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THE IMPACT OF *VILLAGE OF WILLOWBROOK* V. *OLECH*¹ ON DISPARATE TREATMENT CLAIMS

J. Michael McGuinness²

Good afternoon. I am here to address equal protection law and *Village of Willowbrook v. Olech*.³ *Willowbrook* is the latest word from the Supreme Court on one of the most fascinating issues of our time. *Willowbrook* is also the first case in at least ten years that the Supreme Court has had the occasion to touch upon this issue.

The issue is this: to what extent does the Equal Protection clause afford a right or a remedy to a victim of disparate treatment where the victim is not a member of a suspect class?⁴ Most of us recall the traditional suspect class cases and legislative classification schemes.⁵ What I have grappled with for the past

¹ 120 S. Ct. 1073 (2000).

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³ 120 S. Ct. at 1073. For some more recent interpretations of *Willowbrook*, see *Cruz v. Town of Cicero*, 275 F.3d 579, 586-89 (7th Cir. 2001) (affirming verdict on *Willowbrook* claim); *Carlin v. Village of Mineola*, 273 F.3d 494 (2nd Cir. 2001); *Jackson v. Burke*, 256 F.3d 93, 97 (2nd Cir. 2001); *Shipp v. McMahon*, 234 F.3d 907 (5th Cir. 2000). While *Bush v. Gore*, 531 U.S. 98 (2000) did not cite *Willowbrook*, it provides some potentially fertile ground for non-suspect class equal protection claims.

⁴ *Id.* at 1074.

⁵ See J. Michael McGuinness, *Equal Protection for Non-Suspect Class Victims of Governmental Misconduct: Theory and Proof of Disparate Treatment and Arbitrariness Claims*, 18 CAMPBELL L. REV. 333, 334 n.9 (1991).

[L]egislative classification schemes are frequently the subject of equal protection challenge In the classic legislative

sixteen or seventeen years in the trenches, however, is the more typical Equal Protection problem that arises when you have a real person who is deprived of some benefit, privilege, license, permit, or job, and his or her claim does not hinge on being a member of a suspect class. These types of problems are very common. After *Willowbrook*, these types of claims are probably going to flood the state and federal courts.

Please consider a couple of examples of the types of claims that *Willowbrook* addresses. Sheriff Joe McQueen of Wilmington, North Carolina is a litigant in one of the cases I have handled in my native Southland.⁶ He has proclaimed that

context, equal protection generally mandates that classifications not be based upon impermissible criteria or arbitrarily used to burden a group of individuals Under 'traditional' equal protection analysis when classification schemes are in issue, a multi-tiered system of review with three levels of scrutiny has been enunciated by the Supreme Court.[citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 14.2 (4th ed. 1991) . . . the Supreme Court . . . adhere[s] to the deferential rationality test where the matter in issue involves general economic or social matters. Under these tests, as long as there is a rational basis for the governmental action, the court will not invalidate the governmental action The second type of equal protection review is referred to as 'strict scrutiny.' This standard generally applies where there is a 'suspect classification' or when there is a 'fundamental right' in issue. Classifications based upon race, national origin and alienage are generally held to constitute suspect classifications Where a suspect class or a fundamental rights is in issue, the government must prove a compelling governmental interest in order to uphold the classification The Court has also enunciated a third test known as 'intermediate scrutiny.' Under this approach the court will not uphold a classification unless it has a 'substantial relationship' to an 'important' governmental interest. This test has been applied by the Court in cases involving gender and illegitimacy.

⁶ See J. Michael McGuinness, *The Impact of Willowbrook on Equal Protection & Selective Enforcement Claims*, in 16TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION 469, 471 (Practicing Law Institute, 2000) (referring to *Benson v. McQueen*, E.D.N.C. 7:98-CV-164-DEN (deposition testimony)).

God put him in office, and his employees serve at his whim.⁷ What I want you to consider is: is that consistent with equal protection? Secondly, I also want you to consider whether a law enforcement officer or a public employee can be fired because he or she is a redneck, when other similarly situated employees of other social classes are not so terminated. Finally, think about a scenario where you have a law enforcement officer and a couple of firefighters who participate in a parade.⁸ In essence they perform a racial skit to draw attention to the problem of discrimination in their neighborhood.⁹ Others who were present thought they were making fun of African Americans.¹⁰ Suppose the mayor, for the first time in the history of the city, orders the police commissioner to fire these public employees.¹¹ The mayor intervenes in this case, and in this case only, because he has no authority under the law of his jurisdiction to get involved in such basic personnel matters. The mayor's name is Mr. Giuliani and the case is *Locurto v. Giuliani*.¹² So these problems present themselves not just with country sheriffs in the South, they present themselves right in this City with the same type of attitudes and the same types of prejudices.

To begin with, there is a formula that I derived from *Willowbrook* and the antecedent cases that is as follows: disparate treatment plus arbitrariness equals a violation of equal protection. That is as simple as I can make it. There is a 1999 Second Circuit case, *Muller v. Costello*,¹³ which boils the black letter rule down better than any other case. In *Muller*, the court stated that the Equal Protection clause prohibits arbitrary and irrational

⁷ *Id.* See also J. Michael McGuinness, *Decisions of the Past Decade Have Expanded Equal Protection Beyond Suspect Class*, 72 N.Y. ST. B.J. 36, 37 (Feb. 2000).

⁸ See *Locurto v. Giuliani*, 95 F. Supp. 2d 161 (S.D.N.Y. 2000).

⁹ *Id.* at 162. The officers wore "black face" and rode on top of a float entitled "Black to the Future."

¹⁰ *Id.* at 164. "A tape of the parade depicting the . . . float was aired on CBS . . . The media portrayed the float as racist."

¹¹ *Id.* "In response to the incident, Mayor Giuliani stated that any city employee involved in the float would be fired."

¹² 95 F. Supp. 2d at 161.

¹³ 187 F.3d 298 (2d Cir. 1999).

discrimination even if no suspect class or fundamental right is implicated.¹⁴

History and Development of Irrational and Arbitrary Claims

Let us now look at some of the history leading up to *Willowbrook*. We all remember *Yick Wo v. Hopkins*.¹⁵ In fact, *Yick Wo* was a suspect class case.¹⁶ Language developed in *Yick Wo* was subsequently adopted in non-suspect class cases.¹⁷ That language essentially provides that the Constitution does not leave room for the play and action of purely personal and arbitrary power.¹⁸ That language was followed in 1944 by the United States Supreme Court in *Snowden v Hughes*.¹⁹ Essentially, *Snowden* set up the following rule: an Equal Protection violation might be premised upon deliberate selective enforcement based

¹⁴ *Id.* at 309. “It is an established principle of constitutional law that the Equal Protection Clause protects against class or group-based invidious discrimination. The Equal Protection Clause prohibits ‘arbitrary and irrational discrimination’ even if no suspect class or fundamental right is implicated.” (citing *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988)). See also *Romer v. Evans*, 517 U.S. 620, 631-34 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 413 U.S. 432, 450 (1985).

¹⁵ 118 U.S. 356 (1886).

¹⁶ *Id.* *Yick Wo*, as well as the other applicants in the case, were citizens of China.

¹⁷ See *Snowden v. Hughes*, 321 U.S. 1, 8 (1944); *Oyler v. Boyles*, 368 U.S. 448 (1962). See also *McFarland v. American Sugar*, 241 U.S. 79, 86-87 (1916). The Court found that a statute that “bristled with severities that touch the plaintiff alone” was arbitrary and a violation of equal protection. *McFarland*, 241 U.S. at 86-87.

¹⁸ *Yick Wo*, 118 U.S. at 370.

When we consider the nature and the theory of our institutions and government . . . they do not leave room for the play and action of purely personal and arbitrary power . . . The very idea that one may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails

¹⁹ *Snowden*, 321 U.S. at 8. “[I]ntentional or purposeful discrimination . . . may . . . be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another.”

upon unjustifiable standards.²⁰ However, the Court did not define what it meant by unjustifiable standards. That was left for the circuit courts. Subsequently, in 1962, the Court held in *Oyler v. Boles*,²¹ that Equal Protection prohibits discrimination on the grounds of race, religion, or “other arbitrary classifications.”²² These cases suggest some breadth in the different areas where you can premise a disparate treatment or selective enforcement case.

Examining the circuit court history, the Second Circuit has probably led the country in this area since its 1946 decision in *Burt v. The City of New York*.²³ Judge Learned Hand wrote the *Burt* decision and it is still a case that is frequently cited by circuit courts that get involved with these issues. Essentially, *Burt* involved an architect who thought that he was not being given fair and equal treatment as compared with other applicants. He contended that city officials selected him for oppressive measures, unconditionally approving the applications of others, but denying his application.²⁴ Judge Hand essentially concluded that because the plaintiff was singled out for unlawful oppression based upon a deliberate misinterpretation and abuse of statutory power, he had a valid constitutional claim.²⁵ The denial did not have anything whatsoever to do with a suspect class. That involved a singling out of an individual for arbitrary and unjustifiable reasons.

²⁰ *Id.* at 8-9. “The unlawful administration by state officers of a state statute . . . is not a denial of equal protection unless there is shown to be . . . an element of intentional or purposeful discrimination.”

²¹ 368 U.S. 448 (1962).

²² *Id.* at 456.

²³ 156 F.2d 791 (2d Cir. 1946). *Burt* was before Circuit Judges L. Hand, Swan, and Chase. Judge Hand wrote the opinion.

²⁴ *Id.* *Burt* alleged that officials “deliberately misinterpreted and abused their statutory power” in denying his application. *Burt* also alleged that officials selected him alone “for these oppressive measures, unconditionally approving the applications of other architects, similarly situated.”

²⁵ *Id.* at 792. “[I]f a complaint charges a state officer, not only with deliberately misinterpreting a statute against the plaintiff, but also with purposely singling out him alone for that misinterpretation, it is good against demurrer.”

Getting a little closer to modern times, in 1980 the Second Circuit decided the modern “granddaddy” case in this area, *LeClair v. Saunders*.²⁶ The standard that the Second Circuit enunciated in *LeClair*, which was uniformly followed in about all the circuits, including my circuit,²⁷ was that selective treatment claims may be premised upon intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.²⁸ That is the language that you will fundamentally see in the numerous other circuits that followed *Leclair*.²⁹

Judge Richard Posner of the Seventh Circuit embraced this doctrine in the 1990s, and it is my belief that several of his decisions brought *Willowbrook* to the Supreme Court.³⁰ *Willowbrook* was, in fact, his decision in the Seventh Circuit.³¹

The leading case prior to *Willowbrook* was *Esmail v. Macrane*.³² I would suggest that you read *Esmail* when you have a chance to. The reason I say that is because when you actually

²⁶ 627 F.2d 606 (2d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

²⁷ See *Canady v. City of Wilson*, 1998 U.S. Dist. LEXIS 21041 (E.D.N.C. 1998); *Jetstream Aero v. New Hanover County*, No. 88-1748, 1989 WL 100644 (4th Cir. 1989).

²⁸ *Leclair*, 627 F.2d at 609-10.

[L]iability in [this] type of equal protection case should depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

²⁹ See, e.g., *Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen of the Town of Randolph*, 878 F.2d 16 (1st Cir. 1989); *Latrieste Restaurant and Cabaret Inc. v. Village of Port Chester*, 40 F.3d 587 (2d Cir. 1994); *Smith v. Eastern New Mexico Medical Center*, 1995 U.S. app. LEXIS 35920 (10th Cir. 1995) (reported in table form at 72 F.3d 138).

³⁰ See *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995) (discussed *infra*); *Indiana State Teacher's Ass'n v. Board of School Commissioners*, 101 F.3d 1179, 1181-82 (7th Cir. 1996).

³¹ *Olech v. Village of Willowbrook*, 160 F.3d 386 (7th Cir. 1998) (Olech was before Chief Judge Posner, and Circuit Judges Cummings and Eschbach. The opinion was by Chief Judge Posner.).

³² 53 F.3d 176 (7th Cir. 1995).

read *Willowbrook*, you will find that it is devoid of much analysis. It has virtually nothing to say about the facts of the case. Even if you go back and look at what the Seventh Circuit had to say,³³ or examine the district court opinion,³⁴ there is virtually nothing said about the facts of the case. If you read *Esmail*, however, you will see how it works in the “real” world.

Esmail essentially involved an individual who ran liquor stores and came across a problem with the mayor, who was the judge, jury and executioner for those who dealt with liquor licenses in that city.³⁵ Mr. Esmail pled a long list of examples of other individuals who had their applications routinely granted, yet for some reason Mr. Esmail was having a problem.³⁶ Essentially, the problem was traced back to the fact that in the mid-1980s, Mr. Esmail had appealed from a previous denial of one of his liquor licenses.³⁷ What we often learn in this line of cases is that when you aggravate your bureaucracy and become a litigant, they will often make you pay for that in subsequent times. That is what the courts have come to recognize as the vindictiveness basis for an Equal Protection claims, and that is essentially what Judge Posner said the problem was in *Esmail*.³⁸ *Willowbrook* did away with any contended need for vindictiveness in these cases, and instead opened the door to claims based solely on an arbitrary and irrational act.

I had a case before the Fourth Circuit, *Edwards v. City of Goldsboro*,³⁹ that I thought was going to be the winning case in that circuit on this issue. It was interesting for a number of reasons. Essentially, what happened was that a police sergeant wanted to teach an off-duty course mandated by the North

³³ *Willowbrook*, 160 F.3d at 386.

³⁴ *Olech v. Village of Willowbrook*, 1998 WL 196455 (N.D. Ill.).

³⁵ *Esmail*, 53 F.3d at 177.

³⁶ *Id.*

³⁷ *Id.* at 178.

³⁸ *Id.* at 179. “The distinctive feature here . . . is that the unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor.”

³⁹ 178 F.3d 231 (4th Cir. 1999).

Carolina Concealed Handgun Statute⁴⁰ shortly after it was passed by the North Carolina General Assembly.⁴¹ The chief of police was an adamant opponent of the Concealed Handgun law, lobbying the general assembly against it. When my client chose to teach this lawfully-mandated course required by state law,⁴² the chief of police suspended his employment. When I deposed him, his response and reasoning for why he suspended the sergeant was that the underlying state law was “bad law.” Keep in mind that virtually every other employee in the history of the City of Goldsboro who had ever sought any off-duty employment or self-employment was permitted to do so. You can teach political science in the city of Goldsboro, but you cannot teach a course about carrying concealed weapons.

I thought we had a great Equal Protection case until I got to the Fourth Circuit and learned to the contrary. We won the case on expression grounds,⁴³ which, in my judgment is a much better cause of action for a civil rights action where there is some protected expression. However, the court rejected the retaliation

⁴⁰ N.C. GEN. STAT. §§14.415.10 – 415.23 (2000). The statute states in pertinent part: “Any person who has a concealed handgun permit may carry a concealed handgun unless otherwise specifically prohibited by law.”

⁴¹ *Edwards*, 178 F. 3d at 238-39.

⁴² N.C. GEN. STAT. § 14-415.12(a) (2000). The statute states in pertinent part:

The sheriff shall issue a [concealed handgun] permit to an applicant if the applicant qualifies under the following criteria: (1) The applicant is a citizen of the United States and has been a resident of the State 30 days or longer . . . (2) The applicant is 21 years of age or older. (3) The applicant does not suffer from a physical or mental infirmity that prevents the safe handling of a handgun. (4) The applicant has successfully completed an approved firearms safety and training course which involves the actual firing of handguns and instruction on the laws of this State governing the carrying of a concealed handgun and the use of deadly force.

⁴³ *Id.* at 248. “[T]he Defendant’s threat to terminate Sergeant Edward’s, if he resumed conducting the concealed handgun safety course, was intended to chill his right to engage in . . . protected expression.”

theory, therefore essentially rejecting the *Leclair* doctrine.⁴⁴ In addition, with regard to the *Esmail* point of vindictiveness and the language that related to the official's complaint of harassment, the Fourth Circuit contended that we had not pled enough in our complaint.⁴⁵ We are still bewildered about that. However, *Edwards'* equal protection analysis does not survive *Willowbrook*. *Willowbrook* provides a new workable standard, if the Circuit Courts will only apply it reasonably.

Willowbrook and its Aftermath

Now, on to *Willowbrook*. Essentially, what was involved in *Willowbrook* was that Ms. Olech and some of her neighbors were having water problems. Her well had broken down and she sought to connect to the municipal water system.⁴⁶ In order to do that, the City required her to grant an easement to the City so they could take care of the appropriate roadwork.⁴⁷ The standard and custom and policy required that applicants grant a fifteen-foot easement. The City insisted upon a thirty-three-foot easement for Ms. Olech and her neighbors.⁴⁸ When you track back to the

⁴⁴ *Id.* at 250. "Sergeant Edwards' Equal Protection claim is . . . a mere rewording of his First Amendment retaliation claim . . . [and] 'A pure or generic retaliation claim . . . simply does not implicate the Equal Protection Clause.' *Watkins v. Bowden*, 105 F.3d 1344, 1354 (11th Cir. 1995)."

⁴⁵ *Id.* "Sergeant Edwards has not alleged that the Defendants disciplined him because they harbored animosity toward him personally. Rather, all allegations in the complaint point to the conclusion that the discipline was in retaliation for Sergeant Edwards' exercise of free speech and freedom of association under the First Amendment."

⁴⁶ *Willowbrook*, 120 S. Ct. at 1074. Olech's home was located between two other homes. The Willowbrook water main only extended to the northern boundary of one of those neighbors, Brinkman. Brinkman and the other neighbor, the Zimmers, also got their water from private wells located on each of their properties. When Olech's well broke down, she was forced to hook up to the Zimmers' well temporarily by attaching an overground rubber hose to the well. Subsequently, Olech, the Zimmers and Brinkman all asked Willowbrook to hook their homes up to the municipal water system. *Willowbrook*, 1998 WL 196455, at *1.

⁴⁷ *Id.*

⁴⁸ *Id.*

difference in treatment and the motivation, it comes down to this: she had sued them once before a few years earlier.⁴⁹ Although there was an argument for vindictiveness in the case, the Court's holding was much more simplistic. The holding was simply that the City's demand for the larger easement constituted an irrational and wholly arbitrary act, and that was sufficient to state a claim for what the Court called traditional Equal Protection analysis.⁵⁰

What appears to have spun off since *Willowbrook* is the whole issue of motive. Professor Chemerinsky had something to say about motive in an article in *Trial Magazine*,⁵¹ and two of the circuit courts have discussed it as well.⁵² Do you really have to prove some improper motive in order to state an Equal Protection claim? I believe very strongly that a fair reading of *Willowbrook*, and Professor Chemerinsky agrees with me, held that subjective ill-will or bad motive is not required.⁵³ If that is the case, *Willowbrook* has slammed open the door of Equal Protection like we have never seen it in this country. That is why I say that *Willowbrook* is probably one of the most fascinating decisions of the term.

However, before the *Willowbrook's* was dry, our southern circuits decided they were not going to stand for it. In particular, in a case called *Bryan v. The City of Madison*,⁵⁴ which was a land

⁴⁹ *Id.* Olech and her two neighbors, the Zimmers and Brinkman, had previously sued Willowbrook for damage to their property that had resulted from storm water. Olech and the Zimmers were successful in their suits, and Brinkman's claims were dismissed. *Willowbrook*, 1998 WL 196455, at *2 n.3.

⁵⁰ *Id.* at 1075.

⁵¹ Erwin Chemerinsky, *Suing the Government for Arbitrary Actions*, 36 TRIAL 89 (May 1, 2000). "The Court's decision is clear that an allegation of a retaliatory motive or subjective ill will is unnecessary."

⁵² See *Bryan v. The City of Madison*, 213 F.3d 267 (5th Cir. 2000); *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir. 2000).

⁵³ Chemerinsky, *supra* note 50, at 89. "[I]t should be noted that the allegation of improper motivation . . . was expressly disavowed by the majority as relevant to the decision."

⁵⁴ 213 F.3d 267 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

use case that affirmed summary judgment for the City,⁵⁵ there was a footnote that stated that *Willowbrook* did not change the Fifth Circuit requirement of improper motive.⁵⁶ I am astounded that a circuit court would state something so directly contradictory to what the Supreme Court has held. However, there is a southern tradition of doing that.

Subsequently, Judge Posner authored in *Hilton v. City of Wheeling*.⁵⁷ *Hilton* involved an issue of police protection. A gentleman apparently had a dog that was aggravating neighbors, who in turn repeatedly called the police to complain. The police had to come to the neighborhood eighty times in a seven-year period to deal with these disturbances.⁵⁸ In *Hilton*, the Seventh Circuit observed that the selective withdrawal of police protection is a “prototypical denial of equal protection.”⁵⁹ However, it was held that because of the absence of evidence of an improper motive, the plaintiff could not recover.⁶⁰ Again, I am astounded because that is not what the Supreme Court said in *Willowbrook*. It appears that the Supreme Court went one step further in *Willowbrook* than Judge Posner would have them go in *Hilton*.

There is a concurring opinion in *Willowbrook* by Justice Breyer that addresses motive.⁶¹ Remember however that *Willowbrook* was unanimous. What Justice Breyer said in his concurrence was that this extra factor, ill-will, which was present in the Seventh Circuit’s analysis in *Willowbrook*, was what essentially places the case “over the rail.” Breyer said ill-will was the extra factor that made the equal protection claim

⁵⁵ *Id.* at 270-71.

⁵⁶ *Id.* at 277 n.14. “[Willowbrook] does not . . . alter our requirement of an improper motive, such as racial animus, for selective enforcement claims.”

⁵⁷ 209 F.3d 1005 (7th Cir. 2000), *cert. denied*, 531 U.S. 1080 (2001). *Hilton* was before Chief Judge Posner, and circuit Judges Flaum and Williams. Chief Judge Posner wrote the opinion.

⁵⁸ *Id.* at 1006.

⁵⁹ *Id.* at 1007.

⁶⁰ *Id.* at 1007-08.

⁶¹ *Willowbrook*, 120 S. Ct. at 1075. (Breyer, J., concurring).

actionable.⁶² However, the majority decision expressly disavows that.⁶³ That is my reading of it, as well as Professor Chemerinsky's reading of it.⁶⁴ I am afraid that the southern circuits are not going to follow what the Supreme Court has set forth in its opinion, which is not unlike what happened after *Brown v. Board of Education*⁶⁵ in the 1950s. Time will tell. If the lower courts embrace what *Willowbrook* clearly stands for, much more equal protection will be available to victims of governmental misconduct.

Proving a Disparate Treatment Case

With that background in mind, how do you prove one of these cases? You do it through good old-fashioned hard lawyering. How you investigate the case from the outset is what matters most. Good lawyering starts with thorough investigation and discovery in disparate treatment cases. You can also expect that the defendants are going to fight discovery with every assertable privilege they can think of. You have to file motions to compel. You have to get every personnel file, chase every lead, and run down the witnesses. I contend, however, that the right kind of lawyering will win the case even if you have to prove a bad motive because even the Giulianis of the world will give you the bad motive if you look far enough. In that case the bad motive showed up in the *New York Times* and the *Post*.⁶⁶

⁶² *Id.* (Breyer, J., concurring). “[T]he presence of that added factor [ill-will] in this case is sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right.”

⁶³ *Id.* “These allegations, quite apart from the Village’s subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis.”

⁶⁴ Chemerinsky, *supra* note 50, at 89.

⁶⁵ 347 U.S. 483 (1954).

⁶⁶ *Locurto*, 95 F. Supp. 2d at 164.

Giuliani was quoted in the Friday, September 11, 1998 edition of *The New York Times* as stating, ‘I’ve spoken to Commissioners Safir and Von Essen . . . and we all agreed that any police officer, firefighter or other city employee involved in this disgusting display of racism would be

I have a suggested twenty-two point checklist on how to prove improper motive in these cases.⁶⁷ The first thing that you

removed from positions of responsibility immediately'
 [In addition,] [o]n Saturday, September 12, 1998, Mayor Giuliani stated publicly, '[t]he only way this guy [Locurto] gets back on the police force is if the Supreme Court of the United States tells us to put him back.'

⁶⁷ See J. MICHAEL MCGUINNESS, SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTORNEY'S FEES 2000 at 519-21.

The following factors have been relied upon as a basis for a sufficient inference of a retaliatory or improper motive to establish a violation of equal protection . . .

- (1) Governmental decisionmaker's attitude regarding the conduct of the individual or employee. A hostile attitude suggests an improper motive.
- (2) Disparate treatment, particularly unequal discipline among employees or individuals.
- (3) Reduced employee evaluations or changed conditions after engaging in protected conduct.
- (4) Manner, tone and language of how the individual is informed of the deprivation.
- (5) Inadequate investigation of allegations surrounding the adverse action or other deprivation. Failing to review and consider all facts purportedly in the individual's favor suggests arbitrariness.
- (6) Deviations from procedures or policies.
- (7) Lack of reasonable warnings or notice of alleged violation or noncompliance.
- (8) Temporal proximity. Timing of the adverse action following engagement of protected activity.
- (9) The magnitude of the alleged offense. Comparisons of punishment showing that the employee or applicant has been more harshly punished than others suggests an improper motive.
- (10) History of employee's work performance. A drastic alleged decline in performance is suspect.
- (11) Investigation or scrutiny of employee or applicant's conduct following protected conduct.
- (12) The employer's creation of the problem that is supposedly the basis for the employer's criticism of the employee.
- (13) Subjectivity in termination or rejection criteria.
- (14) Pretext.

want to look for is what the governmental decision-maker's attitude was. Was it hostile when your client was fired or when that permit was denied? Was your client cursed out in the process? If so, when you "nail that proof down," you need to put evidence of the hostility in the affidavit so that the Appellate Court, down the road, will see that it is not some innocuous statement or some profane remark taken out of context. You need to get it into the record that your client was "chewed out." These are the nebulous points that you look for when you do not have that sheriff saying, "you all serve at my whim." You look for reduced evaluations of employees after there has been some dispute with the decision-maker. You look for the manner, tone, and language of how the individual was informed of the deprivation.

You also look to determine if there has been an adequate investigation into the dispute in personnel cases. All of my clients are allegedly insubordinate. I hear it in virtually every case. You want to get into the details of that and determine if there was an investigation into the alleged insubordination. You look for deviations from routine procedures, for whether or not there were warnings or notices of the noncompliance, and obviously, for the time sequence. If your client has done something to aggravate the bureaucracy, how soon after did your client suffer the denial

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- (15) Employee's lack of history of the alleged basis of termination.
 - (16) Changed ground for the adverse action.
 - (17) The failure to adhere to its own procedural or substantive regulations.
 - (18) Undue delay in processing applications.
 - (19) Changes in the course of dealings among the parties.
 - (20) Changes in qualifications of rules after commencement of selection process.
 - (21) A secret paper trail, without notice to the employee.
 - (22) Delayed articulation of alleged justification.
- Analysis of these factors yields information from which a trier of fact can determine the essential question of arbitrariness.

See also McGuinness, *Representing Law Enforcement Officers in Personnel Disputes and Employment Litigation*, 77 AM. JUR. TRIALS 1 (2000).

of the benefit? How close is the protected activity to the adverse action? You want to look for the subjective criteria, and at the history of the employment by the individual, as well as the supervisors, involved. You want to look for any sort of unusual time sequences, any significant delays that are different from routine and changes in qualifications after the posting of the position. That still comes up in case after case after case.

If you learn from your client that there is some impending problem, for example, if there has been a suspension or the client suspects there is going to be a termination, what can you do to capture the evidence and preserve the truth? When my clients are fired in the South, they don't allow lawyers to come in and argue or present facts or evidence. The only tool that I have to preserve the truth and to capture what goes on in those back-room "whip sessions" is a wire.

There is a lot of controversy about the use of a wire. The first thing you have to do in each and every case is you have to determine whether it is lawful in that particular jurisdiction for your client to wear a wire. For example, in the State of Florida it is unlawful to wear a wire.⁶⁸ When the State of North Carolina sent me to prosecutor's school many years ago, they taught me to use that device in drug cases under the theory we are going to let the jury know the whole unadulterated truth. I have continued to do so since becoming a civil lawyer, and it works. The first thing you have to do is plan for your client to wear a wire and then determine if they can do it and under what circumstances. We capture the truth by wearing a wire so they cannot escape from the truth, and it can make a tremendous difference in the case.

One final technique that a good law enforcement officer taught me was that cops are taught to take backup weapons when they go out on their missions, and good investigators are taught to

⁶⁸ See FLA. STAT. § 934.03 (2000). The statute states in pertinent part: [A]ny person who . . . [i]ntentionally intercepts . . . any wire, oral, or electronic communication . . . is guilty of a misdemeanor . . ." *Id.* "Intercept" is defined as meaning "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device. See also 18 U.S.C. § 2510.

take a second tape recorder. The reason is that in some of our jurisdictions, after we have gone in, captured the proof, nailed down the case, and the sheriff resigns and moves on, they become a little less brutal in that jurisdiction the next time they go into the back room. Sometimes they will ask our clients, "What is that bulk in your pocket, son? I order you to remove that recorder." There was a case where the chief was just as diplomatic and professional as he could be because he suspected a wire. After he ordered that the recorder be taken out, and the tape be removed, the chief went absolutely ballistic, which tape recorder number two captured.

Conclusion

In summary, the sheriffs of the South and the mayors of the North are all subject to the Equal Protection Clause. *Willowbrook* is a fascinating case which represents a real piece of ammunition to challenge the tactics of those who abuse governmental power.