton v. Taylor,* 767 F.2d 471 (8th Cir. 1985) (road graders); *Jones v. Dodson,* 727 F.2d 1329 (4th Cir. 1984) (deputy sheriffs); *Barnes v. Bosley,* 745 F.2d 501 (8th Cir. 1984) (deputy court clerks). On the other hand, the court in *Caruso v. De Luca,* 81 F.3d 666, 669 – 671 (7th Cir. 1996), held that the dismissal of a deputy clerk was properly based on the city clerk's "legitimate management concerns," "trust," and the "smooth working relationship" of the office. In *Caruso,* the city clerk successfully argued that the plaintiff's termination was appropriate considering that "trust" was in question after the plaintiff ran for the position of city clerk and lost to her employer, the incumbent city clerk. 81 F.3d at 667 – 668.

The prohibition against political firings also protects public employees from being transferred or denied promotions for political reasons. *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 111 L.Ed.2d 52, 110 S.Ct. 2729, 2737 (1990) ("promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees"). *See also O'Sullivan v. City of Chicago,* 396 F.3d 843, 850 (7th Cir. 2005). However, political retaliation taken against public employees pursuant to a legislative act of a city council is constitutionally permissible, even if the same action taken by an individual public employer would be unconstitutional. *Fraternal Order of Police Lodge #121, Inc. v. City of Hobart,* 864 F.2d 551 (7th Cir. 1988).

In *Tarpley v. Jeffers,* 96 F.3d 921 (7th Cir. 1996), the Seventh Circuit held that non-policy-making, nonconfidential temporary employees were protected by *Rutan, supra.* The court rejected the government's contention that the workers were analogous to unprotected independent contractors, but nonetheless awarded the defendants qualified immunity because the law was not clearly established. The United States Supreme Court has also held that independent contractors are protected under the holding in *Rutan, supra,* in *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr,* 518 U.S. 668, 135 L.Ed.2d 843, 116 S.Ct. 2342 (1996), and *O'Hare Truck Service, Inc. v. City of Northlake,* 518 U.S. 712, 135 L.Ed.2d 874, 116 S.Ct. 2353 (1996).

3. [5.47] Equal Protection: Race-Based or Sex-Based Animus

The Fourteenth Amendment requires the states to afford all persons "equal protection of the laws." U.S.CONST. amend. XIV. The Equal Protection Clause encompasses the right to be free from sexual and racial discrimination and harassment. *See Bohen v. City of East Chicago, Indiana*, 799 F.2d 1180 (7th Cir. 1986). A public employer's decision to discriminate against or harass a person because of race or sex is redressable under 42 U.S.C. §1983.

In the context of claims of sexual and racial discrimination in public employment, §1983 dovetails with Title VII. *Nanda v. Board of Trustees of University of Illinois*, 303 F.3d 817, 830 (7th Cir. 2002) ("review of the standards of the Equal Protection Clause and of Title VII reveals that Title VII 'enforces the Fourteenth Amendment without altering its meaning'"), quoting *Cherry v. University of Wisconsin System Board of Regents*, 265 F.3d 541, 549 (7th Cir. 2001). Title VII is the comprehensive federal legislation that is specifically targeted at eliminating discrimination in the private and public workplace. For an overview of Title VII, see §5.53 below. Public employees may, therefore, bring discrimination claims under both Title VII and §1983. While Title VII claimants must comply with that statute's comprehensive administrative process, §1983 claims may be filed directly in federal or state court without resort to any administrative scheme. *See Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 73 L.Ed.2d 172, 102 S.Ct. 2557 (1982).

Some of the advantages that §1983 held over Title VII were blurred when Congress passed the Civil Rights Act of 1991 (1991 Act), Pub.L. No. 102-166, 105 Stat. 1071, which provides for jury trials and for compensatory and punitive damages with certain dollar caps that vary depending on the size of the company — advantages previously not available. See 42 U.S.C. §1981a. Notwithstanding these additional remedies, it makes little sense for an attorney representing a public employee in a discrimination case to sue solely under Title VII and to forgo the uncapped-damages remedies available under §1983.

Another difference between §1983 claims and Title VII claims is the burden of proof. "[A] discrimination plaintiff alleging a violation of the equal protection clause bears a heavier burden of proof than a discrimination plaintiff under Title VII." *Sims v. Mulcahy*, 902 F.2d 524, 538 (7th Cir. 1990). As explained in *Sims:*

> **Under Title VII, the petitioner must prove that she was discriminated against through disparate treatment based on an impermissible factor, or disparate impact of a neutral practice on a protected group. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 – 05, 93 S.Ct. 1817, 1824 – 26, 36 L.Ed. 668 (1973)); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 – 36 & n.15, 97 S.Ct. 1843, 1854 – 55 & n.15, 52 L.Ed.2d 396 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 – 32, 91 S.Ct. 849, 853 – 54, 28 L.Ed.2d 158 (1971).** 902 F.2d at 538, quoting *Forrester v. White*, 846 F.2d 29, 32 (7th Cir. 1988).

In an equal-protection claim, the petitioner faces the tougher standard of proving purposeful and intentional acts of discrimination based on his or her membership in a particular class, not just on an individual basis. *See generally Washington v. Davis*, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct.

2040, 2049 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 50 L.Ed.2d 450, 97 S.Ct. 555, 563 (1977); *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 60 L.Ed.2d 870, 99 S.Ct. 2282, 2296 (1979). Absent the foregoing distinctions, §1983 claims for sexual or racial harassment generally follow the contours of a Title VII claim. *Trautvetter v. Quick,* 916 F.2d 1140 (7th Cir. 1990).

To state a prima facie claim under the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must demonstrate that (a) he or she is otherwise similarly situated to members of the unprotected class, (b) he or she was treated differently from members of the unprotected class, and (c) the defendant acted with discriminatory intent. *Greer v. Amesqua,* 212 F.3d 358, 370 (7th Cir. 2000). The burden then shifts to the employer to produce evidence that the plaintiff was either discharged or not hired for a legitimate, nondiscriminatory reason. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089, 1095 n.10 (1981). Once this burden is met, the presumption of discrimination "drops from the case," and the plaintiff must persuade the trier of fact that the defendant's proffered justification is merely a pretext for what is, in reality, a racially motivated decision. *Id.* In addition, the Supreme Court has recognized the viability of the class of one under the Equal Protection Clause. To state a cause of action under this theory, plaintiffs must prove that they were intentionally treated differently from others who were similarly situated and that there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech,* 528 U.S. 562, 145 L.Ed.2d 1060, 120 S.Ct. 1073, 1074 (2000).

Class-of-one claims fuel lawsuits in many different areas of government. *E.g., Del Marcelle v. Brown County Corp.,* 680 F.3d 887 (7th Cir. 2012). However, that equal-protection theory does not apply to claims by a public employee against his or her employer. *Engquist v. Oregon Deparment of Agriculture,* 553 U.S. 591, 170 L.Ed.2d 975, 128 S.Ct. 2146 (2008).

The area of racial or sexual discrimination is also quite susceptible to class claims based on wide-ranging discriminatory conduct. Though the prima facie case in class claims is similar to individual claims of racially discriminatory conduct, the proof involved is significantly different and far more complicated. Specifically, in class claims, the emphasis is on a pattern of discriminatory decision-making. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843, 1867 n.46 (1977). *See also Coates v. Johnson & Johnson,* 756 F.2d 524 (7th Cir. 1985). This pattern generally is proven through statistical evidence demonstrating substantial disparities in the treatment of the group claiming discrimination. Once the plaintiff has established a prima facie pattern or practice of discrimination, "[t]he burden then shifts to the employer to defeat the prima facie showing . . . by demonstrating that the . . . proof is either inaccurate or insignificant." *International Brotherhood of Teamsters, supra,* 97 S.Ct. at 1867. Alternatively, a defendant is permitted to demonstrate that a "nondiscriminatory explanation for the apparently discriminatory result" exists. 97 S.Ct. at 1867 n.46.

4. [5.48] Liberty Interest — Defamation Plus

When a public employer makes defamatory statements in connection with disciplinary action, the employee may be entitled to notice of the reasons for discipline and at least an informal

opportunity to refute the charge. *Paul v. Davis,* 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976); *Codd v. Velger,* 429 U.S. 624, 51 L.Ed.2d 92, 97 S.Ct. 882 (1977).

Under the "stigma-plus doctrine" recognized by *Paul, supra,* "mere defamation by the government does not deprive a person of liberty protected by the Fourteenth Amendment, even when it causes serious impairment of [one's] future employment." *Brown v. City of Michigan City, Indiana,* 462 F.3d 720, 730 (7th Cir. 2006), quoting *Hojnacki v. Klein-Acosta,* 285 F.3d 544, 548 (7th Cir. 2002). "Rather, it is only the 'alteration of legal status,' such as the governmental deprivation of a right securely held, 'which, combined with the injury resulting from the defamation, justifie[s] the invocation of procedural safeguards.' " *Brown, supra,* 462 F.3d at 730, quoting *Paul, supra,* 96 S.Ct. at 1164. The defamatory statement alone does not give rise to a liberty interest claim. The statements must be made in connection with a dismissal, suspension, or some other disciplinary action. *See Ewers v. Board of County Commissioners of County of Curry,* 802 F.2d 1242 (10th Cir. 1986); *Thomas v. Board of Examiners, Chicago Public Schools,* 866 F.2d 225 (7th Cir. 1988) (failure to secure promotion does not implicate liberty interest). Thus, defamatory statements that were uttered three weeks after the plaintiff's job was abolished were not "in connection with" the plaintiff's discharge, and his liberty interest was not implicated. *Ewers, supra,* 802 F.2d at 1248. *See Wulf v. City of Wichita,* 883 F.2d 842 (10th Cir. 1989) (statements made months after termination did not support liberty interest claim). Under the *Paul* stigma-plus test, a plaintiff must establish "the alteration of a legal status." *Brown, supra,* 462 F.3d at 727.

The Due Process Clause of the Fourteenth Amendment permits an employer to discharge a terminable-at-will employee for even false, defamatory, or stigmatizing reasons. *Ratliff v. City of Milwaukee,* 795 F.2d 612, 627, 627 n.4 (7th Cir. 1986). There is no constitutional right to be free of defamation, although "there may be a right to a hearing when defamatory statements interfere with employment." *Batagiannis v. West Lafayette Community School Corp.,* 454 F.3d 738, 742 (7th Cir. 2006). The remedy for a liberty infringement is simply the opportunity to clear one's name in order to protect the employee's opportunity to secure future employment in a chosen profession. A violation is not present merely because of a reduction in an individual's attractiveness to potential employers. *Perry v. Federal Bureau of Investigation,* 781 F.2d 1294, 1302 (7th Cir. 1986). Even the loss of a job does not implicate a liberty interest as long as other employment in one's chosen profession is available. *Altman v. Hurst,* 734 F.2d 1240 (7th Cir. 1984). Accordingly, under *Paul, supra,* the fact that a public employer defames an employee is insufficient to state a cause of action under 42 U.S.C. §1983. *Hernandez v. Joliet Police Department,* 197 F.3d 256, 262 (7th Cir. 1999).

When governmental employers make derogatory public statements about an employee who is being dismissed, counsel should alert governmental clients to the importance of providing the employee with an opportunity to refute the charges if the statements support an inference of dishonesty, immorality, or corruption. *See Hadley v. County of DuPage,* 715 F.2d 1238 (7th Cir. 1983). Public charges of mismanagement or incompetence, however, generally are insufficient to implicate a liberty interest. *See also Adams v. Walker,* 492 F.2d 1003, 1008 – 1009 (7th Cir. 1974). At least one court has relied on the employee's high degree of access to the media as negating the need for a liberty interest, name-clearing hearing. *Baden v. Koch,* 799 F.2d 825 (2d Cir. 1986).

A liberty interest is not implicated unless the defamatory statements are publicized. *Webster v. Redmond,* 599 F.2d 793 (7th Cir. 1979). The publication prong is construed broadly, however, and extends even to the placement of a termination letter in an employee's personnel file that was accessible to prospective governmental employers. *Zurek v. Hasten,* 553 F.Supp. 745, 747 n.5 (N.D.Ill. 1982). *See also Buxton v. City of Plant City, Florida,* 871 F.2d 1037 (11th Cir. 1989). Though some courts have held that damages are never available for this type of liberty interest claim (*White v. Thomas,* 660 F.2d 680 (5th Cir. 1981)), other courts have permitted damages, but only for those injuries that can be fairly traced to the failure to hold a hearing (*e.g., Rodriguez de Quinonez v. Perez,* 596 F.2d 486, 491 (1st Cir. 1979)).

F. [5.49] Suspensions — Due Process

Due-process challenges to suspensions from employment warrant separate treatment because of several circumstances uniquely applicable to such cases. The court must first determine whether the employee was deprived of a liberty or property interest before addressing what process must be provided.

1. [5.50] Liberty Interest

The function of the liberty interest in the context of public employment is narrow and intended primarily to prevent an employee's future employment opportunities from being foreclosed. See §5.48 above. Accordingly, a mere suspension in the absence of termination usually should not result in a deprivation of liberty. When a plaintiff alleges, however, that the publicized stigma accompanying his or her suspension has made him or her unemployable in his or her profession, it has been held that a liberty interest claim was stated. *Covell v. Menkis,* 595 F.3d 673, 677 – 678 (7th Cir. 2010) ("In order to prevail on a liberty interest claim, a plaintiff must show 'that (1) he was stigmatized by the defendant's conduct, (2) the stigmatizing information was publically disclosed, and (3) he suffered a tangible loss of other employment opportunities as a result of public disclosure.' "); *D'Acquisto v. Washington,* 640 F.Supp. 594, 608 – 609 (N.D.Ill. 1986). In addition, the Supreme Court has held that a termination need not be present for a liberty interest claim to be stated. *Owen v. City of Independence, Missouri,* 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980). *See also Lawson v. Sheriff of Tippecanoe County, Indiana,* 725 F.2d 1136, 1138 (7th Cir. 1984) (severe demotion sufficient to trigger liberty interest). "The law protects government employees against suspension as well as discharge without due process of law." *Niebur v. Town of Cicero,* 212 F.Supp.2d 790, 811 (N.D.Ill. 2002). However, "[b]efore a liberty interest is implicated, there must be 'some tangible alteration of a "status." ' " 212 F.Supp.2d at 811, quoting *Ratliff v. City of Milwaukee,* 795 F.2d 612, 625 (7th Cir. 1986).

In *Nelson v. Crystal Lake Park District,* 342 Ill.App.3d 917, 796 N.E.2d 646, 652, 277 Ill.Dec. 560 (2d Dist. 2003), the appellate court found suspending a park district commissioner for one meeting was a deprivation of her liberty interest sufficient to satisfy the stigma-plus test. *See also Niebur, supra,* 212 F.Supp.2d at 812 ("[s]uspension is manifestly a change of status"). *But see Moore v. Otero,* 557 F.2d 435, 438 (5th Cir. 1977) (police officer's transfer from corporal to officer did "not provide the additional loss of a tangible interest necessary to give rise to a

liberty interest"); *Shamley v. City of Chicago,* 163 Ill.App.3d 375, 516 N.E.2d 646, 114 Ill.Dec. 491 (1st Dist. 1987) (liberty interest not implicated by reassignments and suspensions); *Thomas v. Board of Examiners, Chicago Public Schools,* 866 F.2d 225 (7th Cir. 1988) (failure to secure promotion does not implicate liberty interest).

The court in *Rubin v. Ikenberry,* 933 F.Supp. 1425, 1437 (C.D.Ill. 1996), held that a university professor's claims of First Amendment free speech, First Amendment academic freedom, and academic freedom under Illinois law all stated protectable liberty interests that required a fair adversarial hearing under *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985). The court determined, however, that the plaintiff did receive all the process due to him. *Rubin, supra,* 933 F.Supp. at 1439. In *Bryant v. Gardner,* 545 F.Supp.2d 791 (N.D.Ill. 2008), a high school head varsity basketball coach stated a liberty due-process claim based on public statements about his removal as coach made by the athletic director.

2. [5.51] Property Interest

A property interest in continued employment is determined by reference to state law. See §5.41 above. If an employee can establish a property interest in continued employment, he or she is typically entitled to a hearing before he or she can be suspended. *Confederation of Police v. City of Chicago,* 547 F.2d 375, 376 (7th Cir. 1977). *See also Finkelstein v. Bergna,* 924 F.2d 1449, 1451 (9th Cir. 1991) (clearly established that temporary suspension implicates procedural protections of Due Process Clause). Note, however, that brief suspensions may not trigger the right to due process despite the presence of a property interest. *See Gillard v. Norris,* 857 F.2d 1095 (6th Cir. 1988) (three-day suspension de minimis); *Angell v. Leslie,* 832 F.2d 817 (4th Cir. 1987) (one- or two-day suspension without pay de minimis). *See also Stutzman v. Board of Education of City of Chicago, Illinois,* 171 Ill.App.3d 670, 525 N.E.2d 903, 121 Ill.Dec. 596 (1st Dist. 1988) (property interests implicated only upon termination and not in cases of suspension); *Shamley v. City of Chicago,* 163 Ill.App.3d 375, 516 N.E.2d 646, 114 Ill.Dec. 491 (1st Dist. 1987) (same).

When a hearing is required, generally it should occur before suspension. In *Gilbert v. Homar,* 520 U.S. 924, 138 L.Ed.2d 120, 117 S.Ct. 1807, 1811 (1997), the Supreme Court stated that in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985), it was concluded that "a public employee dismissible only for cause was entitled to a very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing." The Court stressed that "the pretermination hearing 'should be an initial check against mistaken decisions — essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.' " *Gilbert, supra,* 117 S.Ct. at 1811, quoting *Loudermill, supra,* 105 S.Ct. at 1495. The "pretermination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story." *Id.* Moreover, the Court in *Loudermill* explained that

> **affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. . . . [I]n**

> **those situations where the employer perceives a significant hazard in keeping the employee on the job . . . it can avoid the problem by suspending with pay. [**Footnote omitted.**]** 105 S.Ct. at 1494 – 1495.

See also Gilbert, supra, 117 S.Ct. at 1811 (holding that suspensions without pay are also possible under some circumstances); *Luellen v. City of East Chicago,* 350 F.3d 604, 615 (7th Cir. 2003) (city was entitled to place fire inspector on administrative leave without pre-deprivation hearing when he had been arrested and charged with crime). In *Gilbert,* the Supreme Court held that a pre-termination hearing is not required prior to the suspension when a public employee (in this case, a university police officer) is immediately suspended without pay after being charged with the commission of a felony (possession of drugs). 117 S.Ct. at 1814. *See also D'Acquisto v. Washington,* 640 F.Supp. 594, 613 (N.D.Ill. 1986) (absence of pre-suspension hearing not fatal to police board procedures). The "first stage hearing," however, is usually feasible because it need not be extensive, and the employee is entitled only to notice of the charges and at least an informal opportunity to rebut. 640 F.Supp. at 616 – 617. *See also Lallave v. Biermann,* No. 09-cv-03051, 2010 WL 4683618 at *7 (C.D.Ill. Nov. 5, 2010) (collecting cases that "appear to suggest that a pre-deprivation hearing is required for termination of employment, whereas a post-deprivation hearing may be sufficient for suspension").

In *Mathews v. Eldridge,* 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893, 903 (1976), the court held that three factors should be balanced to determine what process is constitutionally due:

a. the private interest that will be affected by the official action;

b. the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and

c. the government's interest.

When a suspension is merely the first step in the public employer's efforts to terminate, the termination hearing or second-stage hearing must be reasonably prompt. The factors most relevant in determining the reasonableness of a delay are (a) the completeness of the hearing in terms of the extent of procedural safeguards and (b) to whom the brunt of the delay is attributable. *Loudermill, supra,* 105 S.Ct. at 1496. In *Loudermill,* the court found that a nine-month delay was not unreasonable in light of the thoroughness of the hearing's procedures. The court expressly recognized, however, that "[a]t some point, a delay in the post-termination hearing would become a constitutional violation." *Id.* In one case, a federal district court indicated that a four- or five-month delay could be too long if there were no procedural justifications for the delay. *D'Acquisto, supra,* 640 F.Supp. at 618. In any event, counsel should encourage police and fire boards to conduct hearings expeditiously in order to prevent separate civil rights violations from arising from the conduct of the hearings themselves.

G. [5.52] Employment Discrimination — Overview

In order to deter discrimination in the workplace, Congress has enacted a series of statutes that address various aspects of the phenomenon. These laws include, but are certainly not limited to,

1. Title VII;

2. the Civil War reconstruction statutes, particularly 42 U.S.C. §1981;

3. the Equal Pay Act of 1963, Pub.L. 88-38, 77 Stat. 56;

4. the Age Discrimination in Employment Act of 1967 (ADEA), Pub.L. No. 90-202, 81 Stat. 602;

5. §201 of the Older Workers Benefit Protection Act, Pub.L. No. 101-433, 104 Stat. 978 (1990);

6. the Americans with Disabilities Act;

7. the Rehabilitation Act of 1973, Pub.L. No. 93-112, 87 Stat. 355; and

8. the Family and Medical Leave Act of 1993 (FMLA), Pub.L. No. 103-3, 107 Stat. 6.

In addition to these federal statutes, Illinois adopted the Illinois Human Rights Act, which in many ways mirrors its federal counterparts.

Sections 5.53 and 5.54 below provide an overview of some of these statutes and, as is true with the majority of this chapter, should provide the reader with a general sense of conduct prohibited in the workplace and litigants' respective burdens. However, following the passage of each of these laws, extensive caselaw has developed touching on the finer points and explaining the pitfalls faced by employers and employees alike.

1. [5.53] Title VII, the Age Discrimination in Employment Act of 1967, and 42 U.S.C. §1981

It is well settled in the Seventh Circuit that the methods and order of proof applicable to claims under Title VII are the same as for claims under 42 U.S.C. §1981 (*Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 403 (7th Cir. 2007)) and the Age Discrimination in Employment Act (*Cerutti v. BASF Corp.*, 349 F.3d 1055, 1060 – 1061 (7th Cir. 2003)). *See also Smith v. City of Jackson, Mississippi,* 544 U.S. 228, 161 L.Ed.2d 410, 125 S.Ct. 1536 (2005) (recognizing disparate impact claims under ADEA). The law discussed in this section applies equally to these statutes, unless otherwise noted.

Title VII is the primary statutory scheme providing for the protection of both private and public-sector employees against discrimination in employment. The statute reaches all units of local government and private companies employing at least 15 employees. 42 U.S.C. §2000e(b). Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin. Title VII also prohibits an employer from retaliating against an employee for exercising rights under Title VII.

The ADEA prohibits discrimination on the basis of age for people 40 years of age or older. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 134 L.Ed.2d 433, 116 S.Ct 1307, 1310 (1996); 29 U.S.C. §631. Section 1981 prohibits discrimination on grounds of race in the making and enforcing of contracts. *Vakharia v. Swedish Covenant Hospital*, 190 F.3d 799, 806 (7th Cir. 1999). But the Seventh Circuit has held that §1981 does not create a private right of action against a government employer. *Campbell v. Forest Preserve District of Cook County, Illinois*, 752 F.3d. 665 (7th Cir. 2014).

To establish a prima facie case of sexual harassment under Title VII, a plaintiff must show that (a) he or she was subjected to unwelcome harassment, (b) the harassment was based on sex, (c) the harassment was sufficiently severe or pervasive so as to alter the condition of his or her employment and create a hostile or abusive atmosphere, and (d) there is a basis for employer liability. *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 940 (7th Cir. 2007). Similarly, to establish a prima facie case of racial discrimination under Title VII, a plaintiff must produce evidence that (a) he or she is a member of a protected class, (b) his or her job performance met the employer's legitimate expectations, (c) he or she suffered an adverse employment action, and (d) another similarly situated individual who was not in the protected class was treated more favorably than the plaintiff. *Burks v. Wisconsin Department of Transportation*, 464 F.3d 744, 750 – 751 (7th Cir. 2006).

Title VII discrimination actions generally fall into one of two categories: disparate treatment claims and disparate impact claims. *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971). The elements of proof for disparate treatment and disparate impact claims under Title VII are significantly different. *Melendez v. Illinois Bell Telephone Co.*, 79 F.3d 661, 670 (7th Cir. 1996), citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 104 L.Ed.2d 733, 109 S.Ct. 2115, 2118 – 2119 (1989).

A claim for disparate treatment requires the individual to prove intentional discrimination and generally attacks individual actions taken by the employer. *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998). The Supreme Court set forth a three-step process in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973):

a. The plaintiff must establish a prima facie case.

b. The defendant must offer a legitimate, nondiscriminatory reason for its action.

c. The plaintiff must establish that this supposedly legitimate, nondiscriminatory reason was a pretext to mask an illegal motive.

Naturally, the elements for a prima facie case vary somewhat depending on the form of the discrimination (*i.e.*, failure to hire or promote, discharge or promotion, or retaliation).

For example, in order to set forth a prima facie case of age discrimination for failure to promote under the ADEA, a plaintiff must show that he or she (a) was 40 or older, (b) applied for and was qualified of the position sought, (c) was rejected for the position, and (d) did not get the position in favor for someone substantially younger. *Schaffner v. Glencoe Park District*, 256 F.3d

616, 620 (7th Cir. 2001). *See also Rabinovitz v. Pena*, 89 F.3d 482, 486 (7th Cir. 1996). Similarly, in order to establish a prima facie case of sex or race discrimination under Title VII, a plaintiff must establish, by a preponderance of the evidence, that (a) he or she is a member of a protected class, (b) he or she is qualified for the position, (c) he or she was rejected for the position sought, and (d) the position was granted to a person outside the protected class who is similarly or less qualified than the plaintiff. *Jordan v. City of Gary, Indiana*, 396 F.3d 825, 833 (7th Cir. 2005).

The Supreme Court has held that proof of the falsity of the employer's proffered reason for terminating an employee is not a substitute for proof of discriminatory animus. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993). In 1989, the Supreme Court decided, in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L.Ed.2d 268, 109 S.Ct. 1775 (1989), that an employer was allowed to escape liability for sexual discrimination in a disparate treatment case as long as the employer could show that it still would have dismissed the employee for other nondiscriminatory reasons. The Civil Rights Act of 1991 partially overruled *Price Waterhouse* by providing that an unlawful practice is established by showing discrimination even though other factors also motivated the practice. See 42 U.S.C. §§2000e-2(m), 2000e-5(g)(2)(B). The Supreme Court held that neither direct evidence nor any other heightened evidentiary showing is required to prove a mixed-motive case of discrimination. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 156 L.Ed.2d 84, 123 S.Ct. 2148, 2154 (2003). In a mixed-motive case, the burden shifts to the employer to show that it would have made the same adverse decision in the absence of the impermissible motivating factor. *Id.* In such mixed-motive cases, however, the employee can recover only limited declaratory relief and attorneys' fees but, notably, may not seek reinstatement or recover backpay or damages. 42 U.S.C. §2000e-5(g)(2)(B). *See also McNutt v. Board of Trustees of University of Illinois*, 141 F.3d 706, 708 (7th Cir. 1998).

A disparate impact claim challenges facially neutral procedures (*e.g.*, examinations or height requirements) that have a discriminatory effect. Proof of discriminatory intent is not necessary in a disparate impact claim but is inferred from the results of the procedure used by the employer. *Senner v. Northcentral Technical College*, 113 F.3d 750, 757 (7th Cir. 1997) (disparate impact occurs "where a specified employment practice, although neutral on its face, has a disproportionally negative effect on members of a legally protected class"), quoting *Vitug v. Multistate Tax Commission*, 88 F.3d 506, 513 (7th Cir. 1996). For instance, if a test disqualifies 1 of 100 white applicants but disqualifies 50 of 100 black applicants, the test is considered discriminatory as a matter of law. *See Connecticut v. Teal*, 457 U.S. 440, 73 L.Ed.2d 130, 102 S.Ct. 2525 (1982). Although past decisions held that "the ADEA does not permit liability based solely on disparate impact" (*Salvato v. Illinois Department of Human Rights*, 155 F.3d 922, 926 (7th Cir. 1998)), more recent Supreme Court cases hold to the contrary (*Smith, supra*).

In a disparate impact case, the plaintiff also must first demonstrate a prima facie case of discrimination. In order to establish a prima facie case of disparate impact,

> **[**t**]he plaintiff must first "isolate and identify 'the specific employment practices that are allegedly responsible for any observed statistical disparities' ", and second demonstrate causation by offering "statistical evidence of a kind and degree**

> **sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotion because of their membership in protected group."** *Farrell v. Butler University,* 421 F.3d 609, 616 (7th Cir. 2005), quoting *Bennett v. Roberts,* 295 F.3d 687, 698 (7th Cir. 2002).

A claim of disparate impact does not require a showing that the defendants intended to discriminate against the plaintiff. *Wards Cove, supra,* 109 S.Ct. at 2119.

Following *Wards Cove,* Congress enacted the Civil Rights Act of 1991, which, inter alia, altered the burden of proof with respect to a disparate impact discrimination claim. See 42 U.S.C. §2000e-2(k); *Olmstead v. L.C.,* 527 U.S. 581, 144 L.Ed.2d 540, 119 S.Ct. 2176, 2195 n.3 (1999) (Thomas, J., dissenting). The burden of proof in disparate impact cases has undergone substantial change after the passage of the 1991 Act.

> **Specifically, the 1991 Act provides that where an employee has demonstrated that a particular employment practice causes a disparate impact, both the burden of production and the burden of persuasion shift to the employer to show that the practice is job related and consistent with business necessity. 1991 Act §§104, 105. This is in contrast to the scheme set forth in *Wards Cove Packing Co. v. Antonio,* 490 U.S. 642, 659 – 60, 109 S.Ct. 2115, 2125 – 26, 104 L.Ed.2d 733 (1989), where the burden of persuasion was held to remain with the plaintiff at all times.** *Fisher v. Transco Services-Milwaukee, Inc.,* 979 F.2d 1239, 1245 n.4 (7th Cir. 1992).

Under the 1991 Act, a litigant is entitled to a jury trial and compensatory damages awards with dollar caps ranging from $50,000 to $300,000 based on the number of employees. 42 U.S.C. §1981a. Compensatory damages do not include an award of backpay. *Id.*

Title VII and the other federal antidiscrimination statutes require an aggrieved employee to file a charge of discrimination with the Equal Employment Opportunity Commission before proceeding to federal court. In Illinois, such a charge must be filed with the EEOC within 300 days from the date of the discriminatory act. 42 U.S.C. §2000e-5(e). NOTE: An employee must file within 180 days with the Illinois Department of Human Rights. 775 ILCS 5/7A-102.

The failure to file a charge in a timely fashion bars an otherwise valid action in the federal courts under Title VII. *Casteel v. Executive Board of Local 703 of International Brotherhood of Teamsters,* 272 F.3d 463, 466 (7th Cir. 2001). A timely filed complaint triggers an administrative investigation. Normally, a hearing is held; the administrative agency makes inquiry of the employer and requests specifics on the employee's charge. Upon completion of the EEOC's investigation, the employee receives a right-to-sue letter. 42 U.S.C. §2000e-5.

Upon receipt of a right-to-sue letter, an individual must file a complaint in either state or federal district court within 90 days. *Dandy v. United Parcel Service, Inc.,* 388 F.3d 263, 270 (7th Cir. 2004); 42 U.S.C. §2000e-5(f). Failure to file a complaint within the 90-day time limit does generally bar a claim. *Dandy, supra.*

2. [5.54] Americans with Disabilities Act of 1990

The Americans with Disabilities Act prohibits employment discrimination against persons with disabilities. The ADA prohibits employers from discriminating

> **against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees . . . and other terms, conditions, and privileges of employment.** *Wright v. Illinois Department of Corrections,* 204 F.3d 727, 730 (7th Cir. 2000), quoting 42 U.S.C. §12112(a).

The ADA also affirmatively requires employers to make reasonable accommodations to qualified individuals with a disability. *Gile v. United Airlines, Inc.*, 95 F.3d 492, 496 (7th Cir. 1996).

The Supreme Court, in *Board of Trustees of University of Alabama v. Garrett,* 531 U.S. 356, 148 L.Ed.2d 866, 121 S.Ct. 955 (2001), held that suits in federal court by state employees to recover money damages by reason of the state's failure to comply with Title I of the ADA are barred by the Eleventh Amendment. It should be noted, however, that as a general rule Eleventh Amendment immunity does not extend to local governmental units such as cities and counties. *See Mackey v. Stanton,* 586 F.2d 1126, 1130 (7th Cir. 1978), citing *Moor v. County of Alameda,* 411 U.S. 693, 36 L.Ed.2d 596, 93 S.Ct. 1785 (1973). Unlike the ruling in *Garrett, supra,* the Supreme Court later held that the Eleventh Amendment does not immunize states for claims arising under the Family and Medical Leave Act, and state employees may recover money damages. *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721, 155 L.Ed.2d 953, 123 S.Ct. 1972 (2003). In addition, the Supreme Court has held that states are not immune under the Eleventh Amendment for claims brought under Title II of the ADA that relate to access to public facilities. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *United States v. Georgia,* 546 U.S. 151, 163 L.Ed.2d 650, 126 S.Ct. 877, 878 – 879 (2006), quoting 42 U.S.C. §12132.

The ADA defines "disability," with respect to an individual, as

> **(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;**
>
> **(B) a record of such an impairment; or**
>
> **(C) being regarded as having such an impairment.** 42 U.S.C. §12102(1).

Generally, there are two types of disability discrimination claims under the ADA: disparate treatment claims and failure-to-accommodate claims. *Wright, supra,* 204 F.3d at 730. The disparate impact theory has also been recognized, as discussed below. A person with a disability may bring an action against an employer for disparate treatment. "[I]n a disparate treatment claim

under the ADA, the plaintiff could use either direct proof or rely on the burden-shifting method defined in [*McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973)]." *Lenker v. Methodist Hospital,* 210 F.3d 792, 799 (7th Cir. 2000), citing *Bultemeyer v. Fort Wayne Community Schools,* 100 F.3d 1281, 1283 (7th Cir. 1996).

> **However, when a plaintiff brings a claim under the reasonable accommodation part of the ADA, the burden-shifting method of proof is both unnecessary and inappropriate. We held in *Bultemeyer* that if the plaintiff demonstrated that the employer should have reasonably accommodated the plaintiff's disability and did not, the employer has discriminated under the ADA and is liable.** *Lenker, supra,* 210 F.3d at 799.

The *McDonnell Douglas* burden-shifting approach also applies to a claim of disparate impact under the ADA. *Pond v. Michelin North America, Inc.,* 183 F.3d 592, 597 (7th Cir. 1999). Under an ADA disparate impact claim, the disabled individual must prove that the employer has fixed a qualification that bears more heavily on a disabled worker than on other workers and is not required by the necessities of the business or activity in question. *Matthews v. Commonwealth Edison Co.,* 128 F.3d 1194, 1195 – 1196 (7th Cir. 1997). However, unlike under Title VII and the ADEA, there is no provision in the ADA permitting mixed-motive claims. *Serwatka v. Rockwell Automation, Inc.,* 591 F.3d 957, 962 (7th Cir. 2010).

VII. [5.55] LAND USE DISPUTES

On many occasions, developers or property owners unhappy with local zoning officials' decisions seek redress under 42 U.S.C. §1983 for an alleged violation of their civil rights. Very often, these cases are disposed of by either dismissal or summary judgment. Plaintiffs in these disputes generally bring three types of claims: (a) takings claims, (b) equal-protection claims, and/or (c) due-process claims.

A. [5.56] Takings Claims

The Takings Clause of the Fifth Amendment prohibits the taking of property without just compensation. *Palazzolo v. Rhode Island,* 533 U.S. 606, 150 L.Ed.2d 592, 121 S.Ct. 2448, 2457 (2001). However, even if a plaintiff can show that his or her property was taken without just compensation, the plaintiff must still show the inadequacy of state remedies in order to state a takings claim under 42 U.S.C. §1983. *Hoagland v. Town of Clear Lake, Indiana,* 415 F.3d 693, 699 (7th Cir. 2005), citing *San Remo Hotel, L.P. v. City & County of San Francisco, California,* 545 U.S. 323, 162 L.Ed.2d 315, 125 S.Ct. 2491 (2005). Because Illinois provides a remedy for inverse condemnation, it would be the rare takings claim that would survive this hurdle. *Muscarello v. Ogle County Board of Commissioners,* 610 F.3d 416, 422 (7th Cir. 2010) ("Illinois provides ample process for a person seeking just compensation"), citing 735 ILCS 30/10-5-5 (providing statutory basis for inverse condemnation actions under Illinois law); *Hager v. City of West Peoria,* 84 F.3d 865, 869 (7th Cir. 1996). "The exhaustion requirement of *Williamson County* [*Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 87

L.Ed.2d 126, 105 S.Ct. 3108, 3121 – 3124 (1985),] applies whether plaintiffs claim an uncompensated taking, inverse condemnation, or due process violation." *Hager, supra,* 84 F.3d at 869.

B. [5.57] Equal Protection

Like the Takings Clause, the Equal Protection Clause of the Fourteenth Amendment is often used by plaintiffs in attempting to overturn land use decisions. The Seventh Circuit has recognized three ways in which a plaintiff can successfully allege an equal-protection violation: (1) being singled out for unequal treatment because of his or her membership in a vulnerable group; (2) being subjected to laws or policies that make irrational distinctions; or (3) being subjected to a campaign of official harassment directed against him or her out of sheer malice. *Esmail v. Macrane,* 53 F.3d 176, 178 (7th Cir. 1995); *Union Pacific R.R. v. Village of South Barrington,* 958 F.Supp. 1285, 1296 (N.D.Ill. 1997). *See also Albright v. Oliver,* 975 F.2d 343, 348 (7th Cir. 1992) (to state equal-protection claim, although plaintiff can be member of class with only one member, plaintiff must be singled out because of membership in class and not be just random victim of governmental incompetence).

The Seventh Circuit held that when a defendant took numerous actions against the plaintiff in an "orchestrated campaign of official harassment," an equal-protection claim was stated. *Esmail, supra,* 53 F.3d at 179. In *Esmail,* a mayor allegedly (1) attempted to deny the plaintiff his liquor license; (2) caused the plaintiff and his employees to be harassed by constant, intrusive surveillance; (3) caused the plaintiff's car to be stopped repeatedly and the plaintiff to undergo sobriety testing; and (4) caused false criminal charges to be brought against the plaintiff.

One way to defend these types of claims under *Esmail* is to force a 42 U.S.C. §1983 plaintiff to prove sufficient intent on behalf of the municipality. Intent to discriminate is an element of all equal-protection claims, and a plaintiff cannot rely on a disparate impact theory. *Franklin v. City of Evanston,* 384 F.3d 838, 846 (7th Cir. 2004), citing *Anderson v. Cornejo,* 355 F.3d 1021, 1024 (7th Cir. 2004); *McPhaul v. Board of Commissioners of Madison County, Indiana,* 226 F.3d 558, 564 (7th Cir. 2000); *Greer v. Amesqua,* 212 F.3d 358, 370 (7th Cir. 2000). The possible improper motive of one member of a multi-person board is not enough to show discriminatory intent on behalf of a municipal entity because a single commissioner does not have the power to establish policy or bind the city. *Northwestern University v. City of Evanston,* No. 00 C 7309, 2002 WL 31027981 (N.D.Ill. Sept. 11, 2002) (to establish municipal liability based on discriminatory motive of multimember body, plaintiff must show that majority of its members acted with discriminatory intent); *Union Pacific R.R. v. Village of South Barrington,* No. 96 C 1698, 1998 WL 292394 (N.D.Ill. May 20, 1998) (court adopted First Circuit's decision in *Scott-Harris v. City of Fall River,* 134 F.3d 427 (1st Cir. 1997), *rev'd on other grounds sub nom. Bogan v. Scott-Harris,* 523 U.S. 44, 140 L.Ed.2d 79, 118 S.Ct. 966 (1998), in finding that improper intent on behalf of village mayor was not sufficient to support finding of improper motive on behalf of municipality).

C. [5.58] Due Process

First and foremost, no due-process claim can exist, whether procedural or substantive, without a constitutionally protected right. *Swartz v. Scruton,* 964 F.2d 607 (7th Cir. 1992).

Contractual interests do not normally rise to the necessary level of a fundamental right within the meaning of the Due Process Clause. *See Khan v. Gallitano,* 180 F.3d 829, 834 (7th Cir. 1999) ("It would be absurd to turn every breach of contract by a state or municipality into a violation of the federal Constitution."), quoting *Horwitz-Matthews, Inc. v. City of Chicago,* 78 F.3d 1248, 1250 (7th Cir. 1996); *Mid-American Waste Systems, Inc. v. City of Gary, Indiana,* 49 F.3d 286, 291 (7th Cir. 1995) (corporation's only interest was in obtaining maximum return on investment, and, therefore, it failed to state fundamental right under theory of substantive due process). In *Khan, supra,* the court found that (1) the plaintiff attorney did not have a substantive-due-process right to be free from tortious interference by village officials in her contract with a client and (2) the attorney failed to show that the right was fundamental — one deeply rooted in history and tradition or implicit in the concept of ordered liberty.

Caselaw already explains that mere breaches of contract by the government do not support substantive-due-process claims under the Constitution. *See, e.g., Garcia v. Kankakee County Housing Authority,* 279 F.3d 532, 536 (7th Cir. 2002); *Mid-American Waste, supra,* 49 F.3d at 290 – 291; *Sudeikis v. Chicago Transit Authority,* 774 F.2d 766, 770 (7th Cir. 1985). However, the following explanation is for the sake of future litigants who may think it a good idea to bring regular state law contract claims to federal court via 42 U.S.C. §1983. When a state actor breaches a contract it has with a private citizen — and the subject matter of that contract does not implicate fundamental liberty or property interests — the state acts just like any other contracting private citizen. *Cf. Horwitz-Matthews, supra,* 78 F.3d at 1250. The proper tribunal to adjudicate issues arising from the contract or alleged contract is a state court because contract law is a creature of state law. *See IFC Credit Corp. v. United Business & Industrial Federal Credit Union,* 512 F.3d 989, 991 – 992 (7th Cir. 2008) ("There is no general federal law of contracts after *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938)."). If a party believes that the contract contemplates fundamental rights that are substantively protected by the Due Process Clause, but which have not yet been recognized by state court or the Supreme Court, the party's burden is "great" because it must show (1) that the rights at stake are "deeply rooted in our history and tradition or implicit in the concept of ordered liberty" and (2) that the remedies available in state courts do not adequately protect those rights. *Khan, supra,* 180 F.3d at 834 – 885, citing *Washington v. Glucksberg,* 521 U.S. 702, 138 L.Ed.2d 772, 117 S.Ct. 2258, 2263 – 2266 (1997).

1. [5.59] Substantive Due Process

Most due-process claims that arise out of land use cases are substantive due process. However, substantive due process is not a "blanket protection against unjustifiable interferences with property." *Gosnell v. City of Troy, Illinois,* 59 F.3d 654, 658 (7th Cir. 1995), quoting *Schroeder v. City of Chicago,* 927 F.2d 957, 961 (7th Cir. 1991). "It is instead a modest limitation that prohibits government action only when it is random and irrational." *General Auto Service Station v. City of Chicago,* 526 F.3d 991, 1000 (7th Cir. 2008). "Unless a governmental practice encroaches on a fundamental right, substantive due process requires only that the practice be rationally related to a legitimate governmental interest, or alternatively phrased, that the practice be neither arbitrary nor irrational." *Lee v. City of Chicago,* 330 F.3d 456, 461 (7th Cir. 2003). To claim a substantive-due-process violation, it must be shown that (a) the property owner was

subjected to "arbitrary and irrational" conduct by the municipality and (b) either state law remedies are inadequate or an independent constitutional violation exists. *Doherty v. City of Chicago,* 75 F.3d 318, 325 (7th Cir. 1996).

As with takings claims, it is the rare occasion that a property owner would not have an adequate state remedy to redress his or her claim. Most civil rights claims in this area also allege a pendent state claim seeking relief from the same action. Declaratory judgment actions or inverse condemnation actions are almost always available and are considered to be an adequate state remedy. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108, 3120 – 3121 (1985).

> **In *Williamson*[**, *supra,***] the Supreme Court articulated a special ripeness doctrine for constitutional property rights claims which precluded federal courts from adjudicating land use disputes until: (1) the regulatory agency has had an opportunity to make a considered definitive decision, and (2) the property owner exhausts available state remedies for compensation.** *Forseth v. Village of Sussex,* 199 F.3d 363, 368 (7th Cir. 2000).

As noted by the Seventh Circuit in *Forseth:*

> **Although we have recognized the potential for a plaintiff to maintain a substantive due process claim in the context of land use decisions . . . we have yet to excuse any substantive due process claim in the land-use context from *Williamson's* ripeness requirements. [**Citations omitted.**]** 199 F.3d at 368 – 369.

Even if state law does not include a remedy for damages, that deficiency would not render the state remedies inadequate. The mere fact that the state law remedies may not allow for the full panoply of relief available under 42 U.S.C. §1983 does not render them inadequate. *See, e.g., Germano v. Winnebago County, Illinois,* 403 F.3d 926, 928 (7th Cir. 2005). Indeed, the Supreme Court itself has reasoned that "[a]lthough the state remedies may not provide . . . all the relief . . . available . . . under §1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." *Parratt v. Taylor,* 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908, 1917 (1981). *See also Hudson v. Palmer,* 468 U.S. 517, 82 L.Ed.2d 393, 104 S.Ct. 3194, 3204 (1984). Accordingly, in order for a substantive-due-process claim to withstand motion practice, a second independent constitutional violation must already exist.

2. [5.60] Procedural Due Process

Procedural-due-process claims that allege a "random and unauthorized" act must also make a showing of inadequate state law remedies. *Germano v. Winnebago County, Illinois,* 403 F.3d 926, 928 – 929 (7th Cir. 2005), quoting *Parratt v. Taylor,* 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908, 1916 (1981). The Supreme Court has held "that when the deprivation of a property right by a governmental agency is 'random and unauthorized,' the action does not violate the due process clause." *Id. See also Easter House v. Felder,* 910 F.2d 1387, 1400 – 1401 (7th Cir. 1990). The Seventh Circuit has held that when the challenge is not to the adequacy of state procedures but to the departure from established procedure, the actions are considered "random and unauthorized."

Germano, supra, 403 F.3d at 928 – 929, quoting *Easter House, supra,* 910 F.2d at 1402. The conduct is still viewed as "random and unauthorized" despite the actors having acted intentionally pursuant to a conspiracy. *Easter House, supra,* 910 F.2d at 1398 – 1400. In addition, the fact that the decision was made by a policy-maker is also irrelevant. 910 F.2d at 1403.

Under most scenarios, therefore, it is also necessary to show the inadequacy of state law remedies before proceeding with a procedural-due-process claim. *See, e.g., Germano, supra; Doherty v. City of Chicago,* 75 F.3d 318, 323 (7th Cir. 1996). As noted in §5.59 above, this is a hard burden to overcome.

D. [5.61] Housing Discrimination

In Illinois, federal, state, and local laws prohibit housing discrimination. Generally, all three levels of regulation prohibit discrimination in sale and rental of housing on the basis of an individual's status in a protected class; however, the scope of protection differs somewhat on each level.

At the federal level, the Fair Housing Act, Pub.L. No. 90-284, Title VIII, 82 Stat. 81 (1968), was passed to promote integrated residential housing and to prevent the increase of segregation of racial groups whose lack of opportunities the FHA was designed to combat. *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 558 F.2d 1283, 1289 (7th Cir. 1977). The FHA and the Fair Housing Amendments Act apply to municipalities and their ordinances. *Hemisphere Building Co. v. Village of Richton Park,* 171 F.3d 437, 438 (7th Cir. 1999). The FHAA prohibits discrimination on the basis of a person's race, color, religion, sex, familial status, national origin, and handicap. "Familial status" means one or more individuals younger than 18 living with a parent or legal custodian or the designee of such person. 42 U.S.C. §3602(k). The FHAA's definition of "handicap" is similar to that under the Americans with Disabilities Act. See 42 U.S.C. §3602(h). In addition, the requirements for showing failure to reasonably accommodate are the same under the ADA and the FHAA. *Good Shepherd Manor Foundation, Inc. v. City of Momence,* 323 F.3d 557, 561 (7th Cir. 2003). "These statutes require a public entity to reasonably accommodate a disabled person by making changes in rules, policies, practices or services as is necessary to provide that person with access to housing that is equal to that of those who are not disabled." *Id.*

The FHAA prohibits anyone, including municipalities, from taking the following actions because of an individual's status in one of the above-mentioned classes:

1. refusing to rent or sell housing;

2. refusing to negotiate for housing;

3. making housing unavailable;

4. setting different terms and conditions relating to the sale or rental of a dwelling; or

5. falsely denying that housing is available for inspection, sale, or rental. 42 U.S.C. §3604.

A plaintiff may prevail on any one of three theories in an action under the FHAA: "(1) disparate treatment, also called intentional discrimination, (2) disparate impact, also called discriminatory effect, or (3) failure to accommodate." *Harris v. Chicago Housing Authority,* No. 97 C 6285, 1998 WL 386371 at *4 (N.D.Ill. June 30, 1998), quoting *Alliance for Mentally Ill v. City of Naperville,* 923 F.Supp. 1057, 1069 (N.D.Ill. 1996).

Frequently, FHAA claims are brought against municipalities by individuals alleging that a municipality's zoning ordinances adversely affect those in one of the above-mentioned categories. Maximum occupancy regulations are often the subject of such attacks. However, the FHAA specifically provides that nothing in the Act "limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. §3607(b)(1). In *City of Edmonds v. Oxford House, Inc.,* 514 U.S. 725, 131 L.Ed.2d 801, 115 S.Ct. 1776, 1782 (1995), the Court held that

> **rules that cap the total number of occupants in order to prevent overcrowding of a dwelling "plainly and unmistakably" . . . fall within §3607(b)(1)'s absolute exemption from the FHA's governance; rules designed to preserve the family character of a neighborhood, fastening on the composition of households rather than on the total number of occupants living quarters can contain, do not.** Quoting *A.H. Phillips, Inc. v. Walling,* 324 U.S. 490, 89 L.Ed. 1095, 65 S.Ct. 807, 808 (1945).

The Court ultimately found the ordinance did not fall into the §3607(b)(1) exemption because it defined who could compose a family unit as opposed to the maximum number of people who could reside in a dwelling. *City of Edmonds, supra,* 115 S.Ct. at 1782 – 1783.

An example of an ordinance falling within the exemption is found in *Fair Housing Advocates Ass'n v. City of Richmond Heights,* 998 F.Supp. 825, 826 – 827 (N.D. Ohio 1998). The court found that a city ordinance that placed a cap on the total number of occupants allowed per dwelling unit based on a minimum number of square feet did fall within the FHAA's exemption as a reasonable restriction on the maximum number of occupants permitted to occupy a dwelling.

A municipality is also obligated under the FHA (as amended by the FHAA) to refrain from zoning policies that effectively foreclose construction of low-cost housing within corporate limits. *Metropolitan Housing Development Corp., supra,* 558 F.2d at 1293 – 1295.

In addition to claims under the FHA (as amended by the FHAA), aggrieved individuals may bring a claim under the Equal Protection Clause when there is "[p]roof of racially discriminatory intent or purpose" behind a zoning ordinance. *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 50 L.Ed.2d 450, 97 S.Ct. 555, 563 (1977).

At the state and local levels, Article 3 of the Illinois Human Rights Act similarly prohibits discrimination in housing because of someone's status in a protected class. 775 ILCS 5/3-101, *et seq.* Also, the City of Chicago, pursuant to the authority granted municipalities under §7-108(A) of the IHRA, 775 ILCS 5/7-108(A), has passed regulations prohibiting discrimination on broader grounds than either the FHAA or the IHRA. Chapter 5-8 of the Chicago Municipal Code makes it unlawful, inter alia, to discriminate on the basis of sexual orientation, marital status, parental status, military discharge status, or source of income.

For an analysis of the *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 68 L.Ed. 362, 44 S.Ct. 149 (1923), and *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), abstention doctrines (see §§5.7 and 5.8 above) and their applicability to ordinance challenges under the FHA and the FHAA, *see Olague v. Village of Bensenville*, No. 96 C 6854, 1997 WL 337199 (N.D.Ill. June 13, 1997).

VIII. INSURANCE CONSIDERATIONS AND INDEMNIFICATION OF PUBLIC EMPLOYEES

A. [5.62] Duty of Local Public Entity To Indemnify Public Employees

Under Illinois law, a local public entity is required to indemnify a police officer or deputy sheriff for liability he or she incurs while engaged in the performance of his or her duties. 65 ILCS 5/1-4-5 (City of Chicago police officers), 5/1-4-6 (up to $1 million for police officers in cities with population of less than 500,000), 5/1-4-8 (municipality requesting police assistance of another municipality is liable to and must indemnify assisting municipality); 55 ILCS 5/5-1002 (up to $1 million for sheriffs and deputy sheriffs). By their terms, these statutes apply to judgments only and have been interpreted as not requiring indemnification for the amount of a settlement in cases that have not gone to judgment. *Gillespie v. City of Maroa, Illinois*, 104 Ill.App.3d 874, 433 N.E.2d 688, 691 – 692, 60 Ill.Dec. 646 (4th Dist. 1982). *See also Hill v. Longini*, 767 F.2d 332, 333 – 334 (7th Cir. 1985); *Malden v. City of Waukegan, Illinois*, No. 04 C 2822, 2004 WL 2331839 (N.D.Ill. Oct. 14, 2004). However, these statutes contain an express exclusion for acts of willful misconduct. These monetary limitations and exceptions may be avoided if the employee seeks indemnification under §9-102 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act), 745 ILCS 10/1-101, *et seq.* Section 9-102 is broader than the aforementioned statutes and expressly applies to both tort judgments and settlements, and it contains no monetary indemnity limit.

In *Wright v. City of Danville*, 174 Ill.2d 391, 675 N.E.2d 110, 221 Ill.Dec. 203 (1996), the Illinois Supreme Court held that the City of Danville owed no statutory duty to indemnify or defend former county commissioners and the former corporate counsel pursuant to §9-102 when they incurred fees in defending criminal misconduct charges that they improperly used their offices for their own financial gain. The court also held that the ordinance directing their indemnification was improper because

> **[**a**]n unsuccessful criminal defense involving the holder of a public office, but not arising out of the lawful exercise of the duties of that office, is purely private litigation . . . and as such, absorbing the costs of such litigation cannot be considered a proper public purpose. [**Citations omitted.**]** 675 N.E.2d at 116.

The *Wright* court specifically noted that the denial of indemnification was proper since, under the facts of the case, "[t]he city [was] at no risk of becoming involved in civil litigation with an injured third party as a result of the convictions." *Id.* Moreover, the court held that as a matter of law the commissioners' and corporation counsel's acts were outside the scope of their employment because they acted purely in their own interests and their acts had no relation to their positions. 675 N.E.2d at 117 – 118.

The Seventh Circuit previously determined that the term "tort judgment or settlement" contained in §9-102 is broad enough to encompass both compensatory and punitive damages awarded in civil rights actions asserted under 42 U.S.C. §1983. *Kolar v. County of Sangamon of State of Illinois,* 756 F.2d 564, 566 – 567 (7th Cir. 1985). *See also Coleman v. Smith,* 814 F.2d 1142 (7th Cir. 1987); *Argento v. Village of Melrose Park,* 838 F.2d 1483, 1493 – 1494 (7th Cir. 1988). In addition, §9-102 does not contain an exclusion for willful conduct.

However, in *Kolar, supra,* the Seventh Circuit concluded that because Illinois law in effect at that time (1) provided that a local government indemnified its employees for "any tort judgment or settlement for which it or an employee while acting in the scope of his employment is liable," and (2) did not expressly bar a punitive damage remedy, local entity immunity for punitive damage liability was waived. 756 F.2d at 566 – 567, quoting Ill.Rev.Stat. (1983) c. 85, ¶9-102. In 1986, however, ¶9-102 (now §9-102) was amended to provide that local governments indemnified their employees only for compensatory tort damages. Ill.Rev.Stat. (1987), c. 85, ¶9-102. Several courts have interpreted this amendment to §9-102 to prohibit an award of punitive damages in a §1983 case because the right to prohibit such an award has not been waived through indemnification. *Fangman v. Chicago Board of Education,* No. 86 C 8002, 1990 WL 103225 (N.D.Ill. July 18, 1990). *See also Medina v. City of Chicago,* 100 F.Supp.2d 893 (N.D.Ill. 2000) (punitive damages are not recoverable under §9-102); *Whitehouse v. Piazza,* 397 F.Supp.2d 935, 942 (N.D.Ill. 2005) (municipalities are not liable for punitive damages). The Illinois Supreme Court in discussing the 1986 amendment to §9-102 stated that it was a direct reaction to *Kolar, supra,* and the legislative debates indicate that the legislature was concerned with eliminating the recovery of punitive damages. *In re Consolidated Objections to Tax Levies of School District No. 205 for Years 1991 Through 1996,* 193 Ill.2d 490, 739 N.E.2d 508, 516, 250 Ill.Dec. 745 (2000).

This interpretation of §9-102 seems consistent with the Tort Immunity Act, which provides:

> **It is hereby declared to be the public policy of this State, however, that no local public entity may elect to indemnify an employee for any portion of a judgment representing an award of punitive or exemplary damages.** 745 ILCS 10/2-302.

The legislature's announcement of a public policy prohibiting indemnification for punitive damages may significantly deter qualified individuals from seeking positions of public service. In addition, dual representation of public officials and public entities is increasingly difficult because of the greater potential for conflicts of interest, thereby increasing the costs of defense. *See Illinois Municipal League Risk Management Ass'n v. Seibert,* 223 Ill.App.3d 864, 585 N.E.2d 1130, 166 Ill.Dec. 108 (4th Dist. 1992). See also §5.63 below.

On December 3, 1996, the Illinois Attorney General opined that Illinois law allows Illinois counties to purchase insurance to protect governmental employees and officials from punitive damages. Op. Att'y Gen. (Ill.) No. 96-034. The opinion stated that even though §2-302 of the Tort Immunity Act bars entities from "elect[ing] to indemnify an employee for any portion of a judgment representing an award of punitive . . . damages," the issue of insuring against punitive damages is distinct from the §2-302 bar to indemnification. The Attorney General concluded that 55 ILCS 5/5-1079 specifically authorized counties to purchase liability insurance for "any liability of any officer." Although the opinion is specifically directed to Illinois counties, the

reasoning could be directly applicable to villages and cities because it is based on caselaw cited in the opinion that speaks to municipalities generally. *See Harris v. County of Racine*, 512 F.Supp. 1273, 1282 – 1283 (E.D.Wis. 1981). However, in *Fox v. American Alternative Insurance Corp.*, 757 F.3d 680, 683 – 684 (2014), the Seventh Circuit read Illinois law as prohibiting insurance coverage for punitive damages. On another note, it has been held that the plaintiff's counsel's reference during closing argument to a municipality's duty to indemnify a police officer in an excessive force case constituted reversible error. *Griffin v. Hilke*, 804 F.2d 1052, 1056 – 1058 (8th Cir. 1986).

B. [5.63] Conflicts of Interest — Punitive Damages

In representing both governmental entities and public employees through their insurers, defense counsel should be aware of the variety of difficulties presented by the question of punitive damages. Generally, Illinois public policy prevents insurance for acts arising out of the insured's own misconduct. *Crawford Laboratories, Inc. v. St. Paul Insurance Company of Illinois*, 306 Ill.App.3d 538, 715 N.E.2d 653, 659, 239 Ill.Dec. 899 (1st Dist. 1999), citing *Beaver v. Country Mutual Insurance Co.*, 95 Ill.App.3d 1122, 420 N.E.2d 1058, 51 Ill.Dec. 500 (5th Dist. 1981); *Utica Mutual Insurance Co. v. David Agency Insurance, Inc.*, 327 F.Supp.2d 922, 928 – 929 (N.D.Ill. 2004). However, at least one Illinois court has held that indemnity against intentional conduct may be tolerated when it provides benefits for the victim, but not when it compensates the wrongdoer. *Lincoln Logan Mutual Insurance Co. v. Fornshell*, 309 Ill.App.3d 479, 722 N.E.2d 239, 242, 242 Ill.Dec. 750 (4th Dist. 1999). Illinois courts have not addressed whether public policy prohibits insurance for punitive damages assessed in civil rights cases. Some courts have fashioned an exception to this public policy in civil rights actions asserted against local public entities and have, therefore, permitted punitive damage insurance in such cases. *See Providence Washington Insurance Company of Alaska v. City of Valdez*, 684 P.2d 861 (Alaska 1984); *Harris v. County of Racine*, 512 F.Supp. 1273 (E.D.Wis. 1981). Other states have rejected this exception. *See Hartford Accident & Indemnity Co. v. Village of Hempstead*, 48 N.Y.2d 218, 397 N.E.2d 737, 422 N.Y.S.2d 47 (App. 1979); *City of Newark v. Hartford Accident & Indemnity Co.*, 134 N.J.Super. 537, 342 A.2d 513, 518 (1975). As noted in §5.62 above, *Fox v. American Alternative Insurance Corp.*, 757 F.3d 680 (2014), sees Illinois as prohibiting such coverage.

In any event, a prayer for punitive damages should alert defense counsel to the potential for a conflict of interest because of the general practice of insurance companies to deny coverage for punitive damages on grounds of public policy. *Nandorf, Inc. v. CNA Insurance Cos.*, 134 Ill.App.3d 134, 479 N.E.2d 988, 88 Ill.Dec. 968 (1st Dist. 1985) (conflict of interest created by claim of $100,000 for punitive damages versus $5,000 claim for compensatory damages). If a conflict of interest exists, the insurer ordinarily must pay the cost of independent counsel for the insured. *American Family Mutual Insurance Co. v. W.H. McNaughton Builders, Inc.*, 363 Ill.App.3d 505, 843 N.E.2d 492, 498, 300 Ill.Dec. 234 (2d Dist. 2006). However, the mere potential for a conflict is insufficient to require an insurer to pay for independent counsel. *Shelter Mutual Insurance Co. v. Bailey*, 160 Ill.App.3d 146, 513 N.E.2d 490, 496 – 497, 112 Ill.Dec. 76 (5th Dist. 1987); *AMEC Constructions Management, Inc. v. Regent Insurance Co.*, No. 03 C 2880, 2004 WL 816720 at *3 (N.D.Ill. Mar. 12, 2004) (insurer required to pay for independent counsel only when there is "serious conflict" between insurer and insured). If a conflict of interest exists and the insurer nonetheless chooses to defend the lawsuit, the insurer must generally

defend under a reservation of rights, advising the insured of its right to deny coverage for punitive damages and of its entitlement to independent counsel at the insurer's expense. *See Maryland Casualty Co. v. Peppers*, 64 Ill.2d 187, 355 N.E.2d 24 (1976); *Royal Insurance Co. v. Process Design Associates, Inc.*, 221 Ill.App.3d 966, 582 N.E.2d 1234, 1240, 164 Ill.Dec. 290 (1st Dist. 1991).

The decision in *Illinois Municipal League Risk Management Ass'n v. Seibert*, 223 Ill.App.3d 864, 585 N.E.2d 1130, 166 Ill.Dec. 108 (4th Dist. 1992), made it much more difficult for insurance companies and risk management groups to control the defense of civil rights cases brought against their insureds and member communities. The *Seibert* court held that the presence of a claim for punitive damages against a public official in a civil rights case creates a conflict of interest for an attorney who has been assigned to represent both the municipality and a public employee. Because the court interpreted Illinois law as prohibiting an insurance company from insuring against a punitive damage award, it concluded that the public employee is entitled, in such situations, to choose his or her own attorney at the insurance company's expense. The Seventh Circuit cautioned, however, that the mere possibility that punitive damages may be requested in future litigation does not create an actual conflict of interest to mandate independent counsel for the insured. *National Casualty Co. v. Forge Industrial Staffing Inc.*, 567 F.3d 871, 876 (7th Cir. 2009).

A conflict exists only when the claim for punitive damages so clearly exceeds the compensatory damages claim that an insurer-appointed defense counsel might be compromised in providing a vigorous defense to the noncovered punitive damages claim. *Fox, supra; Nandorf, supra*, 479 N.E.2d at 991 – 992. In the aftermath of *Seibert*, the Intergovernmental Risk Management Agency (IRMA) amended its intergovernmental agreement to add "No Coverage-No Defense" and "Punitive Damages Exclusion" provisions. *Village of Lombard v. Intergovernmental Risk Management Agency (IRMA)*, 288 Ill.App.3d 1003, 681 N.E.2d 88, 90, 224 Ill.Dec. 106 (2d Dist. 1997). In *Village of Lombard*, the village sought a declaration that IRMA, which provided liability insurance coverage to the village and its employees, was obligated to defend them against the entirety of underlying claims, both as to covered compensatory damages and as to noncovered punitive damages, by using independent counsel of Lombard's choosing. The Second District held that the "No Coverage-No Defense" amendment and the "Punitive Damages Exclusion" in the insurance contract were valid and enforceable and did not create a conflict of interest, eliminating IRMA's duty to defend the municipality and its employees against claims for punitive damages. 681 N.E.2d at 95 – 96. The court also noted that nothing prevented the Village of Lombard from retaining its own counsel to defend the punitive damage claim, at its own expense.

IX. MISCELLANEOUS MATTERS

A. Civil Rights Attorney's Fees Awards Act of 1976

1. [5.64] Defendant's Attorneys' Fees in Civil Rights Cases

The defendant's attorneys' fees in civil rights cases may be assessed against a plaintiff under the Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. No. 94-559, 90 Stat. 2641

(amending 42 U.S.C. §1988), only when the plaintiff's claim is "frivolous," "unreasonable," or "without foundation" even though it is not brought in subjective bad faith. *Leffler v. Meer,* 936 F.2d 981, 986 (7th Cir. 1991), quoting *Unity Ventures v. County of Lake,* 894 F.2d 250, 253 (7th Cir.1990). *See Christiansburg Garment Co. v. Equal Employment Opportunity Commission,* 434 U.S. 412, 54 L.Ed.2d 648, 98 S.Ct. 694, 700 (1978). Though this threshold imposes a substantial hurdle for defendants to overcome, courts do impose fees in appropriate cases even when a good-faith belief in the merits of a claim is arguably present at the outset but the claim becomes frivolous at some point during the litigation. *See, e.g., Hermes v. Hein,* 742 F.2d 350, 357 – 358 (7th Cir. 1984); *Coleman v. McLaren,* 631 F.Supp. 763 (N.D.Ill. 1986). *Cf. Vargas v. City of Chicago,* No. 96 C 1372, 1997 WL 688879 (N.D.Ill. Oct. 29, 1997) (denying attorneys' fees after concluding plaintiff's claims were not frivolous following close of discovery). In *Coleman, supra,* the court shifted a defendant's attorneys' fees to a plaintiff whose claim had merit when filed but was rendered groundless, in part, by two Supreme Court decisions decided during the litigation's pendency. The Seventh Circuit Court of Appeals has not hesitated to assess fees when a plaintiff's claim was not well grounded in either law or fact. *See, e.g., Munson v. Milwaukee Board of School Directors,* 969 F.2d 266, 269 – 270 (7th Cir. 1992) (claims barred by lack of factual or evidentiary basis for civil rights claim); *Hamilton v. Daley,* 777 F.2d 1207 (7th Cir. 1985) (claims barred by prosecutorial immunity); *Werch v. City of Berlin,* 673 F.2d 192 (7th Cir. 1982) (claim barred by Tax Injunction Act, 28 U.S.C. §1341); *Munson v. Friske,* 754 F.2d 683, 696 – 697 (7th Cir. 1985) (absence of factual support for civil rights claim).

When a plaintiff's lawsuit involves both frivolous and nonfrivolous claims, a court may grant reasonable fees to the defendant under §1988 for costs that the defendant would not have incurred but for the frivolous claims. *Fox v. Vice,* 562 U.S. ___, 180 L.Ed.2d 45, 131 S.Ct. 2205, 2214 (2011) ("the presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed").

The circumstances justifying a fee award under §1988 often parallel the requirements for sanctions under Fed.R.Civ.P. 11. *See, e.g., Leffler, supra,* 936 F.2d at 987 – 988 (it is not clear as to whether standard is same). Nonetheless, the two provisions differ in certain significant respects. First, §1988 fees should be imposed against parties only (936 F.2d at 987, citing *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 65 L.Ed.2d 488, 100 S.Ct. 2455, 2461 (1980)), whereas Fed.R.Civ.P. 11 reaches attorneys and parties (*Burda v. M. Ecker Co.,* 2 F.3d 769, 773 (7th Cir. 1993)). *Cf.* 28 U.S.C. §1927 (directed only at attorneys and not parties). In addition, Fed.R.Civ.P. 11 applies only to specific pleadings or other papers without regard to winners and losers or plaintiffs and defendants. Section 1988 fees for frivolous litigation, on the other hand, are available only to "prevailing" defendants and are directed at the plaintiff's entire claim or portions thereof. Accordingly, counsel should analyze carefully the basis for a fee or sanction request and proceed under the appropriate provision. The common trap of seeking fees under §1988 for a violation of Fed.R.Civ.P. 11 should be avoided, as each provision provides a separate and independent basis for fees and sanctions.

2. [5.65] Plaintiff's Attorneys' Fees in Civil Rights Cases

Parties to litigation are traditionally required to pay their own attorneys' fees. However, Congress enacted the Civil Rights Attorney's Fees Awards Act, which allows a prevailing party to recoup reasonable attorneys' fees, to encourage competent counsel to handle civil rights cases.

To effect its purposes, 42 U.S.C. §1988 has been interpreted as entitling only prevailing plaintiffs to recover attorneys' fees, absent exceptional circumstances. *See Dupuy v. Samuels,* 423 F.3d 714, 719 (7th Cir. 2005); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 L.Ed.2d 723, 100 S.Ct. 2024 (1980).

The seminal case on plaintiff's attorneys' fees under §1988 is *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983). *Hensley* helped define (a) who is to be considered a prevailing plaintiff and (b) how to determine the amount of the award. First, "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." 103 S.Ct. at 1939, quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278 – 279 (1st Cir. 1978). Since *Hensley*, the "lodestar" figure has become the guiding light of fee-shifting jurisprudence. *Perdue v. Kenny A.*, 559 U.S. 542, 176 L.Ed.2d 494, 130 S.Ct. 1662, 1672 (2010). However, the party must have been granted some sort of relief, either through a judgment or a court-ordered consent decree that alters the legal relationship of the parties, in order to recover. *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 149 L.Ed.2d 855, 121 S.Ct. 1835 (2001). The Supreme Court's decision in *Buckhannon* altered the rule applicable to an award of attorneys' fees when success has been achieved through settlement rather than litigation.

Prior to the Supreme Court's decision in *Buckhannon, supra,* when a cause was settled or disposed of without full litigation on the merits, the Seventh Circuit applied a two-step analysis to determine if the party prevailed in the litigation. *See, e.g., Nanetti v. University of Illinois at Chicago,* 867 F.2d 990 (7th Cir. 1989). The first part of this two-part test required the plaintiff's lawsuit to be causally linked to the achievement of the relief obtained; in other words, the lawsuit must have been a "catalyst" or "material factor" in obtaining concessions from the opponent and a favorable outcome to the dispute. 867 F.2d at 992 – 993. The second part of the test required that the defendant must not have acted wholly gratuitously (*i.e.*, the plaintiff's claims, if pressed, cannot have been frivolous, unreasonable, or groundless). *Id.*

In *Sonii v. General Electric,* No. 95 C 5370, 2003 WL 21541039 (N.D.Ill. June 11, 2003), the district judge agreed with the defendants that *Buckhannon, supra,* effectively overruled the two-part catalyst test. Under *Buckhannon,* the Seventh Circuit now holds that a settlement agreement falling short of a consent decree must have a sufficient judicial imprimatur to entitle a plaintiff to fees. *Petersen v. Gibson*, 372 F.3d 862, 866 – 867 (7th Cir. 2004). Mere judicial involvement is not enough to establish sufficient judicial imprimatur; instead, "[t]here must be some official judicial approval of the settlement and some continuing oversight." 372 F.3d at 867, quoting *T.D. v. LaGrange School District No. 102,* 349 F.3d 469, 479 (7th Cir. 2003). Therefore, settlement agreements, in order to qualify for attorneys' fees, should be incorporated into the dismissal order, and the order should be signed by the judge rather than the parties and provide that the court retain jurisdiction to enforce the terms of the settlement. 372 F.3d at 868 – 867.

Generally, when calculating attorneys' fees, a district court determines a "lodestar amount by multiplying the reasonable number of hours worked by the market rate." *Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399, 407 (7th Cir. 1999), quoting *Bankston v. State of Illinois*, 60 F.3d 1249, 1255 (7th Cir. 1995). The market rate is "the rate that lawyers of similar ability and experience in the

community normally charge their paying clients for the type of work in question." *Uphoff, supra,* 176 F.3d at 407, quoting *McNabola v. Chicago Transit Authority,* 10 F.3d 501, 519 (7th Cir. 1993). Recognizing the difficulty of determining the hourly rate of an attorney who uses contingent-fee agreements, the Seventh Circuit has advised district courts to rely on the "next best evidence" of an attorney's market rate, *i.e.*, "evidence of rates similarly experienced attorneys in the community charge paying clients for similar work and evidence of fee awards the attorney has received in similar cases." *Pickett v. Sheridan Health Care Center,* 664 F.3d. 632, 640 (7th Cir. 2011), quoting *Spegon v. Catholic Bishop of Chicago,* 175 F.3d 544, 555 (7th Cir. 1999). However, the burden of proving the market rate is on the party seeking the fee award. *Uphoff, supra,* 176 F.3d at 407. "[O]nce an attorney provides evidence establishing his market rate, the opposing party has the burden of demonstrating why a lower rate should be awarded." *Id.*

In addition, *Hensley, supra,* discredited those cases that had denied fees for work expended on all unsuccessful claims. Instead, fees should be denied on unsuccessful claims only when the claims are unrelated to successful claims. 103 S.Ct. at 1940. Of course, when a judgment for damages or an injunction on which an award of fees was based is reversed on appeal, the fee award falls as well. *Palmer v. City of Chicago,* 806 F.2d 1316 (7th Cir. 1986). *See Ekanem v. Health & Hospital Corporation of Marion County, Indiana,* 778 F.2d 1254 (7th Cir. 1985).

Litigation over fees earned by plaintiff's counsel in related proceedings is common under §1988. The Supreme Court has permitted a plaintiff under Title VII to recoup fees for time expended on mandatory prior state administrative and judicial proceedings to which the plaintiff was referred under Title VII. *New York Gaslight Club, supra.* Title VII, however, differs from 42 U.S.C. §1983 because the latter does not require resort to state administrative and judicial proceedings before instituting a §1983 claim. Accordingly, the Supreme Court has held that *Carey* does not require reimbursement for attorneys' fees incurred while pursuing optional administrative proceedings. *Webb v. Board of Education of Dyer County, Tennessee,* 471 U.S. 234, 85 L.Ed.2d 233, 105 S.Ct. 1923 (1985).

Although the courts look with disfavor on litigation over attorneys' fees, such issues are frequently litigated. Both the Supreme Court and the Seventh Circuit have determined that a contingent-fee agreement entered into between the plaintiff's attorney and the client did not set a ceiling on the collection of an award of attorneys' fees from the defendant under §1988. *Blanchard v. Bergeron,* 489 U.S. 87, 103 L.Ed.2d 67, 109 S.Ct. 939 (1989); *Kirchoff v. Flynn,* 786 F.2d 320 (7th Cir. 1986). On the flip side, the Supreme Court subsequently held that an award of fees under §1988 did not place a ceiling on the prevailing plaintiff's attorney's entitlement to additional fees from the plaintiff under a contingent-fee contract. *Venegas v. Mitchell,* 495 U.S. 82, 109 L.Ed.2d 74, 110 S.Ct. 1679 (1990). Accordingly, the *Venegas* court allowed a plaintiff's attorney who was awarded $75,000 under §1988 to obtain an additional $406,000 pursuant to a contingent-fee arrangement after the plaintiff recovered $2.08 million in a false arrest and malicious prosecution case.

In an earlier case, the Supreme Court rejected the argument that a fee award must bear some proportionality to the amount of the plaintiff's judgment. *City of Riverside v. Rivera,* 477 U.S. 561, 91 L.Ed.2d 466, 106 S.Ct. 2686 (1986). Accordingly, the *Rivera* Court upheld a fee award of $245,000 in a case in which the judgment in favor of the plaintiff was for only $33,000. However,

the Supreme Court later held that an award of nominal damages in favor of a plaintiff, while it makes him or her a prevailing party within the meaning of *Hensely, supra,* does not necessarily entitle the plaintiff to an award of attorneys' fees. *Farrar v. Hobby,* 506 U.S. 103, 121 L.Ed.2d 494, 113 S.Ct. 566 (1992). *Farrar* ushered in the practice of courts considering the plaintiff's success in the lawsuit as a factor in setting an appropriate fee. In reviewing the district court's application of "a non-lodestar, *Farrar*-type of analysis," the court in *Simpson v. Sheahan,* 104 F.3d 998, 1001 – 1002 (7th Cir. 1997), held that the district court could not order $23,252.53 in costs and fees to sanction Cook County when the improperly detained plaintiff received merely $140 of his requested $75,000 in damages. *See also Cole v. Wodziak,* 169 F.3d 486, 489 (7th Cir. 1999) ("recovering less than 10% of the demand is a good reason to curtail the fee award substantially"); *Richardson v. City of Chicago, Illinois,* 740 F.3d. 1099 (7th Cir. 2014) ($675,000 lodestar reduced to $123,000 based on limited success); *Montanez v. Simon,* 755 F.3d. 547 (7th Cir. 2014) (lodestar reduced by 50 percent based on limited success).

Prevailing plaintiffs whose awards are reduced on appeal are still entitled to fees incurred in defending the appeal. *Ustrak v. Fairman,* 851 F.2d 983, 990 (7th Cir. 1988). In *Ustrak,* the court noted that although the plaintiff's award was reduced from $50,000 to $1,100, the plaintiff would be entitled to all fees expended in defending the appeal because the plaintiff "had no choice but to incur [fees on appeal] or forfeit his victory in the district court." *Id.* Following *Ustrak,* the Seventh Circuit subsequently concluded that a plaintiff whose award of attorneys' fees was reduced by $2,600 was still entitled to an additional $3,000 expended in defending the appeal. *Jackson v. Illinois Prisoner Review Board,* 856 F.2d 890 (7th Cir. 1988). Accordingly, the defendants were left almost $400 in the hole despite having prevailed on appeal.

B. [5.66] Offer of Judgment — Fed.R.Civ.P. 68 — Impact on Attorneys' Fees

A valuable tool for defendants in civil litigation conducted in federal court is Fed.R.Civ.P. 68, which permits as follows:

> **At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service.** Fed.R.Civ.P. 68(a).

When an offer of judgment is not accepted and the plaintiff's recovery at trial is less than the offer, the plaintiff must "pay the costs incurred after the offer was made." Fed.R.Civ.P. 68(d). The rule is designed to encourage settlement and prompts the parties to evaluate the litigation realistically when faced with the prospect of responsibility for post-offer costs.

The United States Supreme Court gave teeth to Fed.R.Civ.P. 68 in the context of civil rights suits in *Marek v. Chesny,* 473 U.S. 1, 87 L.Ed.2d 1, 105 S.Ct. 3012 (1985). A prevailing plaintiff in civil rights litigation is entitled to an award of reasonable attorneys' fees from the defendants. See §5.65 above. In *Marek,* the Supreme Court held that the term "costs" contained in Fed.R.Civ.P. 68 encompasses attorneys' fees so that a Rule 68 offer may be used to cut off the defendant's responsibility for a plaintiff's attorneys' fees earned after the offer was extended.

Because the average attorneys' fee award in civil rights litigation often exceeds the ultimate verdict itself, the impact of *Marek* is substantial. *Cf. City of Riverside v. Rivera*, 477 U.S. 561, 91 L.Ed.2d 466, 106 S.Ct. 2686 (1986) (approximately $245,000 in attorneys' fees awarded to plaintiff's attorney whose client recovered $33,000).

A Fed.R.Civ.P. 68 offer can take many forms; therefore, a word to the wise is appropriate. In *Webb v. James*, 147 F.3d 617 (7th Cir. 1998), the plaintiff filed a claim under the Americans with Disabilities Act. Shortly before trial, the defendant filed a Rule 68 offer of judgment, which read:

> **The Defendants . . . by their attorneys . . . hereby make an offer of judgment in the above-captioned matter in the amount of Fifty Thousand Dollars ($50,000.00) pursuant to Federal Rule of Civil Procedure 68.** 147 F.3d at 619.

The offer was signed for the defendants by one of their attorneys. On its face, the offer did not address costs or fees. On the day before trial was to begin, the plaintiff filed with the court a "notice of acceptance of offer of judgment." *Id.*

> **Upon learning of the acceptance, the defendants' attorneys faxed a letter to and telephoned plaintiff's counsel, to clarify that the offer was all-inclusive, and that defendants had no intention of paying any additional sums for attorney's fees.** *Id.*

The plaintiff's counsel took exception to this interpretation of the offer, citing caselaw that allowed a plaintiff to recover additional amounts for attorneys' fees when the Rule 68 offer failed to include fees. The parties took their new dispute into court, at a previously scheduled pretrial conference. After hearing argument, the court entered judgment in the amount of $98,773.65 for fees, costs, and expenses, almost twice the original offer. 147 F.3d at 620. The defendant attempted to rescind the offer but to no avail.

On appeal, the Seventh Circuit ruled:

> **"Entry of a Rule 68 judgment is ministerial rather than discretionary." . . . Thus, there is no opportunity for a district court to even consider allowing rescission of the Rule 68 "contract." Once the acceptance has been properly filed, judgment must be entered.** 147 F.3d at 621, quoting *Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991).

The court further rejected the defendant's argument that the Rule 68 offer was a "contract" subject to rescission. Rather, a party should seek relief from judgment under Fed.R.Civ.P. 60(b).

In *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390, 391 (7th Cir. 1999), the court found the offer of "one total sum as to all counts of the amended complaint" to include attorneys' fees when one of the counts specified attorneys' fees as part of the relief sought. *Cf. Stewart v. Professional Computer Centers, Inc.*, 148 F.3d 937 (8th Cir. 1998) (similar provision was held to be ambiguous because only some of counts requested attorneys' fees). *Webb* has been interpreted to stand for the general rule that when a Rule 68 offer of judgment does not expressly include fees and costs, courts are within their discretion to grant fees and costs in an additional and separate award. *Garcia v. Oasis Legal Finance Operating Co.*, 608 F.Supp.2d 975, 978 (N.D.Ill. 2009).

Should an attorney wish to exclude fees in an offer of judgment, an offer such as the following variation suggested by the authors of an Illinois Bar Journal article may suffice:

> **Pursuant to Rule 68, the defendant offers to allow judgment to be taken against him in the amount of $_____, [**exclusive of**] costs and attorney's fees now accrued in such amount as determined by the court as recoverable under this rule upon acceptance of this offer by the plaintiff.** James S. Stephenson and William W. Kurnik, *Rule 68 Offers of Judgment in Actions Arising Under 42 U.S.C. Section 1983,* 74 Ill.B.J. 346, 350 (1986) (Stephenson and Kurnik).

See also 11 Louis R. Frumer et al., BENDER'S FEDERAL PRACTICE FORMS, No. 68:3, and Comment on Rule 68, ¶6 (2011). For more variations, see Ian H. Fisher, *Federal Rule 68, A Defendant's Subtle Weapon: Its Use and Pitfalls*, 14 DePaul Bus.L.J. 89, 104 (2001) (Fisher).

The offer may be made "inclusive" of costs and thereby, depending on the underlying claim, include attorneys' fees. *See, e.g., Fisher v. Kelly,* 105 F.3d 350, 352 (7th Cir. 1997) (within context of claim under 42 U.S.C. §1983, offer of judgment included term "costs," and as defined in 42 U.S.C. §1988, "costs" included attorneys' fees). Regardless of the form it takes, defense counsel should assess the litigation realistically in order to determine whether a Rule 68 offer should be made and, if so, prepare an offer with a realistic chance of paralleling a potential jury verdict. In formulating a realistic offer, defense counsel should be mindful that a court, in determining whether the judgment at trial exceeds the amount of the offer, does add the plaintiff's pre-offer attorneys' fees to the amount of the judgment. *Grosvenor v. Brienen,* 801 F.2d 944 (7th Cir. 1986). *See also O'Brien v. City of Greers Ferry,* 873 F.2d 1115 (8th Cir. 1989); *Hopper v. Euclid Manor Nursing Home, Inc.,* 867 F.2d 291 (6th Cir. 1989).

Dissenting in *Marek, supra,* Justice Brennan pointed out the possibility that a literal interpretation of the requirement that plaintiffs pay post-offer costs could result in an obligation on the plaintiff to pay the defendant's post-offer attorneys' fees. 105 S.Ct. at 3022 – 3023. However, in light of the caselaw that permits defendants to recover attorneys' fees only in frivolous and vexatious cases (see §5.64 above), it is unlikely that such a requirement would ever be imposed. *See Crossman v. Marcoccio,* 806 F.2d 329 (1st Cir. 1986); *Grosvenor, supra,* 801 F.2d at 946 n.4.

Shifting the defendant's post-offer costs, other than attorneys' fees, to the plaintiff in such cases does not run afoul of any countervailing caselaw. Accordingly, at least one court has held that a plaintiff whose judgment does not exceed the Fed.R.Civ.P. 68 offer must pay the defendant's post-offer costs in addition to his or her own fees. *Crossman, supra,* 806 F.2d at 331 – 333. See also Lynn S. Branham, *Offers of Judgment and Rule 68: A Response to the Chief Justice,* 18 J. Marshall L.Rev. 341, 343, 357 (1985); Roy D. Simon, Jr., *The Riddle of Rule 68,* 54 Geo.Wash.L.Rev. 1, 6 n.18 (1985). The analysis in both *Grosvenor, supra,* and *Crossman, supra,* has been affirmed by the Seventh Circuit. *See, e.g., Harbor Motor Co. v. Arnell Chevrolet-Geo, Inc.,* 265 F.3d 638 (7th Cir. 2001); *Payne v. Milwaukee County,* 288 F.3d 1021 (7th Cir. 2002). For excellent discussions of these and other considerations raised by *Marek, supra,* and the use of Fed.R.Civ.P. 68, see Stephenson and Kurnik, *supra,* and Fisher, *supra,* 14 DePaul Bus.L.J. at 96 – 100.

C. [5.67] Negotiated Release of Claims — Public Policy

Civil rights suits asserted against public officials and public entities are often instituted by individuals who are defendants in pending criminal proceedings arising out of the same incident giving rise to the civil rights suit. In an effort to protect public officials, prosecutors sometimes seek to condition a dismissal of the criminal charges on a voluntarily executed release terminating the civil rights suit. Such efforts are risky and have been held violative of public policy. *Boyd v. Adams,* 513 F.2d 83 (7th Cir. 1975). *See also Murphy v. Rochford,* 55 Ill.App.3d 695, 371 N.E.2d 260, 264, 13 Ill.Dec. 543 (1st Dist. 1977). However, the United States Supreme Court in *Town of Newton v. Rumery,* 480 U.S. 386, 94 L.Ed.2d 405, 107 S.Ct. 1187 (1987), concluded that the mere possibility of harm to the interests of a criminal defendant and of society as a whole did not justify a per se rule invalidating release-dismissal agreements. To the contrary, such agreements are now enforceable when the criminal defendant voluntarily enters into the agreement and there is no evidence of prosecutorial misconduct. *See, e.g., Gonzalez v. Kokot,* 314 F.3d 311 (7th Cir. 2002); *Dye v. Wargo,* 253 F.3d 296 (7th Cir. 2001).