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Section 1983 Litigation: Case Law and Trends

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Fourth Amendment – Warrantless Blood Test

Missouri v. McNeely, 133 S. Ct. 1552 (2013)

Upon being arrested for speeding and suspicion of driving under the influence, McNeely was taken to a nearby hospital for blood testing. The officer directed a lab technician to take a non-consensual blood sample for McNeely's blood alcohol concentration.

The state argued that the officer had probable cause to arrest, and that the blood test was justified because McNeely's blood alcohol concentration was dissipating as time went on, establishing an exception for preventing the destruction of evidence.

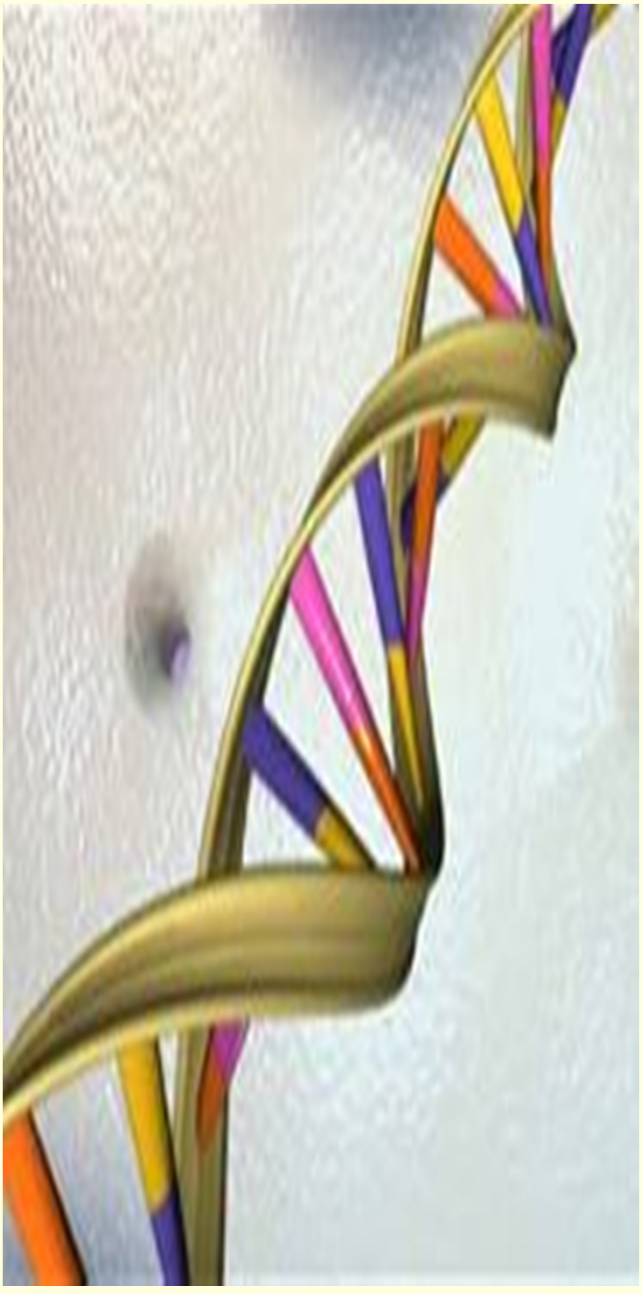
- USSC disagreed:
  - A warrantless blood test to determine blood alcohol concentration violated the Fourth Amendment. The natural dissipation of McNeely's blood alcohol concentration does not constitute an exigency to satisfy warrantless blood tests.

Fourth Amendment – Warrantless DNA Swabbing

Maryland v. King, 133 S. Ct. 1958 (2013)

The police arrest a suspect for a serious offense and bring the suspect to the station to be detained in custody and take and analyze cheek swab of the suspect's DNA.

USSC held that collecting DNA samples, like fingerprinting and photographing, is a legitimate police booking procedure that is reasonable under the Fourth Amendment.



Fourth Amendment and Police Canines

Florida v. Jardines, 133 S.Ct. 1409 (2013) and *Florida v. Harris*, 133 S.Ct. 1050 (2013)

Florida v. Jardines - Police brought canine onto front porch and dog alerted to narcotics at residence. The police obtained a search warrant and found drugs. Supreme Court affirmed suppression of the evidence, finding that front porch is a classic example of curtilage for which the activity of the home life extends and to which there is no customary invitation to conduct a search.

Florida v. Harris – Police canine's alert can provide probable cause to search a vehicle so long as the State lays proper foundation as to the dog's satisfactory performance in a certification or training program.

Fourth Amendment – Qualified Immunity – Warrantless Entry

Stanton v. Sims, 134 S. Ct. 3 (2013)

Police officer kicked down a backyard gate in hot pursuit of a suspect for misdemeanor offense. The gate struck and injured the home owner, who sued for her injuries under Section 1983, claiming that the warrantless entry violated the Fourth Amendment.

- The Ninth Circuit held that the law was clearly established that the officer's warrantless entry was unconstitutional.
- The USSC reversed, finding that the law was not clearly established. The officer was entitled to qualified immunity because he may have been mistaken in believing his actions were justified, but he was not "plainly incompetent."

FOIA and the Constitution

McBurney v. Young, 133 S. Ct. 1709 (2013)

Virginia's Freedom of Information Act grants access to public records to Virginia citizens only. Citizens of other states, including those who own vacation properties, sued the state under Section 1983, alleging violations under the Privileges and Immunities Clauses and Dormant Commerce Clause.

- The Supreme Court held that Virginia's citizens-only FOIA provision did not violate the U.S. Constitution. "[T]here is no constitutional right to obtain all the information provided by FOIA laws."

Workplace Harassment – Supervisor or Co-Worker

Vance v. Ball State Univ., 133 S.Ct. 2434 (2013).

Vance sued BSU under Title VII, alleging that a fellow employee created a racially hostile work environment. The Seventh Circuit held that BSU was not vicariously liable for the employee's actions because the employee was not a supervisor and could not take tangible employment action against Vance.

The USSC agreed and held that an employee is a supervisor for purposes of vicarious liability under Title VII only if the employee is empowered to take tangible employment actions against the victim.

- The USSC drew a sharp distinction under Title VII between co-workers and supervisors. An employer is strictly liable only if a supervisor is given the responsibility to take tangible employment actions against an allegedly harassed employee. Otherwise, the employer is liable only if it was negligent in controlling the working conditions of the company.

Fifth Amendment – Takings

Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 2586 (2013)

Landowner was denied development permit because he refused to reduce the size of his development and financially contribute to off-site wetlands mitigation. Landowner filed a takings claim. Trial court found government's actions unlawful under *Nollan* and *Dolan*, and state appellate court affirmed. However, state supreme court reversed.

The USSC held that that landowner may bring a takings claim even though he was denied the permit. Court also held that *Nollan/Dolan* apply even if the government exacts money as a condition of development.

Fourth Amendment – Warrantless Seizure

Hamilton v. Vill. of Oak Lawn, 735 F.3d 967 (7th Cir. 2013)

Hamilton claimed that she was hired as an in-home caretaker of a man dying of Parkinson's disease. After she worked only 88 hours, she was given a check for $10,000. The man's family called the police, who detained Hamilton and questioned her for two hours.

The Seventh Circuit affirmed dismissal of her lawsuit. While the conduct of the police had a custodial dimension, it was not an arrest. Not all detentions need be classified as a *Terry* stop or an arrest. A stop too intrusive to be justified under *Terry*, but still short of a custodial arrest, may still be reasonable under the Fourth Amendment.

Fourth Amendment – False Arrest – Qualified Immunity

Williams v. City of Chi., 733 F.3d 749 (7th Cir. 2013)

Williams was returning home from work in the wee hours of the morning when he saw his neighbor's house on fire. He sprinted to the porch to knock on the door to rouse anyone who may be inside the home. Two Chicago police officers saw Williams on the front porch and arrested him on suspicion of arson. The charges were later dismissed. Williams sued the two officers under Section 1983 for false arrest. The district court granted the officers' motion for summary judgment.

- The Seventh Circuit reversed. Rejecting the officers' qualified immunity defense, the court held that the officers did not have probable cause or even "arguable probable cause" to make the arrest based merely on the fact that he was found on the porch.

Fourth Amendment – Search and Seizure

Balthazar v. City of Chi., 735 F.3d 634 (7th Cir. 2013)

Balthazar lived in one of two apartments on the third floor of a walk-up apartment building. The police had a warrant to search the other apartment but mistakenly smashed open Balthazar's door with a battering ram exposing the inside to view. Balthazar sued under Section 1983 based upon an illegal search and seizure.

- On appeal, the Seventh Circuit affirmed dismissal of the suit. A search resulting from an innocent mistake is not unreasonable and does not violate the Fourth Amendment. Nor does simply looking inside the apartment always constitute a search.

Fourth Amendment – Qualified Immunity

Findlay v. Lendermon, 722 F.3d 895 (7th Cir. 2013)

Clark Howey suspected that his nephew Jason Findlay was trespassing on his land. Howey set up a surveillance camera at the property line. However, Findlay found the camera and called the police to file a report. Officer Lendermon responded to the call. With the video camera running, Findlay made comments that suggested he had trespassed on Howey's land. Lendermon decided to confiscate the camera as evidence. At some point, the memory chip separated from the camera and fell to the floor. Findlay accused Lendermon of tackling him to prevent him from picking up the chip and sued for excessive force. The district court denied Lendermon's summary judgment motion.

- The Seventh Circuit reversed, holding that Findlay failed to meet his burden of showing the incident violated clearly established law. Tackling a suspect under these circumstances was not clearly established. Thus, Lendermon was entitled to qualified immunity.

Fourth Amendment – Search and Seizure – Qualified Immunity

Rabin v. Flynn, 725 F.3d 628 (7th Cir. 2013)

Police saw Rabin carrying a holstered gun in public. He was handcuffed, searched and detained for 1 ½ hours while the officers tried to confirm the validity of his carrying license. He sued for illegal detention but the district court denied summary judgment for the officers, rejecting their qualified immunity defense.

- The Seventh Circuit reversed. It was reasonable under clearly established law to verify the legitimacy of the license. Further, the time delay was caused by the government's failure to have an efficient system of license verification, not the individual officer's response.

- Additionally, qualified immunity applied to handcuffing Rabin because during this case there was no clearly established law on handcuffing suspects during *Terry* stops.

Qualified Immunity – Excessive Force – Tasers

Abbott v. Sangamon County, 705 F.3d 706 (7th Cir. 2013)

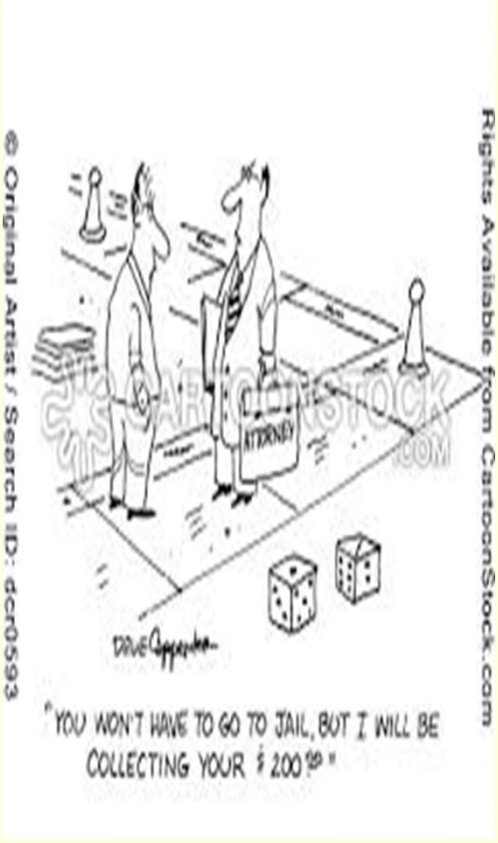
Police use Taser on mother of suspect whom they believed was trying to help her son escape custody. The mother sued under Section 1983 for excessive use of force. The district court granted summary judgment in favor of defendants.

- The Seventh Circuit reversed. There was a question of fact as to whether the use of the Taser was clearly excessive because of mom's passive noncompliance with police orders.

Due Process and Booking Fees

Markadonatos v. Vill. of Woodridge, ___ F.3d ___, 2014 WL 60452
(7th Cir. 2014)

The Village of Woodridge enacted an ordinance requiring arrestee to pay $30.00 booking fee prior to probable cause hearing. The ordinance did not allow the arrestee to appeal or seek reimbursement. Markadonatos filed class action suit under Section 1983 arguing that the fee violated his procedural and substantive due process rights.



- The Seventh Circuit affirmed dismissal of the action. In balancing the interests of the parties under *Mathews v. Eldridge*, the Court found that the government's interest, including the "fiscal and administrative burdens that the additional or substitute procedural requirement would entail," outweighed the private citizen's interest in $30. The plaintiff's substantive due process claim failed because he lacked standing. He was arrested and found not guilty after successfully completing a term of supervision.

Fourth Amendment and pre-*Gerstein* custody

Currie v. Chhabra, 728 F.3d 626 (7th Cir. 2013)

Phillip Okoro died in the Williamson County Jail of diabetic ketoacidosis. His family sued the jail doctor and nurse for inadequate medical care. He had not yet had a probable cause (*Gerstein)* hearing. Thus, he was not considered a pretrial detainee, and his suit was brought under the "objective reasonableness" standard of the Fourth Amendment.

Defendants moved for summary judgment arguing that the Fourth Amendment did not apply to the provision of medical services to a pre-*Gerstein* arrestee. The district court denied the motion.

The Seventh Circuit held that the claim was properly analyzed under the Fourth Amendment. All pre-*Gerstein* arrestees or detainees, whether in a police lockup or a jail have protection under the Fourth Amendment, and not the Fourteenth Amendment. And, the right to adequate medical care under the Fourth Amendment was clearly established.

Fourth Amendment – Strip Searches

Banaei v. Messing, ___ Fed. Appx. ___, 2013 WL 6234599 (7th Cir. 2013)

Plaintiff, a 60 year old woman, claims that she was arrested for misdemeanor battery and strip searched in violation of her Fourth Amendment rights. At the 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 present in the room.

- District court granted summary judgment, finding that the plaintiff was not strip searched and that there was no prohibition in male officers watching the search. The court found that the bulky sweater could have interfered with a pat down and plaintiff was still wearing her pants and bra.

- The Seventh Circuit disagreed. The officers offered no justification for conducting the search in the manner and place they did. Triable issues of fact existed as to whether the search was reasonable.

Equal Protection of Laws – Police Failure to Protect

Bond v. Atkinson, 728 F.3d 690 (7th Cir. 2013)

Stephanie Bond was shot by her husband who then fatally shot himself. She filed suit alleging that the police violated her equal protection rights by failing to enforce an order of protection and seize her husband's weapons. The district court denied the officers' qualified immunity defense.

The Seventh Circuit reversed:

- Section 1983 requires intentional discrimination. Disparate impact does not state a claim. The fact that the police were wrong about the risk that the husband posed did not make them constitutionally liable. The Constitution does not guarantee mistake-free police work.

First Amendment – Free Speech and Retaliation

Diadenko v. Folino, ___ F.3d ___, 2013 WL 6680930 (7th Cir. 2013).

Diadenko was an administrator at Schurz High School in Chicago. She wrote a letter to the mayor criticizing certain practices relating to the school's special education department. Prior to receiving a response, she was suspended twice for violating school policies. She filed suit claiming that the suspensions were retaliatory.

The Seventh Circuit affirmed summary judgment for school and its officials.

- Diadenko failed to show that the principal was aware of her letter to the mayor prior to taking disciplinary action against her. Absent such knowledge, she was unable to prove unlawful motivation.

First Amendment – Free Speech in a Public Setting

Craig v. Rich Twp. High Sch. Dist., 736 F.3d 1110 (7th Cir. 2013)

Craig, a teacher at Rich Township High School, self published an adult relationship advice book entitled "It's Her Fault." The book was filled with sexually provocative themes, sexually explicit terms, and other sexually deviant theories. After the book was published, the school terminated Craig. Craig sued under Section 1983 alleging First Amendment retaliation.

- The Seventh Circuit affirmed dismissal of the action. Although Craig's book contained matters of public concern, "the allegations of Craig's complaint and the documents he relies upon to support his claim establish that the school district's interest in ensuring effective delivery of counseling services outweighed Craig's speech interest." The book disrupted the learning environment at the school because students learned of the "hyper-sexualized" content of the book and were reluctant to seek out Craig's advice.

Fourteenth Amendment – Race Discrimination

Lavalais v. Vill. of Melrose Park, 734 F.3d 629 (7th Cir. 2013)

Black police sergeant sued the Chief of Police under Title VII and Section 1983, alleging race discrimination and retaliation. The sergeant had been assigned to the midnight shift. After a year, he requested a different shift or position, which the Chief denied. He filed suit alleging that he had suffered a materially adverse employment action because he was forced to work "midnights indefinitely."

The Seventh Circuit reversed dismissal of the suit:

- Although the complaint did not provide much factual detail, the allegations were sufficient to plead that the denial of a transfer from the midnight shift was adverse enough to state a claim.

First Amendment – Political Retaliation – Qualified Immunity

Chrzanowski v. Bianchi, 725 F.3d 734 (7th Cir. 2013)

An assistant state's attorney, Chrzanowski, was fired after testifying against the State's Attorney who was being investigated for official misconduct. He filed suit under Section 1983. Applying *Garcetti v. Caballos*, the district court dismissed the suit, finding that the testimony was given pursuant to his official duties and therefore did not implicate the First Amendment.

- The Seventh Circuit reversed. When Chrzanowski was testifying, he was speaking outside of his duties of employment. The court further determined that retaliation for providing truthful testimony was a clearly established First Amendment violation.
- Watch for *Lane v. Franks*, 2013 WL 5675531 (U.S.), *certiorari* granted – same issue!

First Amendment – Retaliation

Kristofek v. Vill. of Orland Hills, 712 F.3d 979 (7th Cir. 2013)

Part time police officer arrested a driver for traffic violations. The driver turned out to be the son of a former mayor of a nearby town. The officer was ordered to let him go. The officer disagreed and shared his belief of corruption with his supervisors and the FBI and was later fired. He sued for First Amendment retaliation, and his suit was dismissed.

- The Seventh Circuit reversed. While his speech may have been motivated by personal interests, he alleged that he spoke up to expose corruption inside the police department. Thus, his speech concerned a matter of public concern.

First Amendment – Political Retaliation

Peele v. Burch, 722 F.3d 956 (7th Cir. 2013)

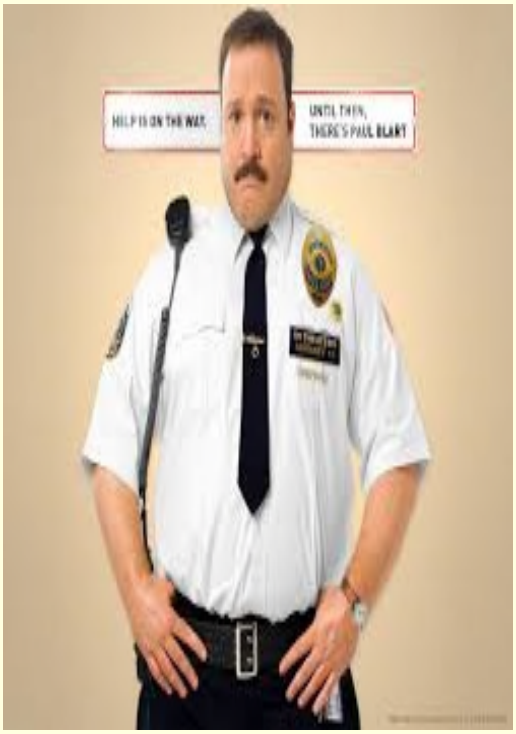
Police detective, who supported mayoral opponent in election, spoke to local reporter about his support and was transferred out of detective's bureau the next day. He sued under Section 1983 for First Amendment retaliation. The district court granted summary judgment in favor of the defendants.

- The Seventh Circuit reversed. A triable issue of fact existed as to the true cause of the transfer based on suspicious timing of the transfer and the Chief's comment that the plaintiff had "made the mayor mad."

TITLE VII – Race Discrimination – Method of Proof

Morgan v. SVT, LLC, et al., 724 F.3d 990 (7th Cir. 2013)

Morgan was hired as a store security guard. Morgan had several corrective write-ups and informal discussions with his supervisors about poor performance. Morgan was ultimately fired after he reported that his supervisor stole a newspaper. He sued under Title VII for retaliation. The district court granted summary judgment in favor of the company.



- The Seventh Circuit affirmed. Although Morgan stated that the timing was "suspicious" based on his reporting of a manager for stealing a newspaper, suspicious timing alone was insufficient to create a genuine issue whether he was fired for failing to meet legitimate job expectations or retaliation.
- The court criticized strictly using "direct" and "indirect" methods of proof.

First Amendment – Retaliation

Swetlik v. Crawford, 738 F.3d 818 (7th Cir. 2013)

Police detective sued city, its mayor and city council for filing termination charges with police commission allegedly in retaliation for his public criticism of the police chief made in his capacity as a union member supporting the union's demand for the chief's resignation. The district court granted summary judgment for the defendants, which the Seventh Circuit affirmed.

- Detective's statements were constitutionally protected by the First Amendment when he made statements as part of his union activities, rejecting *Garcetti* defense.
- However, the mayor and city council genuinely and reasonably relied on an independent investigator's report that the detective had been untruthful in his criticism of the chief and thus they were justified in bringing termination charges against him based on those statements.

Due Process – Occupational Liberty Under Section 1983

Blackout Sealcoating, Inc. v. Peterson, 733 F.3d 688 (7th Cir. 2013)

Blackout Sealcoating had terminable, at-will contracts with CTA to conduct asphalt paving work. The CTA temporarily debarred the firm from doing work. Blackout sued under Section 1983 claiming deprivation of "occupational liberty" without due process of law.

The Seventh Circuit affirmed dismissal of the suit. "[T]o treat being suspended or fired by a single employer as a deprivation of liberty or property would be to override the Supreme Court's conclusion that public employers need not give or hold hearings before ending at will contracts." Blackout failed to show that debarment by the CTA amounted to a blackballing from the industry, especially since they were provided a contract from a school district immediately after being debarred.

Use of Science and Technology by the Legal Profession *Jackson v. Pollion*, 733 F.3d 786 (7th Cir. 2013)

An Illinois inmate failed to receive his prescribed hypertension medication for three weeks. The inmate sued under Section 1983 claiming deliberate indifference.

The Seventh Circuit held that the correctional counselor, at most, was negligent, but not deliberately indifferent to the inmate's medical needs.

This opinion is notable for Judge Posner's rant against the judges and attorneys for their discomfort with science and technology. "The legal profession must get over its fear and loathing of science."

Claim Preclusion

Walczak v. Chi. Bd. of Educ., ___ F.3d ___, 2014 WL 92234
(7th Cir. 2014)

- Harriet Walczak was a teacher in the Chicago Public School system for 30 years when her new principal placed her in a performance remediation program. At the end of that year, she was facing discharge proceedings. She filed a charge with the EEOC alleging violations of the ADEA. While the EEOC charge was pending, Walczak was discharged and filed a complaint in Cook County challenging the Board's termination, but the Circuit Court and recently Illinois Appellate Court affirmed the judgment of the board.
- Shortly after the circuit's decision, Walczak received a right to sue from the EEOC and sued in federal court alleging a violation of the ADEA. The district court dismissed the ADEA suit based on claim preclusion.
- The Seventh Circuit affirmed. The doctrine of *res judicata* barred her ADEA claim. She could have brought her ADEA claim in conjunction with her state-court suit for judicial review of the Board's decision but failed to do so. She was not allowed to split her claims.

Biography

- Michael D. Bersani is a partner with Hervas, Condon & Bersani, P.C., located in Itasca, Illinois. Mike received an undergraduate degree from the University of Illinois, Urbana-Champaign in 1985 and a law degree from John Marshall Law School, Chicago, Illinois in 1988. Following law school, he served two years as a judicial clerk to Judge Edward T. Barfield, First District Appellate Court, State of Florida. Upon entering private practice in 1990, he has concentrated his practice in defending local governments and their officials and employees in federal civil rights and state court tort litigation. Mike is admitted to practice law in Illinois and Florida, as well as the U.S. Supreme Court, Seventh Circuit Court of Appeals, and the U.S. District Courts for the Northern and Central Districts of Illinois.