Fundamentals of Section 1983 Litigation: Common Claims, Defenses and Immunities

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I. Introduction

A. Historical Perspective

1. 42 U.S.C. §1983 is the primary remedial statute for asserting federal civil rights claims against local public entities, officers and employees.

2. Section 1983 is the codification of the Civil Rights Act of 1871, otherwise known as the "Klu Klux Klan Act."

a) The legislative purpose was to provide a federal remedy in federal court because the state governments and courts, "by reason of prejudice, passion, neglect, intolerance or otherwise" were unwilling to enforce the due process rights of blacks guaranteed by the 14th Amendment. *Monroe v. Pape*, 365 U.S. 167 (1961).

3. Section 1983 lay dormant for 90 years. Against the backdrop of the civil rights movement in the 1950's and 1960's, there were three main legal events that have contributed to the explosion of Section 1983 litigation:

a) *Monroe v. Pape*, 365 U.S. 167 (1961): Local governmental officials who violate constitutional rights act "under color of law" for purposes of Section 1983, even if their conduct was contrary to state law. Section 1983 provides a federal remedy for violation of constitutional rights against local governmental officials and employees. But, municipal corporations are not "persons" and therefore cannot be sued under Section 1983.

b) *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978): Overruling *Monroe v. Pape*, in part, Supreme Court held that municipal entities may be sued under section 1983 when their policies, customs or practices cause the constitutional injury at issue.

c) Fee shifting statute, 42 U.S.C. § 1988, enacted in 1976 to provide incentive for private attorneys to enforce civil rights laws.

4. In 1990, there were 18,793 total Civil Rights cases filed in U.S. District Courts (Title VII, ADA, Voting Rights, Section 1983, etc.). In 2015, there were 37,384. As a subset, the total Section 1983 filings in 1990 were 9,780, and in 2015, there were 16,561 filings. Source: http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-facts-and-figures.

II. Section 1983 Elements and Liability Standards

A. "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 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."

B. To succeed on a Section 1983 claim, a plaintiff must prove that his constitutional rights were violated, and that the violation was caused by a person acting under color of law. *West v. Atkins*, 487 U.S. 4242 (1988).

1. Section 1983 is not by its language a source of substantive rights; it is remedial statute.

2. Plaintiff must start by identifying the constitutional right violated.

3. Plaintiff must prove causation. There is no vicarious liability under Section 1983. Plaintiff must prove that each defendant, individual or entity, caused the constitutional injury.

4. Only intentional conduct is actionable under Section 1983. Negligence is insufficient to incur Section 1983 liability. *Daniels v. Williams*, 474 U.S. 327 (1986).

C. Individual Liability

1. Individual liability is premised on personal involvement.

a) However, an officer may still be liable even if he or she did not commit the act that injured the plaintiff. An officer who is present and fails to intervene to prevent other law enforcement officers from violating a person's constitutional rights is liable under Section 1983. *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972) (an officer who knows about the unlawful conduct and has a realistic opportunity to intervene and prevent harm from occurring is liable).

2. Supervisory liability

a) Liability cannot be premised on supervisor/subordinate relationship alone.

b) For liability to attach to a supervisor, the subordinate's misconduct must occur at the supervisor's direction or with the supervisor's knowledge and consent.

c) Supervisor must know of the subordinate's misconduct and facilitate, approve, condone, or turn a blind eye toward it. *Gentry v. Duckworth*, 65 F.3d 555 (7th Cir. 1995).

D. Official/*Monell* Liability

1. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978):

a) A local governmental entity is not liable under Section 1983 for a constitutional injury inflicted by its employees merely because of the employer/employee, or *respondeat superior*, relationship. In other words, there is no vicarious liability under Section 1983.

b) Municipal entities may be sued under section 1983 only when their own policies, customs or practices cause the constitutional deprivation.

c) This can happen in one of three ways:

1) an official policy adopted and promulgated by the entity;

2) a practice or custom that, although not officially authorized, is widespread and well settled within the entity; or,

3) the decision of an official with final policy-making authority.

2. Official capacity claims brought against individual defendants are the same as suing the local governmental entity. These claims are typically dismissed because they are duplicative of the claims brought against the public entity under *Monell*.

III. Common Types of Section 1983 Claims

A. The First Amendment

1. "prohibits the making of any law . . . abridging the freedom of speech"

2. Free Speech Retaliation

a) Prohibits, in part, the making of any law that abridges freedom of speech.

b) A common Section 1983 First Amendment suit alleges retaliation in employment decisions, i.e., a public employee alleges that he or she was fired in retaliation for speaking out on a matter of public concern.

a) Did employee speak as a citizen on a matter of public concern?

1. Did employee speak out on purely personal interests, i.e., their own personal grievances?

2. Did the employee speak out pursuant to his or her job duties? If so, they did not speak as citizens for First Amendment purposes. Thus, there is no First Amendment violation. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

(ii) Did the employer have a legitimate reason in terminating the employment?

1. Is employee's speech disruptive of close working relationships?

2. Is the employee's speech disruptive of the efficient operation of the government?

c) If first two steps are met, burden shifts back to employee to show that the discipline imposed was a pretext for unlawful motivation. The speech must be the factor that motivated the termination.

3. First Amendment - Political Retaliation

a) Generally, public employees cannot be fired, transferred, or demoted for their affiliation with political candidates or ideas. *Elrod v. Burns*, 427 U.S. 347 (1976); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

a) Independent contractors are also protected from First Amendment retaliation. *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996).

b) However, certain employees occupy positions for which political affiliation is an appropriate job requirement. *Branti v. Finkel*, 445 U.S. 507 (1980).

a) Policymaking positions, i.e., department head or high-ranking supervisory position with authority over budgeting,

payroll and scheduling, and/or consulting role to elected official on policy issues.

(ii) Confidential positions, i.e., executive assistant to mayor or village manager.

B. Fourth Amendment

1. Prohibits unreasonable searches and seizures and requires that warrants be supported by probable cause.

2. Search Claims

a) Warrants must be based on probable cause issued by a neutral judge.

b) Warrantless searches are *per se* unreasonable subject to judicially created exceptions, i.e., search incident to arrest, exigent or emergency circumstances, fleeing felon, etc.

a) Police may not search cell phones incident to an arrest. *Riley v. California*, 134 S. Ct. 2473 (2014).

3. False Arrest Claims

a) Plaintiff must prove the absence of probable cause. Put another way, probable cause is an absolute bar to a Section 1983 claim.

b) A police officer has probable cause if a reasonable person would believe, based on the facts known at the time of arrest, that a suspect has committed, is committing, or is about to commit a crime.

c) This is an objective standard; the subjective beliefs of the officer and the suspect are irrelevant.

d) The police may rely on the report of a credible victim, witness or another officer, even if it turns out that the report is untrue.

4. Use of Force

a) Generally

a) An officer may not use more force than is reasonably necessary to make an arrest, and the amount of force must be proportional to the threat posed by the subject. *Graham v. Conner*, 490 U.S. 386 (1989).

1. *Graham* factors:

    a) the severity of the crime at issue;

    b) whether the suspect poses an immediate threat to the safety of the officers or others; and,

    c) whether he is actively resisting arrest or attempting to evade arrest by flight."

2. The reasonableness of the force depends on the totality of the facts and circumstances known to the officer at the time the force is applied. The force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

3. Courts must allow for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving.

4. The analysis of an officer's use of force is objective; therefore, an officer's subjective intentions or motivations, whether good or evil should not be considered.

b) Tasers

(i) Upheld:

1) Use of Taser three times in crowded hallway of home on woman who was physically resisting arrest and refusing to obey commands. *Clarett v. Roberts*, 657 F.3d 664 (7th Cir. 2011).

2) Use of Taser on aggressive, disruptive man who posed immediate physical threat to officers. *Forrest v. Prine*, 620 F.3d 739 (7th Cir. 2010).

3) Use of Taser to subdue suicidal person brandishing a knife. *Estate of Williams v. Ind. State Police*, 797 F.3d 468 (7th Cir. 2015).

(ii) Rejected:

1) Use of Taser on non-resisting inmate who was lying prone and handcuffed. *Kingsley v. Hendrickson,* 801 F.3d 828 (7th Cir. 2015)

2) Use of Taser on inmate who simply laid on bed and would not comply with order to get up to be cuffed. *Lewis v. Downey,* 581 F.3d 467 (7th Cir. 2009)

3) Use of Taser on woman who merely laid on ground passively refusing orders to give up hands to be cuffed. *Abbott v. Sangamon County,* 705 F.3d 706 (7th Cir. 2013).

4) Use of Taser on mentally ill person who did not resist arrest or pose a threat to officers. *Cyrus v. Town of Mukwonago,* 624 F.3d 856 (7th Cir. 2010)

c) Deadly Force:

(i) Deadly Force is justified if an objectively reasonable police officer facing the same circumstances as the defendant would conclude that the suspect posed an imminent threat of death or serious bodily harm. *Tennessee v. Garner,* 471 U.S. 1 (1985).

(ii) Fourth Amendment does not require the use of the least or even a less deadly alternative force, so long as deadly force is reasonable and justified. *Scott v. Edinburg,* 346 F.3d 752 (2003).

(iii) Use of deadly force is typically a fact question precluding summary judgment, but not always:

1. The police are justified in shooting and killing a suspect who leads them on a high-speed pursuit thereby posing a grave public safety risk. *Plumhoff v. Rickard,* 134 S. Ct. 2012 (2014); *Mullenix v. Luna,* 136 S. Ct. 305 (2015).

C. Fourteenth Amendment

1. Due Process Clause: "nor shall any State deprive any person of life, liberty, or property, without due process of law"

a) Wrongful prosecutions/convictions

(i) If police conceal exculpatory evidence and plaintiff is convicted, this is a violation of his "fair trial" rights under the 14th Amendment due process clause and is actionable under Section 1983. *Fields v. Wharrie*, 740 F.3d 1107 (7th Cir. 2014).

(ii) But, a claim by a plaintiff who suffered pretrial deprivation of liberty, and is prosecuted without probable cause belongs in state court. *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2010).

b) Employment Claims

(i) Whether a public employee can be bring a due process claim depends on whether his employment is "at will" or requires "just cause" for termination.

1. "At will" employees generally do not have any due process protections.

2. Employees who cannot be disciplined or fired, except for "just cause" i.e., police officers, firefighters, etc., must be afforded notice and a hearing.

2. Equal Protection Clause: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

a) Usually, an equal protection claim involves class-based discrimination (race, gender, etc.) or fundamental rights (marriage, family, procreation, bodily integrity).

(i) Employment discrimination and harassment claims by public employees may be brought under both Title VII (Civil Rights Act of 1964) and Section 1983.

(ii) Primary differences:

1. Title VII claimants must first exhaust EEOC administrative process before filing suit, while Section 1983 claims may be brought immediately to federal court.

2. Title VII has caps on damages, while Section 1983 does not.

3. Title VII liability may be premised on disparate treatment of a person in a protected class, or disparate impact of a neutral practice on a protected group. Section 1983 liability may only be premised on intentional discrimination of an individual in a protected class. *Bond v. Atkinson*, 728 F.3d 690 (7th Cir. 2013).

3. "Class of One" claims: A Section 1983 plaintiff may bring an equal protection claim, even if he or she does not allege membership in a protected class or group if he or she is intentionally treated differently than others similarly situated and there is no rational basis for the disparate treatment. *Olech v. Village of Willowbrook*, 528 U.S. 562 (2000).

a. Law in Seventh Circuit unsettled as to whether plaintiff is additionally required to show personal animus. *Del Marcelle v. Brown County*, 680 F.3d 887 (7th Cir. 2012).

(i) "Class of one" claims may not be brought to redress employment claims. *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591 (2008).

IV. Common Defenses to Section 1983 Claims

A. Statute of Limitations

1. Section 1983 does not provide a statute of limitations. Federal courts are directed to follow the most analogous state statute of limitations pertaining to injuries to the rights of a person. *Wilson v. Garcia*, 471 U.S. 261 (1985).

2. In Illinois, the statute of limitations is two years for personal injury claims. Thus, the statute of limitations for Section 1983 claims is two years.

3. Claim accrues when plaintiff knew or should of known of her injury. *Serino v. Hensley*, 735 F.3d 588 (7th Cir. 2013).

B. Immunities

1. Generally, the purpose of granting immunities from civil rights suits is to:

a) Allow government officials to act and make decisions without fear of being sued for money;

b) Defeat of insubstantial claims; and,

c) Reduce cost of defending suits without resorting to trial.

2. Courts are required to resolve immunity questions at the earliest possible state of the litigation prior to trial.

3. Immunities only apply to individual capacity claims and are not available in official capacity or *Monell* claims.

4. Denial of immunity defense is immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

   a) The case at the trial level is stayed pending the appeal. *Allman v. Smith*, 764 F.3d 682 (7th Cir. 2014).

   b) Immediate appeal is not available if there remains a triable issue of fact. *Tolan v. Cotton*, 134 S. Ct. 1861 (2014).

5. Absolute Immunity

   a) **Judges** are immune for their judicial acts. *Pierson v. Ray*, 386 U.S. 547 (1967).

   b) **Legislators** are immune for actions taken within their scope of legislative authority, introducing, debating, and voting on legislation. *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Raterree v. Rockett*, 852 F.3d 946 (7th Cir. 1988).

      (i) But, not available for administrative or executive acts.

   c) **Prosecutors** have immunity for prosecutorial functions, i.e., conduct associated with the judicial phase of criminal process. *Imbler v. Pachtman*, 424 U.S. 409 (1979); *Bianchi v. McQueen*, 818 F.3d 309 (7th Cir. 2016) (prosecutor is immune from civil rights liability for presenting false statements to grand jury and at trial).

      (i) But, prosecutors who act in investigative capacity are not immune. *Burns v. Reed*, 500 U.S. 478 (1991) (out of court activities, such as participation in search warrant or giving advice to police are not protected by immunity).

   d) **Witnesses** who testify at trial or before a grand jury have immunity from suit for giving their testimony. *Briscoe v. Lahue*, 460 U.S. 325 (1983); *Rehberg v. Paulk*, 132 S.Ct. 1497 (2012).

a. But, investigative misconduct by an expert witness is not protected by absolute immunity. *Stinson v. Gauger*, 799 F.3d 833 (7th Cir. 2015).

e) Qualified Immunity

(i) Government officials performing discretionary functions are immune from suit if their conduct does not violate clearly established constitutional rights of which a reasonable person would know. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

(ii) Once a qualified immunity defense is raised by the defendant, it is plaintiff's burden to defeat it by identifying a close analogous case or describing conduct so plainly egregious that no reasonable police officer could have thought he was acting lawfully.

(iii) Whether the law was clearly established should not be assessed at a high level of generality; but, rather, whether an objectively reasonable police officer would have known that the officer's conduct was unconstitutional based on the specific facts and circumstances that defendant faced. *Mullenix v. Luna*, 136 S. Ct. 305 (2015).

C. Issue and Claim Preclusion

1. Issue preclusion, also called "collateral estoppel" bars an issue that has actually been litigated and decided on the merits in a prior suit.

a) Sometimes arises where the validity of a warrant or the denial of a suppression motion will bar the same civil rights claim brought in a subsequent Section 1983 Fourth Amendment claim.

2. Claim preclusion, also called "*res judicata"* bars a claim that was brought or could have been brought in a prior suit if there is identity of parties and causes of actions, and a final judgment on the merits in the prior suit.

a) A plaintiff who loses in a state court for administrative review of an adverse employment decision and is barred from bringing the same claim under Section 1983 in federal court. *Walczak v. Chi. Bd. of Educ.*, 739 F.3d 1013 (7th Cir. 2014).

D. *Rooker-Feldman* Doctrine

a. Where the plaintiff's injury resulted from a prior state court judgment, the federal court should dismiss the federal claim. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

E. Abstention and *Heck v. Humphrey*

a. Federal court should normally abstain when there are ongoing state court proceedings. *Younger v. Harris*, 401 U.S. 37 (1971).

b. If plaintiff files the Section 1983 suit while a criminal case is pending, the court will usually stay the civil case under *Younger* until the criminal case is concluded. *Simpson v. Rowan*, 73 F.3d 134 (7th Cir. 1995).

c. If the criminal case is already concluded, and the plaintiff has been convicted, he cannot obtain money damages under Section 1983 if it would necessarily impugn the validity of the criminal conviction. Under these circumstances, the Section 1983 suit should be dismissed without prejudice until such time that plaintiff can show that the conviction was overturned. *Heck v. Humphrey*, 512 U.S. 477 (1994).

d. But, not all Section 1983 claims are *Heck*-barred.

(i) Section 1983 false arrest claim does not necessarily undermine criminal conviction because one can have a perfectly successful wrongful arrest claim and still have a perfectly valid conviction. *Booker v. Ward*, 94 F.3d 1052 (7th Cir. 1996).

(ii) Section 1983 excessive force claim was not barred by plaintiff's prior conviction for resisting arrest because the civil claim was based on the allegation that excessive force was used after the plaintiff was subdued. *Evans v. Poskon*, 603 F.3d 362 (7th Cir. 2010).

IV. Indemnification

A. Punitive damages

1. Punitive damages are not recoverable against local public entities, or against public officials who serve in official executive, legislative, quasi-legislative, or quasi-judicial capacities, i.e., judges, hearing officers, etc. 745 ILCS 10/2-102, 2-213.

2. Local public entity may not indemnify employees for punitive damages. 745 ILCS 10-2-302.

B. Compensatory Damages and Attorney's Fees

1. Under Section 9-102 of the Illinois Tort Immunity Act, a local public entity is empowered and directed to pay any tort judgment or settlement for compensatory damages and *may* pay any associated attorney's fees and costs for which it or an employee while acting within the scope of his employment is liable. 745 ILCS 10/9-102.

2. Section 9-102 does not mandate indemnification of attorney's fees. *Winston v. O'Brien*, 773 F.3d 809 (7th Cir. 2014).

V. Section 1988 Attorney's Fees

A. The court in its discretion may allow the prevailing party a reasonable attorney's fee as part of the costs.

1. Purpose of fee shifting:

a) Punish civil rights violations – not just large violations.

b) Encourage the filing of meritorious claims that might not otherwise be brought.

2. Lodestar method: multiply the number of hours expended by a reasonable hourly rate. Courts will strike hourly rates and time spent that is unreasonable.

3. Lodestar amount is "presumptively reasonable" but may be adjusted based on a number of factors including the degree of success achieved by the prevailing party.

4. When court cannot distinguish between work performed on successful versus unsuccessful claims, an "across the board" reduction is sanctioned.

B. Examples:

1. $1 nominal damages award resulted in complete denial of fee petition. *Farrar v. Hobby*, 506 U.S. 103 (1992); *Frizell v. Szabo*, 647 F.3d 698 (7th Cir. 2011).

2. $100 award against one of four police defendants resulted in zero fees. *Aponte v. City of Chicago*, 728 F.3d 724 (7th Cir. 2013).

3. Jury award of $1,000 in compensatory damages and $1,000 in punitive damages resulted in $109,000 attorney's fee. *Montanez v. Simon*, 755 F.3d 547 (7th Cir. 2014).

4. Jury verdict of $1 nominal damages and $3,000 punitive damages resulted in $123,000 fee award. *Richardson v. City of Chicago*, 740 F.3d 1099 (7th Cir. 2014).

5. Jury awarded $1 compensatory damages and $7,500 punitive damages. Court approved $187,467 in fees. *Winston v. O'Brien*, 773 F.3d 809 (7th Cir. 2014).

6. Fees may be awarded to plaintiff who was denied nominal damages but was awarded permanent injunction. *Lefemine v. Wideman*, 133 S. Ct. 9 (2012) (pro-life demonstrators were awarded fees because they were successful in removing Sheriff's threat of arrest through injunction).