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What's Happening With Respect to the Second Circuit

George C. Pratt

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WHAT'S HAPPENING WITH RESPECT TO THE SECOND CIRCUIT

Judge Leon D. Lazer:

Thank you. Seated to my left is Professor Gary Shaw, who will be serving as interlocutor for today's event. He is an authority on constitutional law and a very important member of our faculty. Professor Shaw has been consulted by foreign governments for his expertise in the area of constitutional law and has been a regular traveler to Belarus, one of the former Soviet Republics, which is now in the process of drafting its own constitution. Professor Shaw's function will be to ask questions at the conclusion of each lecture.

Without further adieu, we shall proceed with our first speaker who is going to not only tell you some of his experiences, but also illuminate this conference with some of his thoughts. He will also moderate the discussion among the first two speakers who are going to be dealing with the subject of the Fourth and Sixth Amendments. Touro Law Center is very proud to have achieved the distinction of bringing to its full-time faculty the Honorable George C. Pratt of the Court of Appeals for the Second Circuit. Judge Pratt remains on senior status, and so both the judiciary and academic worlds will have the benefit of his wisdom. Judge Pratt has a very significant background in municipal law as well

as other areas of law. He is a graduate of Yale Law School, served as a clerk to Judge Froessel in the New York State Court of Appeals and served as special counsel for many of the villages in Nassau County. He has served as special counsel to the County Board of Supervisors and to other governmental agencies in Nassau County. It is now my pleasure to introduce to you Judge Pratt.

Hon. George C. Pratt:

Thank you, Judge Lazer. It is important to be up-to-date on the activities of the Supreme Court and, of course, that is the thrust of the conference today and that is what the other speakers are going to talk about. However, I have never been one to go with the flow. What I would like to do is very briefly take a look at some of the results of what the Supreme Court has previously done and focus on how some of those cases have played out in recent Second Circuit decisions. In other words, you might style my remarks, "What's happening with respect to the Second Circuit."

The largest group of section 1983[1] cases that enter into the federal system, of course, are the police misconduct cases.[2] The

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1. 28 U.S.C § 1983 (1988). Section 1983 states:

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

2. *See, e.g.*, King v. Macri, 993 F.2d 294 (2d Cir. 1993). In *King*, the defendant sought punitive damages for police misconduct. *Id.* at 296. At trial the law enforcement officers "conceded that they used a great deal of force, including punching [defendant] and forcing him to the floor." *Id.* Furthermore, "[defendant] testified that the officers continued to punch him after he was handcuffed, and that [one] officer . . . put him in a choke-hold that made it

rules and principles that govern these cases are pretty well settled by now, with the result that on our court we see relatively few appeals that present nuts-and-bolts-type issues in these misconduct cases. What that means, I suppose, is that these cases are now being resolved at the district court level and they simply do not need our appellate guidance,[3] or should I say, appellate interference?

The two questions that have been most frequently litigated over the last year or two, are immunity and municipal liability under *Monell v. Department of Social Services*.[4] Let me focus on those two for just a moment.

With respect to immunity, the appellate focus on immunity problems intensified greatly after the Supreme Court's decision in *Mitchell v. Forsyth*.[5] In *Mitchell*, the Supreme Court held that it was permissible to take an interlocutory appeal to the circuit court whenever the district court denied a defendant's motion to dismiss on grounds of qualified immunity.[6]

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difficult for him to breathe." *Id.* The Second Circuit remanded the case for a determination on the amount of punitive damages. *Id.* at 299; Vann v. City of New York, 1993 WL 404005 (S.D.N.Y. Oct. 4, 1993). In *Vann*, the court granted summary judgment for the City based on plaintiff's claim that an off duty police officer used excessive force in arresting plaintiff who had left the scene of an accident which involved the arresting officer. *Id.* at *1. While the court stated that "[d]eliberate indifference to police officers' use of excessive force can constitute a 'policy' creating municipal liability under section 1983 . . . [p]laintiff . . . failed to raise a triable issue as to whether the existence of a municipal policy or custom caused his injuries." *Id.* at *2, *3; Brown v. Co Chambers #2023, 1993 WL 307769 (S.D.N.Y. Aug. 9, 1993). The court stated that a complaint for a claim under section 1983 against a corrections officer cannot be sustained based on alleged violations of section 1983. *Id.* at *2; Jermosen v. Coughlin, 1993 WL 267357 (S.D.N.Y. July 9, 1993). The court found that plaintiff's perceived threat by corrections officers to conduct a strip search was not excessive force actionable under section 1983. *Id.* at *2.

3. *See supra* note 2.

4. 436 U.S. 658 (1978). The Court held that a municipality can be found liable for constitutional violations only when the violation comes about as a result of the municipality's "policy or custom." *Id.* at 694.

5. 472 U.S. 511 (1985).

6. *Id.* at 527-28. The Court based its holding in part by stating that:

Now, there are a number of points about that. The theory underlying the Supreme Court's decision is that qualified immunity is not just immunity from damages liability, which up until *Mitchell*, everybody had assumed it was.[7] Instead, it was an immunity from suit, from having to be subjected to meritless discovery, and from having to go to trial. This created great consequences in the Supreme Court's view. The Court pointed to their decision in *Harlow v. Fitzgerald*,[8] which transformed qualified immunity from a dual inquiry as to whether there was subjective good faith and objective good faith.[9] They made it a

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> [I]t follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated. An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Id.

7. *See* Washington Square Post #1212 Am. Legion v. Maduro, 907 F.2d 1288, 1290-91 (2d Cir. 1990) ("Qualified immunity has long shielded government officials performing discretionary functions from civil damages liability 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))).

8. 457 U.S. 800 (1982)

9. *Id.* at 815. The Court stated:

> Decisions of this Court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect. The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.' The subjective component refers to 'permissible intentions.' Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would not be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official 'knew or reasonably should have known that the action he took

question of law by saying the test is one that is purely objective.[10] We do not care what was really going on in the mind of the public official, we just wanted to know what would the reasonable official have done and thought and believed under the circumstances.[11] And then the question is, would a reasonable official realize that what was done violated clearly established constitutional law?

It has been said that what the Court established under *Harlow* was that the only public officials that can be held liable are those who are either malicious in what they do, or plainly incompetent because they do not know what they are doing.[12] In any event, the *Harlow* test was made a legal test rather than a factual one, chiefly so that it could be resolved on a motion for summary judgment.[13]

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within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . .'

Id. (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).

10. *Id.* at 818. The Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*

11. *Id.*

12. *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

13. *See Harlow*, 457 U.S. at 818. The *Harlow* Court stated that:

[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed.

Id.

There are several consequences which stem from the *Mitchell* opinion. First, there has been a great increase in the number of appeals in section 1983 cases. In almost every case, after the motion to dismiss for legal insufficiency, there is a motion -- usually on summary judgment -- to dismiss on qualified immunity grounds.[14] This is in cases against the individual officers, not against the municipality.[15] The second consequence is that if a case goes the full route to judgment, it involves three appeals. One on qualified immunity, another on the merits and a third on attorneys' fees, thus multiplying the appellate litigation that is related to these cases.

Another consequence is that the Supreme Court has set up the means for making a kind of end run around the final judgment rule in the federal courts. In *Siegert v. Gilley*,[16] the Court said that district and circuit courts should not address the qualified immunity issue until they have determined whether or not a constitutional right has been violated by the conduct that is at issue.[17] Now, in practical effect, look at the motion to dismiss

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14. *See, e.g.*, Magnotti v. Kuntz, 918 F.2d 364 (2d Cir. 1990) (denying motion for summary judgment based on qualified immunity defense); Alexander v. Perrill, 916 F.2d 1392 (9th Cir. 1990) (affirming denial of motion for summary judgment on qualified immunity defense); Del A. v. Edwards, 855 F.2d 1148 (5th Cir. 1988) (denying motion for dismissal or summary judgment on qualified immunity grounds).

15. *See, e.g.*, *Magnotti*, 918 F.2d at 366 (suit against police officer); *Alexander*, 916 F.2d at 1394-95 (suit against prison warden and administrative systems manager); *Del A.*, 855 F.2d at 1150 (suit against state governor and officials); DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 844 F.2d 714 (10th Cir. 1988) (suit against individual officials of a private corporation and the United States Department of Energy).

16. 111 S. Ct. 1789 (1991).

17. *Id.* at 1793. The Court stated that

> [a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits. One of the purposes of

that is generally made at the beginning of one of these cases. It assumes that what the plaintiff says is true and urges that there is no violation of the constitutional right. Therefore, the motion is denied, but no appeal, because it is not a final judgment. Then you make the motion to dismiss on qualified immunity grounds. That motion is also denied, but you can appeal because of *Mitchell*.[18] Under *Siegert*, however, the Court is then supposed to look back and see whether there is a violation of a constitutional right, so at that point you are getting, in effect, appellate review of the denial of the motion to dismiss -- quite contrary to what the former system was.[19]

Another consequence is that in other cases, the Court has extended the immediate appealability not just to qualified immunity, but also to absolute immunity cases[20] as well as Eleventh Amendment immunity cases.[21] On a more institutional level, the effect of the interlocutory appeal combined with the

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> immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.

Id.

18. *Mitchell*, 472 U.S at 530. The Court held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Id.*

19. *Siegert*, 111 S. Ct. at 1793. The Court held "that the petitioner in this case failed to satisfy the first inquiry in the examination of such a claim; he failed to allege the violation of a clearly established constitutional right." *Id.*

20. *See, e.g.*, *Mitchell*, 472 U.S. at 525. The *Mitchell* Court held that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Id.*; *see also* Nixon v. Fitzgerald, 457 U.S. 731 (1982). In deciding the issue of whether it had jurisdiction over an appeal from a non-final order in which the district court had rejected the petitioner's claim of absolute immunity, the *Nixon* Court held that the denial of the absolute immunity defense was immediately appealable. *Id.* at 742.

21. *See, e.g.*, Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684, 685 (1993). The Court allowed an immediate appeal from a district court order which denied an Eleventh Amendment claim of immunity from a suit brought in federal court and likened it to the immediate appealablity available to qualified immunity found in *Mitchell*. *Id.*

rule of qualified immunity (that you are immune unless what you have done violates clearly established law),[22] has retarded the development and evolution of constitutional doctrine in the circuit courts. The issue is not "what is the constitutional issue?" Instead, it is a question of whether the defendant violated law that was clearly established. If there is any doubt about it, then there is qualified immunity and the case is dismissed.[23] So we cannot take the next step and establish what the law is, with the result that in the next case you still do not know what the clearly established law was. The whole thrust and development of the law in this area has been very much defendant-oriented and protects defendants, and it has, as I said, retarded the evolution of constitutional doctrine.

Another and final point on this is an institutional consideration. The qualified immunity interlocutory appeal is an example of another type of erosion of the final judgment rule that governs appeals in the federal system. In my opinion, and in the opinion of most appellate judges, and I suspect most district judges as well, the final judgment rule is one of the major strong points in the federal system as compared to other systems, such as the New York State system where so many rulings by trial judges can be appealed to the appellate division before a final judgment.[24] The appeals slow down litigation, detract from the

22. *See, e.g.*, Rogue-Rodriguez v. Lema Moya, 926 F.2d 103, 107 (1st Cir. 1991) (finding interlocutory appeal limited to reversing denial of summary judgment based on qualified immunity and does not allow for ruling on due process claim); Brown v. Grabowski, 922 F.2d 1097, 1108 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2827 (1991) (holding that defendant-police officers who allegedly violated constitutional rights of a woman by failing to protect her were entitled to qualified immunity on interlocutory appeal); Alvarado v. Zayas, 816 F.2d 818, 820 (1st Cir. 1987) (holding on interlocutory appeal that Social Services Secretary was entitled to qualified immunity from liability stemming from First Amendment and due process claims).

23. *See supra* note 22.

24. *See, e.g.*, Flanagan v. United States, 465 U.S. 259, 263-64 (1984) The Court noted that:

> The final judgment rule serves several important interests. It helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation. It reduces the ability of litigants to harass

authority of the trial judge, and generally seem to reduce the efficiency of the judicial system.[25] The great virtue in the federal approach has been that the district judge runs the case until it is over, and the appellate court then takes over and determines whether there were any errors of law that are significant enough to warrant reversal. That system is being eroded, and this *Mitchell v. Forsyth* decision is a major contributor to the erosion.[26]

The other major group of section 1983 issues that come before the Second Circuit is municipal liability under *Monell*.[27] In one sense this is related to qualified immunity because qualified immunity tends to knock out the individual defendants.[28] The

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opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice.

Id.; Cobbledick v. United States, 309 U.S. 323, 324-25 (1940) ("Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all.").

25. *See, e.g.*, Appeal of Licht & Semonoff, 796 F.2d 564, 569 (1st Cir. 1986) (stating that the purpose of the § 1291 requirement which limits appellate review to final judgment is to reduce the costs of litigation, promote judicial efficiency and eliminate delays that interlocutory appeals cause); Servo Corp. of Am. v. General Elec. Co., 393 F.2d 551, 557 (4th Cir. 1968) (stating that to bring about judicial efficiency and reduce litigation to manageable size a court can make separate determinations of multiple issues).

26. *See, e.g.*, Yates v. City of Cleveland, 941 F.2d 444, 448 (6th Cir. 1991) (stating that *Mitchell* appeals can be used to purposely delay trial); Abel v. Miller, 904 F.2d 394, 396 (7th Cir. 1990) (warning courts of appeals to be careful with *Mitchell* appeals because they may be used to defeat claims by prolonging trials and incurring undue expenses on plaintiffs); Apostol v. Gallion, 870 F.2d 1335, 1338-39 (7th Cir. 1989) (finding that defendants who do not have genuine claims of immunity may use *Mitchell* appeals to stall trials to gain from postponement by increasing plaintiff's expense).

27. 436 U.S. 658 (1978).

28. *See, e.g.*, Deagle v. City of New York, 1992 WL 116368 (S.D.N.Y. May 24, 1992) at *1 (finding that defendant has qualified immunity does not preclude finding that "municipal defendants" may be liable); Doe v. Sullivan County, 956 F.2d 545, 553 (6th Cir.), *cert. denied*, 113 S. Ct. 187 (1992) (stating that a municipality is not entitled to qualified immunity and thus may still be liable even after dismissal of claim after showing of qualified immunity for an officer); Palmerin v. City of Riverside, 794 F.2d 1409, 1414 (9th Cir.

response of practicing attorneys is, "Well, if we can't get the individual defendant, let's go after the municipality." In short, Plaintiff's attorneys are pushing the envelope of municipal liability as much as possible, because the individual claims are barred for one reason or another.

A claim against a municipality is a much more difficult claim to present from the plaintiff's point of view; it is more difficult to defend from the defendant's point of view, and it is infinitely more difficult to try from a trial judge's point of view.[29] Basically that is because a municipality, of course, can be held liable only if there is a municipal policy that causes the constitutional violation, and if the municipality was deliberately indifferent to the constitutional harm that the policy has caused.[30]

Three recent cases in the Second Circuit illustrate this trend to reach out toward the municipality. One is *Sorlucco v. New York City Police Department*.[31] In *Sorlucco*, potential municipal liability was to be based upon a custom concerning discipline inflicted on police officers.[32] The claim was that the custom

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1986) (stating that a *Monell* claim survives finding that officer was acquitted due to good faith immunity).

29. *See generally* City of Canton v. Harris, 489 U.S. 378, 389 (1989). Regarding municipal liability, the Court stated that:

> Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983 . . . . Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality--a 'policy' as defined by our prior cases--can a city be liable for such a failure under § 1983.

Id.

30. *See, e.g.*, Fiaco v. City of Rensselaer, 783 F.2d 319, 326 (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987) (holding that a municipality may be subjected to § 1983 liability if policy tolerates unconstitutional acts); Owen v. Haas, 601 F.2d 1242, 1247 (2d Cir.), *cert. denied sub nom.*, County of Nassau v. Owens, 444 U.S. 980 (1979). In *Owen*, the second circuit stated that "[i]t is true that the failure to train or supervise law enforcement officers must be so grossly negligent as to constitute 'deliberate indifference' to hold the county liable." *Id.*

31. 971 F.2d 864 (2d Cir. 1992).

32. *Id.* at 870.

discriminated against women.[33] The facts were essentially that a woman police officer claimed she had been raped by a male police officer.[34] The incident occurred in the woman's apartment.[35] She had left her police revolver on the dresser.[36] When the situation became amorous and she resisted his advances, he grabbed her revolver and to force her submission, he fired it a couple of times into the mattress directly next to her.[37] When she made her complaint, she was disciplined for taking improper care of her revolver.[38] The male officer, I believe, was promoted and eventually retired. When the case came to our court, we finally approved the possibility of establishing that this was not just an isolated instance of how they run things in the disciplinary affairs of the New York City Police Department. Rather, there was sufficient evidence to determine whether or not this was the result of a custom or policy of the City, and if so, then the City would be held liable.[39]

In another case, *Walker v. City of New York*,[40] defendant served 19 years in prison, and then it came out that a detective had lied on the witness stand.[41] The Assistant District Attorney who tried the case knew that he had lied.[42] The prosecutor had absolute immunity, so the claim was asserted against the municipality for failure to train.[43] Remember, this trial occurred twenty years ago when *Brady v. Maryland*[44] had first come down, and the claim was that the City did not properly train its

33. *Id.* at 865.
34. *Id.* at 865-66.
35. *Id.* at 865.
36. *Id.* at 865-66.
37. *Id.* 866.
38. *Id.*
39. *Id.* at 872-73.
40. 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1412 (1993).
41. *Id.* at 295.
42. *Id.*
43. *Id.*
44. 373 U.S. 83 (1963). In *Brady*, the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

assistant district attorneys in their obligations to turn over exculpatory material to defense counsel before the trial.[45] We reversed the district court's dismissal of the disciplinary charges and remanded for further proceedings.[46] Potentially that claim can succeed if it ever goes to trial.

The third case is *Dwares v. City of New York*.[47] The claim in *Dwares* was sort of an offshoot of the *DeShaney v. Winnebago County Department of Social Services*[48] case. In *DeShaney*, Social Services had some notes that a child was being abused by his father.[49] They had even taken him into custody at one time, but they finally turned him back to the father.[50] Then he was severely abused, and ended up severely brain damaged.[51] When the boy's mother tried to collect from Social Services, the Supreme Court of the United States said there was no affirmative duty on the part of a municipality to protect the child against harm being inflicted by a parent.[52] You need something more than just notice that something is going to happen.[53]

In any event, the *Dwares* case was an offshoot of that. A bystander at a flag burning event was assaulted by a group of skinheads.[54] The claim was that the police officers essentially knew that there was going to be violence.[55] Plaintiff alleged that there had been a meeting between the leader of the skinheads and the police and that the police had stated that they would not interfere unless the skinheads "got completely out of control."[56] It happened that the one who was harmed in this particular instance was not burning the flag; he was only there to watch

45. *Walker*, 974 F.2d at 294.
46. *Id.* at 300.
47. 985 F.2d 94 (2d Cir. 1993).
48. 489 U.S. 189 (1989).
49. *Id.* at 192-93.
50. *Id.* at 192.
51. *Id.* at 193.
52. *Id.* at 189.
53. *Id.* at 200.
54. *Dwares*, 985 F.2d at 96.
55. *Id.*
56. *Id.* at 97.

what was going on.[57] I am not sure where his sympathies lay, but they certainly were not with the police in the end, because the police stood by while he was beaten by skinheads.[58] On motion, our court held that municipal liability could be established under these circumstances if it could be established that the arrangement between the skinheads and the police was made at a high enough level to fairly be the policy of a city.[59]

These are just some examples of the phenomenon of more and more municipal liability cases that are at the fringe. Plaintiffs are reaching, and frankly, they are pushing the envelope to establish municipal liability. It is largely a response to the fact that you cannot get the individual officer in many cases because the qualified immunity protects them.

One other comment: the substantive claim that most frequently seems to have come to our court in the last couple of years is a retaliation claim, mostly arising out of employment contexts.[60] A couple of other cases, typical whistle-blower cases, are *DiMarco v. Rome Hospital*,[61] and *Vasbinder v. Scott*.[62] Finally, there was

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57. *Id.* at 96.

58. *Id.*

59. *Id.* at 100.

60. *See* Piesco v. Koch, 12 F.3d 332 (2d Cir. 1993) (holding sufficient evidence existed to support former New York City Deputy Director of Examination's claim of retaliatory dismissal based on statements made during committee meetings to evaluate testing procedures); Saulpaugh v. Monroe Community Hosp., 4 F.3d 134 (2d Cir. 1993) (upholding INS employer liability for retaliatory discharge of employee following claims of sexual harassment); Goldberg v. Town of Rocky Hill, 973 F.2d 70 (2d Cir. 1992) (finding the elimination of plaintiff's position as a supernumerary police officer was a retaliatory act for plaintiff's public defense of police chief on controversial issue).

61. 952 F.2d 661 (2d Cir. 1992). The *DiMarco* court stated that in order

> [t]o determine whether the plaintiff has a valid claim of retaliation for public speech, the district court must determine, first, whether the speech related to a matter of public concern. If it did, the district court must then engage in a very subtle balancing test--the degree of public concern expressed by the speaker must be weighed against 'the government's interest in the effective and efficient fulfillment of its responsibilities to the public. '

Id. at 666 (quoting Connick v. Myers, 461 U.S. 138, 150 (1983)).

the interesting case of *Goldberg v. Town of Rocky Hill*.[63] Up in Connecticut they have a position called a supernumerary police officer.[64] This particular officer, Mr. Goldberg, criticized some of the politicians in town, taking a political stance.[65] The result was that the town voted to abolish his job.[66] The suit claimed that this was retaliation, a violation of the First Amendment.[67] The members of the town legislative body were entitled to absolute immunity because this was a legislative act.[68] So the claim was brought against the town itself and the town said, "We, too, are entitled to absolute immunity."[69] It was clear that towns are not entitled to qualified immunity under the Supreme Court's decision in *Owen v. City of Independence*,[70] but the issue

62. 976 F.2d 118 (2d Cir. 1992). In a section 1983 case for punitive damages where plaintiff claimed he was discharged from employment and reassigned to lesser position with reduction in salary in violation of his First Amendments rights, the Second Circuit stated that

> an award should not be so high as to result in the financial ruin of the defendant. Nor should it constitute a disproportionately large percentage of a defendant's net worth. Thus, while a defendant's conduct is obviously germane to the damages issue, 'even outrageous conduct will not support an oppressive or patently excessive award of damages.' Further, because neither compensation nor enrichment is a valid purpose of punitive damages, an award should not be so large as to constitute 'a windfall to the individual litigant.'

Id. at 121 (citations omitted).

63. 973 F.2d 70 (2d Cir. 1992).

64. *Id.* at 71

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 72.

69. *Id.* at 71.

70. 445 U.S. 622 (1980). In *Owen*, the Supreme Court stated that

> [w]here the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.

had never been raised on absolute immunity. Not only that, under Connecticut law, legislators have a privilege not to testify as to what their motives are, and the whole issue in a retaliation case is motive.[71] Why did they abolish the job? The town said, "If we do not have immunity, we are defenseless because our legislators will not testify."[72]

Our court's response was: "You do not have absolute immunity; if you did, then *Monell* would be meaningless because we could not hold the municipality liable for anything but the most formal legislative policies."[73] Motive is relevant now in many issues of constitutional law, such as racial discrimination, free speech, and the Establishment Clause under the First Amendment; and we are dealing here with a federal claim, not a state claim. The state privilege cannot operate to defeat the federal claim.[74]

All right, those are just some random observations as to what is happening out there -- I was going to say in the trenches, but the trenches are really the district courts. The circuit court is one step behind. Nevertheless, these are some of the consequences of what the Supreme Court has done to, or for, us over the past several years.

Id. at 638.

71. *Goldberg*, 973 F.2d at 74.

72. *Id.*

73. *See id.* at 74. The court held "that there is no immunity defense, either qualified or absolute, available to a municipality sought to be held liable under 42 U.S.C. § 1983[,]" and to claim otherwise is a "clear avoidance of the inference from *Monell* and *Owen*." *Id.*; *see also* Monell v. Dep't of Social Servs., 436 U.S. 658, 690 n.55 (1978) (stating that immunity does not attach to legislators sued in their official capacity because "official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent . . . ."); Owen v. City of Independence, 445 U.S. 622, 651 (1980) (cautioning that "granting immunity to municipalities would mean that many victims of municipal malfeasance would be left remediless . . . .").

74. *Owen*, 445 U.S. at 647-48. Supporting this premise, the Court stated that "[b]y including municipalities within the class of 'person' subject to liability for violations of the federal Constitution and laws, Congress - the supreme sovereign on matters of federal law - abolished whatever vestige of the state's sovereign immunity the municipality possessed . . . .").