SECTION 1983 PRIMER

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42 U.S.C. § 1983

Every **person** who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., 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.

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Experience Counts

WILL V. MICHIGAN DEPT. OF STATE POLICE

- A state is not a suable *person* under section 1983
- A state official acting in his or her official capacity is not a *person*

ELEVENTH AMENDMENT IMMUNITY

- The immunity of the states from suit in federal court, as guaranteed by the Eleventh Amendment is not overridden by section 1983.
- This immunity extends to the agents or arms of the state.
- This immunity extends to state officials in their official capacity.

WHY DOES IT MATTER TO ME?

- Official Capacity suits for injunctive relief are allowed (this includes attorney fee awards)
- Does not prevent suit for damages against employees in their individual capacities.
- Punitive damages are also allowed against individual defendants in their personal capacity.

EX PARTE YOUNG

- Allows suit for prospective relief against a state official in his/her official capacity to prevent future federal constitutional or federal statutory violations. This is not barred by 11th Amendment.
- Two questions:
  1. Whether the complaint alleges an ongoing violation of federal law
  2. Whether relief sought could be characterized as prospective - injunctive

BASIC PRINCIPALS

- The statute does not create substantive rights; only a path to a remedy
- Challenged conduct must be committed under color of law (authority)
- No respondeat superior
- State law personal injury, here 2 years, is the statute of limitations
- Federal law controls accrual
- No exhaustion requirement

UNDER COLOR OF STATE LAW

- "Under color of law" includes "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Monroe v. Pape (1961)
- Officers employed by City or State may act under color of federal law if engaged in an operation controlled and operated by federal law enforcement agency.
- A private entity that contracts to operate a prison or provide medical services at a jail can be sued under § 1983 because it is carrying out a traditional state function.
- Employees of such corporations may be sued under Section 1983, but may not be able to invoke QI defense. Richardson v. McKnight (U.S. 1997)

- To impose liability upon a municipality under § 1983, a constitutional tort must have been committed:

  (1) by an ultimate policymaking official of the municipality, typically the governing body of the municipality;

  (2) by an employee acting pursuant to a policy or custom of the municipality; or

  (3) by an employee as a result of deliberate indifference of the municipal governing body to training of the employee. This requirement ensures that a municipality is held liable only for federal rights deprivations resulting from decisions of the duly-constituted legislative body or of those officials whose acts may fairly be considered to be those of the municipality. *Board of County Commissioners of Bryan County, Oklahoma v. Brown,* 520 U.S. 397 (1997). *Monell,* 436 U.S. at 694; *Bryan County,* 520 U.S. at 403-04.

WHO IS THE DEFENDANT?

- Individual vs Official Capacity

John Smith, in his individual capacity or *John Smith in his official capacity as the Secretary of the Department*

- Federal claims – personal participation required if sued in individual capacity

  Actual involvement in violation

  Failed to intervene

  Failure to supervise

  - *Vondrak v. Las Cruces*

  Failure to train

  - *Gray v. Denver*

Official and individual capacities are "'treated as … two different legal personages.'"

Individual capacity suits "seek to impose personal liability upon a government official for actions he takes while under color of state law," while an

official capacity suit is "only another way of pleading an action against an entity of which an officer is an agent." – Should always consider a motion to dismiss.

INDIVIDUAL VS. *MONELL* OR OFFICIAL CAPACITY

Individual liability:

2 elements necessary against an *individual*:

(1) a violation of a right secured by the Constitution and laws of the United States, and

(2) the alleged deprivation was committed by a person acting under color of state law.

MONELL LIABILITY

> To impose § 1983 liability upon a government entity, a third element is required – proof that the governmental entity itself was the "moving force" behind the deprivation such that it would be proper to impose liability on the municipality. *See, e.g.*, *West v. Atkins*, 487 U.S. 42, 48 (1988).

"[I]n other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

Thus, to establish liability under § 1983 against a city for the actions of its police officers, plaintiffs must prove that "(1) An officer committed a constitutional violation and (2) a municipal policy or custom was the moving force behind the constitutional deprivation that occurred." *Estate of Larson*, 511 F.3d at 1259 (citing *Jiron v. City of Lakewood*, 392 F.3d 410, 419 (10th Cir. 2004)).

MONELL CONT.

1. Official policy: A city may only be held liable under § 1983 "for its own unconstitutional or illegal policies." *Barney v. Pulsipher,* 143 F.3d 1299, 1307 (10th Cir. 1998). [L]iable only when the official policy [or unofficial custom] is the **moving force** behind the injury alleged." *Id.* (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown,* 520 U.S. 397, 404 (1997)). A plaintiff must identify the government's policy or custom that caused the injury and show "that the policy was enacted or maintained with deliberate indifference to an almost inevitable constitutional injury." *Schneider v. City of Grand Junction Police Dept.,* 717 F.3d 760, 769 (10th Cir. 2013).
2. Unofficial policy can impute liability if it is so widespread as to have force of law. *See Brown.*
3. Act of final policy maker
4. Always remember ★still have to have a constitutional violation by a person★

SINGLE ACT OF AN EMPLOYEE

§ 1983 liability may be imposed upon the entity for a single act of an employee where that employee possesses "final authority" under state law to establish policy with respect to challenged action.

For example:

i. A school principal does not have final authority to make decisions on hiring or firing teaching staff. Rather, such decisions are reserved exclusively to the school board.

ii. Conversely, a city manager may have such authority. (Sheriffs)

iii. Inadequacy of police training may serve as a basis for Section 1983 liability of a city only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.

City of Canton, 489 U.S. at 390, n.10; *Jantz v. Muci* 976 F.2d 623 (10th Cir. 1992).
Ware v. Unified School District No. 492, 902 F.2d 815, 817 (10th Cir. 1990).
See, e.g.,Arceo v. City of Junction City, 182 F.Supp.2d 1062, 1067 (D.Kan. 2002).
City of Canton, 489 U.S. at 388.

CLEAN UP THE CAPTION

Because claims against persons in their official capacity is the same as suing the entity involved, it is duplicative to sue both the entity and its employees or elected officials in their official capacities. Thus, it is appropriate to dismiss such official capacity claims because they are redundant (and sometimes confusing).*See Burns v. Bd. of County Comm'rs,* 197 F.Supp.2d 1278, 1296-97 (D.Kan. 2002); *Sims v. Unified Gov't of Wyandotte County*, 120 F.Supp.2d 938, 995 (D.Kan. 2000); *Newell v. City of Salina*, 276 F.Supp.2d 1148, 1155 (D.Kan. 2003).

VIOLATION OF A FEDERAL RIGHT

First Amendment.

1. Establishment clause: school prayer, display of religious items on public property;

2. Free exercise: inmate observances, diet, dress, hair style;

3. Free Press: prior restraint, retaliation

4. Assembly rights; parades, demonstrations, political activity, union, etc.

FREE SPEECH: GARCETTI/PICKERING

1. Did the employee speak pursuant to his or her official duties? If so, the speech is unprotected and the inquiry ends.
2. If the employee did not speak pursuant to his or her official duties, did the speech in question involve a matter of public concern? If not, the speech is unprotected and the inquiry ends.
3. If the speech involved a matter of public concern, does the employees interest in the expression outweigh the government employer's interest in regulating the speech of its employees so that it can carry on an efficient and effective workplace? If not, the speech is unprotected and the inquiry ends.

GARCETTI CONT. . .

4. If the employees' interest outweighs that of the employer, was the employee's speech a substantial factor driving the challenged employment action? If not, the inquiry ends.
5. If the employee shows that speech was a motivating factor, can the employer show that it would have taken the same employment action against the employee absent the protected speech? If so, plaintiff is not entitled to constitutional protection.

CONFUSED YET?

SO . . . PER USUAL OUR CLIENTS ARE BETWEEN:

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Experience Counts

1. WAS THE SPEECH MADE PURSUANT TO THE EMPLOYEE'S OFFICIAL DUTIES?

- The official-duties question is a practical one that turns on "whether the speech was commissioned by the employer and reasonably contributes to or facilitates the employee's performance of the official duty."
- Whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties

CASE EXAMPLE:
THE CASE OF SURPRISE TESTIMONY AND AN ANGRY DA

- Plaintiff was the assistant chief of police who testified at a criminal trial on behalf of the criminal defendant. The prosecutor claimed Andres' testimony was a surprise because Andres lied in his pretrial interview with the investigator and prosecutors.
- Plaintiff was a mentor to the accused
- They had a personal conversation wherein the accused reported the victims were "messing with him"
- City officials claimed Andres never reported this conversation to the detectives and never revealed this information in the initial interview
- When Andres testified to this information it supported the self defense theory and plaintiff was acquitted.

WHAT WAS THE SPEECH?

- Was it the testimony itself?
- Was it the communication between the detectives and Andres prior to trial?

- Was it pursuant to his official duties?

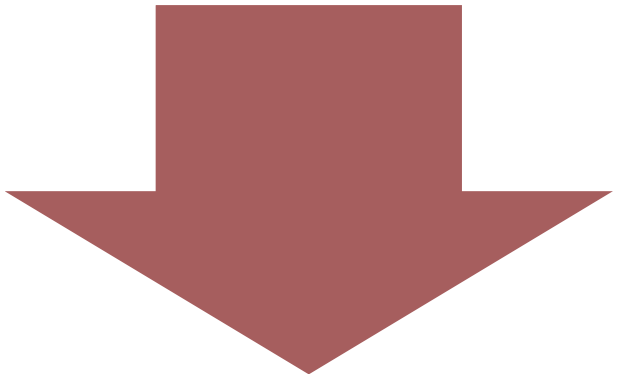
THE COURT SAID . . . NO.

- Andres had a personal relationship with the criminally accused.
- The conversation in question occurred during a personal conversation.
- Plaintiff argued he did not investigate the criminal case.
- The testimony was pursuant to a subpoena
- It was not the routine testimony of a LEO in a criminal trial
- Even his silence is protected speech

2. WAS THE SPEECH A MATTER OF PUBLIC CONCERN?

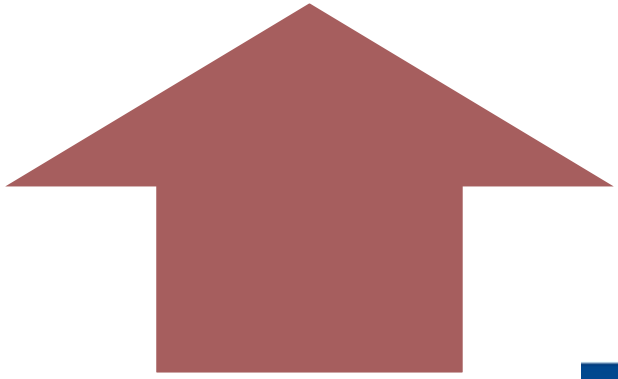
- Was the speech calculated to redress personal grievances or did it have some broader public purpose?
- The speech must not merely relate generally to a subject matter that is of public interest, but must "sufficiently inform the issue as to be helpful to the public in evaluating the conduct of the government." *Schrier v. Univ. of Colo.* 427 F.2d 1253, 1263 (10th Cir. 2005)

FREE SPEECH: GOVERNMENT EMPLOYEES THE BALANCING TEST



The interests of a public employee commenting on matters of public concern

employer's interests in promoting the efficiency of the public services it performs through its employees.



HELGET V. CITY OF HAYS

- Plaintiff was the admin assistant to the Chief of Police and she provided a sworn affidavit in support of a plaintiff in a separate civil action against the police department.
- The court decided the case without determining whether the speech was a matter of public concern.

DID THE PD'S INTEREST IN MAINTAINING CONFIDENTIALITY OUTWEIGH HELGET'S RIGHT TO SPEECH?

- Plaintiff's interest:

  Claimed her statements disclosed misconduct by the City

- City's interest

  Loyalty and confidence among employees is especially important in a law enforcement setting.

  Work place harmony

  Small department

  Chief lost trust in his admin assist.

YES.

- Loyalty and confidence among employees is especially important in law enforcement.
- A public employer does not have to prove the speech did in fact disrupt internal operations or relationships – only that it could have
- An employer doesn't have to wait for detrimental impact before taking action
- Court determined plaintiff's affidavit did not reveal any misconduct by the City
- Helget did not go through the proper channels rather she signed an affidavit in support of a party who was adverse to the City in pending litigation.

4. WAS THE EMPLOYEE'S SPEECH A SUBSTANTIAL FACTOR IN EMPLOYMENT ACTION?

- Although the issue of whether an employee's protected speech was a "motivating factor" in his or her termination is typically a question of fact, the issue may be decided on summary judgment where the record contains no evidence from which a trier of fact could reasonably conclude that the protected conduct was a motivating factor in the plaintiff's termination. See *Rohrhough v. Univ. of Colo. Hosp. Auth.*, 596 F.2d 741, 750 (10th Cir. 2010).
- To survive summary judgment, Plaintiff must produce some facts to demonstrate that the defendant "'acted on the basis of a culpable subjective state of mind.'"
- To survive summary judgment, Plaintiff must produce some facts to demonstrate that the defendant "'acted on the basis of a culpable subjective state of mind.'"
- If the case analysis get's this far into Pickering – summary judgment is unlikely.

CASE EXAMPLE: *ANDRES*

After Andres testified the local DA told the City that Andres was on his *Giglio* list because he had been untruthful in the initial investigation.

The DA went so far to say that he would not prosecute any criminal case touched by Andres.

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Experience Counts

SO – WAS ANDRES SPEECH A SUBSTANTIAL FACTOR IN THE TERMINATION?

- Plaintiff argued the DA's determination was questionable and therefore the court should question the City's motives.
- It really isn't a Giglio issue but a Brady issue
- Andres didn't provide false testimony
- The City terminated Andres days after receiving the DA's letter.
- The DA's determination made it impossible for Andres to do his job – investigate crimes
- The City didn't decide Andres had a Giglio problem the DA did.

THE COURT SAID . . . YES.

- Or – that it was up for debate and he would let a jury decide.
- The court found plaintiff had presented sufficient evidence that a reasonable jury could find pretext.
- "Regardless, the fact of the matter is that defendant's termination derived from plaintiff's testimony. Defendant claims it is not the bad guy here; yet it cannot escape the fact that it made the decision to terminate plaintiff." *Andres* at *3.

5. WOULD THE EMPLOYER HAVE TAKEN THE SAME ACTION AGAINST THE EMPLOYEE ABSENT THE PROTECTED SPEECH?

* Here the burden shifts to the Defense – it is a preponderance of the evidence standard.

* Similar to a legitimate retaliatory reason for the employment decision under Title VII

FOURTH AMENDMENT.

- Unlawful Seizure or Use of Force: A seizure occurs when an officer restrains the liberty of a citizen by means of physical force or show of authority. Thus, an arrest is a seizure within the meaning of the Fourth Amendment, but so too is a traffic stop. Likewise, the application of force is a seizure within the meaning of the Fourth Amendment.

  Standard is one of objective reasonableness.

  Subjective intentions play no role in ordinary, probable-cause 4th Amendment analysis
- Malicious Prosecution.
- Unlawful search.

SHAW V. SMITH "THE KANSAS TWO STEP"

- Case brought under section 1983 – 4th Amendment
- Defendant was Colonel Herman Jones in his official capacity as Superintendent of the Kansas Highway Patrol. When Erik Smith was appointed as Superintendent, Jones was removed from the caption and Smith was added.
- Relief sought was injunctive and declaratory
- The Court held that in violation of the Fourth Amendment, defendant was responsible for a policy or practice which unlawfully detains motorists in Kansas (especially out-of-state motorists) without reasonable suspicion or consent. It also held that in violation of the Fourth Amendment, defendant was responsible for a policy or practice of using the Kansas Two-Step to extend traffic stops of motorists in Kansas without reasonable suspicion and without the motorists' knowing, intelligent and voluntary consent. *Shaw v. Smith*, No. CV 19-1343-KHV, 2023 WL 8018834, at *1 (D. Kan. Nov. 20, 2023)
- Attorney fees/costs awarded total $1,985,837.10 in fees and $363,148.28 in costs.

VIOLATION OF A FEDERAL RIGHT CONT.

- Eighth Amendment – Post Conviction

  Excessive bail/fines

  Cruel and unusual punishments

  Failure to provide medical care

  (1) Deliberately indifferent to

  (2) a serious medical need.

  Jail suicide cases – failure to provide medical care

FOURTEENTH AMENDMENT

Equal Protection: one example is – sexual harassment by a state actor. *Murrell v. School District No. 1, Denver*, 186 F.3d 1239 (10th Cir.)

Individual liability: Deliberate indifference found where refusal to remedy known sexual harassment. *Id.* (where there is deliberate indifference, there is likely no qualified immunity)

FOURTEENTH AMEND. CONT.

Liberty Interest Claim

- A public employee has a liberty interest in their good name.
- The government infringes upon that interest when:

  (1) it makes a statement that 'impugns the good name, reputation, honor, or integrity of the employee; (must be a statement, not just stigmatizing action, like early termination)

  (2) the statement is false;

  (3) the statement is made during the course of termination and forecloses other employment opportunities; and

  (4) the statement is published, disclosed publicly. *McDonald v. Wise*, 769 F.3d 1202, 1212 (10th Cir. 2014)

  ★ All elements must be satisfied.

QUALIFIED IMMUNITY

- Qualified immunity protects government **officials** performing discretionary functions from liability for civil damages.
- Once asserted it is **plaintiff's burden** to establish:

(1) that the defendant's actions violated a federal constitutional or statutory right; and

(2) that the right violated was clearly established at the time of the defendant's actions.

Qualified Immunity has been a powerful defense for nearly 40 years, beginning with *Harlow v. Fitzgerald* in 1982. Since *Harlow,*

- The Supreme Court has confronted the issue of qualified immunity on over thirty cases. Plaintiffs have prevailed in two of those cases: *Hope v. Pelzer* and *Groh v. Ramirez*. In eight of the cases, including *Kisela v. Hughes*, the Court reversed denials of qualified immunity in per curiam summary dispositions. Five of the eight per curiam decisions were unanimous. . . In eleven cases between 2012 and 2018, the Court exercised its discretion to jump to the second prong of the qualified immunity analysis, granting qualified immunity because the law was not clearly established and leaving unresolved the "merits" question of prong one. In four cases, the Court granted certiorari, vacated, and remanded for reconsideration of the qualified immunity determination []. In three of those cases, the respective circuits granted immunity on reconsideration. Karen M. Blum, Qualified Immunity: Time to Change the Message, 93 Notre Dam L. Rev. 1887, 1887-89 (2018).

RATIONAL:

- Suits against government actors allow those wronged by governmental misconduct a method of redress. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Although such suits permit the possible vindication of a plaintiff's federal rights, non-meritorious suits exact a high cost upon both society and government officials. *See Id.* The suits may unduly interfere with the discharge of governmental officials' duties because of the constant threat of civil litigation and potential money damages. See *Harlow*, 457 U.S. at 814. "[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Horstkoetter v. Dept. of Pub. Safety*, 159 F.3d 1265, 1277 (10th Cir., 1998) (internal quotations and citations omitted). Thus, the court held qualified immunity is an important interest to a society as a whole. *White v. Pauly*, 137 S. Ct. 548, 551 (2017).

RAISE THE DEFENSE EARLY & OFTEN

Qualified immunity is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchel v. Forsyth*, 472 U.S. 511, 526; see also *R.F.J. v. Fla. Dep't of Children and Families*, 743 Fed.Appx. 377, 380 (11th Cir. 2018)

⋆It is an affirmative defense⋆

There is a presumption in favor of qualified immunity for a public official acting in his or her individual capacity. See *Hidahl v. Gilpin Cnty. Dep't of Soc. Servs.*, 938 F. 2d 1150, 1155 (10th Cir. 1991). It therefore protects "**all but the plainly incompetent or those who knowingly violate the law**." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); see also *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

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CONSTITUTIONAL VIOLATION

- The courts are permitted to choose which prong to consider first, and often skip to the second prong without deciding this issue. *Pearson*, 555 U.S. 236, (permitting the discretion to address either step first); see also *Weise v. Casper*, 593 F.3d 1163, 1167 (10th Cir., 2010).

CLEARLY ESTABLISHED: HIGH BAR

- "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."
- A constitutional right is clearly established when "'the contours of [the] right are sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).
- The Supreme Court often reiterates that courts must not define what is clearly established at a high level of generality. *Mullenix v. Luna*, 577 U.S. 7, 12 (noting that "specificity is especially important in the Fourth Amendment context").
- Existing precedent "must [ ] place[ ] the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741.

FACT SPECIFIC INQUIRY

To be clearly established, existing case law must place a constitutional question beyond debate. The right cannot be defined at high levels of generality, but instead the focus "is 'whether the violative nature of particular conduct is clearly established.'" "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right."

Sheehan, 575 U.S. at 611; *see also Pauly v. White*, 874 F.3d 1197, 1222 (10th Cir. 2017) *cert. denied*, 138 S.Ct. 2650 (2018) (requiring a United States Supreme Court or Tenth Circuit decision on point).
Mullenix v. Luna, 577 U.S. 7, 12 (emphases original) (quoting *Ashcroft v. al Kidd*, 563 U.S. 731, 741 (2011)).
Id. at 11 (quotation omitted). *See also al Kidd*, 563 U.S. at 741.

QI NOT AVAILABLE TO PRIVATE CONTRACTORS

- *Tanner v. McMurray* (10th Cir. 2021) • Qualified immunity not available to private medical professionals employed full-time by a multi-state, for-profit corporation systematically organized to provide medical care in correctional facilities.

DAMAGES UNDER § 1983

(1) nominal damages;

(2) actual damages, and;

(3) punitive damages

(punitive damages may be assessed only against individuals and *may not* be assessed against governmental entities)

ATTORNEY FEES

RULE 68 OFFERS OF JUDGMENT

- Attorney's fees are awarded as "costs" under R. 68
- R. 68 allows a party defending a claim to make an offer of judgment
- If accepted, judgment is entered against the defendant in accordance with the offer
- If the offer is rejected:

  And the judgment obtained by plaintiff is less than the offer, plaintiff cannot recover attorney fees or costs from the date the offer was made to the end of the case.

CAUTIONARY PRACTICE TIP:

- Specify whether the offer is made inclusive or exclusive of attorneys' fees incurred to date. "Defendant bears the burden of clearly articulating the intended legal consequences of an offer of judgment because defendant is the master of the offer under Rule 68."
- If the R. 68 offer is unclear it will be construed against the defendant.