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Hon. George C. Pratt

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SECTION 1983 IN THE SECOND CIRCUIT

*Hon. George C. Pratt**

Hon. Leon D. Lazer:

We are very honored this morning to have our next speaker join us, and we welcome you, Judge George Pratt. We are honored by his presence on our faculty. Judge Pratt is a former judge of the Court of Appeals for the Second Circuit, a former district judge, and a former partner in the "small" law firm of Farrell Fritz in Nassau County. Also, he frequently represented municipalities as special counsel and he is much beloved by our students. It is my pleasure to introduce Judge Pratt who will discuss Section 1983 in the Second Circuit.

Hon. George C. Pratt:

Good morning. It is good to see such a nice turn-out here this morning. I am a little out of place on this program, which is advertised as Supreme Court. It is nice to discuss the Supreme Court. They can do things the way they like down in Washington, but the real action for most of us ends with the Second Circuit. Maybe five of last year's Second Circuit decisions were reviewed in Washington, five out of approximately 4,000 that the circuit made during the course of the year.

In the area of Section 1983,¹ which impacts municipalities most directly on the federal level, there were about 175 Section 1983

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¹ 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the 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.

decisions by the Second Circuit in the year that I have arbitrarily selected that began June 1, 1997 and ended May 31, 1998. All I am trying to do is give you a snapshot of what the Second Circuit is doing in this area, and I have a few comments about some of the particular decisions.

In reviewing what a federal circuit court is doing, particularly the Second Circuit, you have to understand they write opinions in roughly a third of the cases that they hear. The others are decided by summary orders, and many of the summary orders are so "summary" it is simply impossible to know what the case is about. You have to have been a party to the case to understand that, and the importance of that kind of information does not begin to justify the time that it would take to go back over all the original files. What I have done, therefore, is focus on the opinions they have written.

If the judges are doing what they are supposed to do, they write an opinion in every case that is of jurisprudential significance. Jurisprudential significance is supposed to mean, essentially, every case where we reverse, and every case where we affirm an important decision. Different judges have different views of what is important, what is worth publishing to the world, and what is not.

With those qualifications, the past year is not too different from the prior year. Roughly the same number of opinions were filed in Section 1983 cases, 70 out of approximately 175 cases.² The court reversed in roughly 39 cases and affirmed 31.³ If you add in the summary-order affirmances, it works out to be an 18 or 20 percent reversal rate in the civil rights-type cases. Plaintiffs appealed in three-quarters of these cases, the opinion cases, and were successful in a little over half.⁴ By people who are suing, there are the ones who are familiar to you - arrested citizens, employees who have been disciplined or discharged, businesses who object to the regulation of their operation - plus a miscellaneous group of others. There is another group, prisoners, who are the most active litigants in the federal courts these days. They accounted for 30 percent of

Id.

² See Appendix.

³ See Appendix.

⁴ See Appendix.

the Section 1983 opinions written by the circuit court. Many of their cases involved disciplinary problems in the prison, conditions of confinement, and other events that happened in prison.

One interesting phenomenon - maybe interesting only to me as a former member of the court, but something that should be interesting to lawyers - is a growing concern over the large number of panels this past year that had a visiting judge. I have heard some comments, even complaints, by former colleagues. I ran into one judge who was sitting that morning, and he said, "Things have changed. I have been on the court only for a year and a half and I am the only active judge sitting on the panel this morning. We will be making the law of the circuit. I have a district judge and a senior judge on the panel."

In two-thirds of the cases in this Section 1983 area (there is no reason to think the panels were any different from any of the other areas), there was a visiting judge sitting on the panel, that is, one who was not an active or senior circuit judge. This was due simply to the fact of the political tie-ups down in Washington in not filling the vacancies that had occurred on the court. But, with the recent appointments to the court, that is history now, so I guess it is not a matter to be too much concerned with, even though it does affect the jurisprudence of the court. In the last two-and-a-half months four new judges have been appointed, and this is on a court that has only 13 judges.

The court has changed enormously in the three-and-a-half years since I retired. Some of the new judges show the typical new-judge propensity to reinvent the wheel. They get to write an opinion on a case in an area that has long interested them. Now they have a chance to write it so it will be cast in stone in the federal courts. In doing so, they go on and on and restate the law, and sometimes in restating it, they no longer state it the way it had been stated before. In short, there are changes going on in the Second Circuit, some of them apparent, some of them not quite so apparent.

One of the things that struck me in reviewing what this year's Section 1983 cases were about, is the number of opinions written on the subject of politically motivated discharges of public employees. Throw them out if they are the wrong party. Apparently, a lot of that went on in cases that went up to the

Second Circuit. In every case, the defendants were successful. The rule, as it was originally adopted by the Supreme Court, is that you cannot discharge an employee because he is of the other political party.⁵ Discharge for such a reason is a violation of the employee's right to free speech and freedom of association. But there was an exception for policy-making positions, and it is very interesting to see how far the circuit court is extending the idea of policy making. For example, it seems to include virtually all municipal attorneys at this point, based on the theory that they have to get up in court and argue the position of their superiors, and they have to defend the municipality.⁶ In any event, politically discharged plaintiffs in all five of the cases where opinions were written came up sucking air.⁷

A few other just really random comments here, specifically, concerning the *Coogan v. Smyers*⁸ decision. The *Coogan* case was one of the politically motivated discharge cases in which the court discussed the problem of mixed motive.⁹ This was a case where the discharge was by the municipal board, the city council, when it decided not to reappoint the city clerk. There was no abolition of office so this was not a legislative act.¹⁰ The city clerk had decided to work for the wrong political party, so they did not reappoint.¹¹ The clerk sued and the court sent it back for review.¹² The thing that is interesting is that they could not escape the problem of motive, as the Supreme Court had done with the legislative abolition of a position.¹³ Legislative abolition of a position is a legislative act; therefore, absolute immunity applies. This situation, whether or not this was a politically motivated discharge, was a close enough call so there was a possible qualified

⁵ *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

⁶ *Vona v. County of Niagra*, 119 F.3d 201, 209 (1997).

⁷ See generally *Bavaro v. Pataki*, 130 F.3d 46 (2d Cir. 1997); *Danahy v. Buscaglia*, 134 F.3d 1185 (2d Cir. 1998); *McEvoy v. Spencer*, 124 F.3d 92 (2d Cir. 1997); *Vona v. County of Niagra*, 119 F.3d 201 (2d Cir. 1997); *Coogan v. Smyers*, 134 F.3d 479 (2d Cir. 1998).

⁸ 134 F.3d 479 (2d Cir. 1998).

⁹ *Id.* at 484. See also *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274 (1977).

¹⁰ *Id.* at 481.

¹¹ *Id.*

¹² *Id.*

¹³ *Mt. Healthy School Dist. v. Doyle*, 429 U.S. at 287.

immunity, which depended upon the motive of the board. Most of you are familiar with municipal problems, and you know that it is a very interesting question: What is the "motive" of the board when it acts? The court tried to wrestle with that and sent the case back and directed the district court to analyze each of the defendant council members individually and determine whether a majority of the members have established their *Mount Healthy* defense¹⁴ - that they would have not rehired the clerk for other reasons than the fact that she belonged to the wrong political party.¹⁵ The court then said that if the district court finds the majority of the council would have fired for the other reason, that excludes them all from liability, even though some other council members thought she was doing a great job and fired her only for the improper reason of a politically motivated discharge.¹⁶ However, the court said that does not matter; majority rules, and if the majority of the board was pure or at least pure enough, they all get insulated by qualified immunity.¹⁷ It is an interesting approach.

As a district judge, I once wanted to try a case that was remanded by the circuit court to determine the motive of a school board in some action that it took.¹⁸ I was convinced it was an impossible task, and my intent was to demonstrate for all time that you cannot work on the basis of a board's motivation because there are so many things that influence its various members. Unfortunately, they settled the case and I never got that opportunity.

An interesting case is *Mathie v. Fries*,¹⁹ in Suffolk County, concerning the homosexual abuse of a prisoner by one of the supervisors of the people in the jail.²⁰ In a non-jury trial, Judge Spatt ordered \$250,000 in compensatory damages and \$500,000 punitive damages.²¹ The circuit court upheld the compensatory damages, but reduced the punitive damages from \$500,000 to

¹⁴ See *supra* note 13.

¹⁵ *Id.* at 485.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Pico v. Bd. Of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404, 419 (2d Cir. 1980).

¹⁹ 121 F.3d 808 (2d Cir. 1997).

²⁰ *Id.* at 810-811.

²¹ *Id.* at 810.

\$200,000.²² It is a common phenomenon to reduce awards in the state appellate courts, which are notorious for exercising pretty strong hands on reviewing damage awards, both compensatory and punitive. It is not common in federal courts, however, although it is being done with increasing frequency. Interestingly here, when the court reduced the award, it was after the decision by the Supreme Court in the *BMW v. Gore*²³ case where they laid down the standards for determining what is a reasonable punitive damage award. The Second Circuit said that this award fully satisfied all the limitations the Supreme Court put on it, but it still shocked their judicial conscience despite those guidelines of the Supreme Court, and they thought only \$200,000 should be allowed.²⁴ This shows you where the real power in the system lies, not with the Supreme Court by any means, because there are too many ways around the Supreme Court decisions.

In an amusing case, the plaintiff claimed she went into the clerk's office in state court.²⁵ While she was there, a judge came in, and he had his dog with him. The dog came over and sniffed her under her skirt.²⁶ It happened more than once.²⁷ Apparently, the judge had seen it and did nothing to stop the dog.²⁸ She brought her Section 1983 action in federal court.²⁹ On appeal, the circuit court held this was state action.³⁰ The dog would not have been there but for the judge's presence, and, therefore, the dog was kind of an extension of the judge.³¹ They did not view it exactly that way, however, because they held that the dog's sniffing under the plaintiff's skirt was not a constitutional violation. They said the plaintiff was left to her state-court remedy under the Connecticut dog-bite statute.³² There are some cases where you would think they ought to be able to do a summary order for reversal. This one

²² *Id.*

²³ *BMW of N. Am. v. Gore*, 517 U.S. 1589 (1996).

²⁴ *Mathie*, 121 F.3d at 816-817.

²⁵ *Monsky v. Moraghan*, 127 F.3d 243, 244 (2d Cir. 1997).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 245.

³² *Id.*

really did not warrant the opinion, but at least we now know that a sniffing dog is a state actor provided that it is a judicially owned dog.

For some time, the circuit court has played around with malicious prosecution cases under Section 1983, and we are going to see a lot more of this type of claim. The decision in *Murphy*³³ is one on which they wrote an opinion last term. The holdings there are not earthshaking, but they are significant in the sense that this court is building a whole brick wall of malicious prosecution law, and a few more bricks have been laid here. One was that being required to attend court proceedings while the criminal charge is pending constitutes a seizure of one's liberty interest protected by the Fourth Amendment that is sufficient to support a claim of malicious prosecution.³⁴ Likewise as to being prohibited from leaving the state while the criminal charge is pending. The significance arises out of the court's turning to the Fourth Amendment's protection against unreasonable seizures, rather than the Fourteenth Amendment's protection against deprivation of liberty without due process. The problem the circuit court had, of course, is that if you view it as a due process claim, then *Parratt v. Taylor*³⁵ cuts in and says you do not have a federal claim under the due process clause if there is an adequate state remedy,³⁶ and of course, there is an adequate state remedy for malicious prosecution. The federal remedy is the same as the state remedy. However, if you can shift this analysis over to the Fourth Amendment, which the court did in this case, then the decision in *Parratt* is not applicable.³⁷ They also held that the dismissal of the underlying charge for lack of prosecution, a violation of the state Speedy Trial Act, constituted a "favorable termination" of the criminal proceeding and satisfied that requirement for a malicious prosecution claim.³⁸ Also of interest, at least to those people who represent plaintiffs, the court approved an attorney's fee based on

³³ *Murphy v. Lynn*, 118 F.3d 938 (1997).

³⁴ *Id.* at 951.

³⁵ 451 U.S. 527 (1981).

³⁶ *Id.* at 536-37.

³⁷ *Id.*

³⁸ *Murphy*, 118 F.3d at 951.

\$200 an hour,³⁹ which means they are only about six or seven years behind the times.

The last case I want to bring to your attention is an interesting problem with qualified immunity. The original view of the qualified immunity adopted by the Supreme Court in cases like *Scheuer v. Rhodes*,⁴⁰ was that public officials, at least the governor of Ohio, have to act on incomplete information.⁴¹ Qualified immunity originally was not only an objective concept, but it was also subjective, looking to good faith. It was called a "good faith immunity."⁴² The idea was that we give great discretion to a public official and we want him to use it. We want him to exercise his best judgment; therefore, if he acted reasonably under the circumstances and in good faith, he was immune from any claim of damages.⁴³ A number of Supreme Court cases said you get your qualified immunity because you have discretion.⁴⁴ In *Varrone*,⁴⁵ we have prison guards who got an order from their superior that a particular visitor who was coming to visit a particular prisoner was suspected of bringing drugs to the prisoner.⁴⁶ Therefore, they were ordered to subject the visitor to a strip search.⁴⁷ The visitor brought a suit saying there was no reasonable basis for putting me through the indignity and so forth. The question was: Do the guards have qualified immunity?⁴⁸ They had no discretion whatsoever. They were only taking orders. Qualified immunity in the past has always been tied into some level of discretion, but the circuit court said in this case that there was a kind of a derivative qualified immunity.⁴⁹ The supervisor had sufficient basis for ordering the strip search and, therefore, the guards who carried out the supervisor's order were protected since the supervisor would

³⁹ *Id.* at 952.

⁴⁰ 416 U.S. 232 (1974).

⁴¹ *Id.* at 245.

⁴² *Id.*

⁴³ *Id.* at 247-48.

⁴⁴ See, e.g., *Crawford-EL v. Britton*, 118 S. Ct. 1584, 1589-90 (1998); *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993).

⁴⁵ *Varrone v. Bilotti*, 123 F.3d 75 (1997).

⁴⁶ *Id.* at 77, 79.

⁴⁷ *Id.* at 79.

⁴⁸ *Id.* at 78.

⁴⁹ *Id.* at 81.

have been protected by qualified immunity. In effect, these guards were simply doing the supervisor's dirty work.⁵⁰ The court was obviously troubled by this case and indicated that it thought that this whole area might have to be rethought.⁵¹ I fully agree. There is something wrong in the qualified immunity area; it is not working out the way it was supposed to. Nevertheless, we have to deal with it as it comes down case by case.

That is the end of my comments about what the Second Circuit did with Section 1983 cases in the past year. I look forward to seeing you again next year.

⁵⁰ *Id.*

⁵¹ *Id.* at 82.

APPENDIX

SECOND CIRCUIT REVIEW

AN ANALYSIS OF § 1983 OPINIONS

FILED IN THE SECOND CIRCUIT

BETWEEN 6/1/97 AND 5/31/98

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This outline presents an overview of the opinions in cases brought under 42 U.S.C. §1983 that were written in the United States Court of Appeals for the Second Circuit during the one year from June 1, 1997, to May 31, 1998. It focuses on what kinds of disputes are being brought to the court, who brings them, what are the current problems in §1983 litigation, and how is the Second Circuit handling these problems.

CASES CONSIDERED.

In all of the 70 cases described and discussed here, the court wrote formal opinions; thus, the article does not consider the larger number of §1983 appeals that were decided by summary order. (A summary order is used when the panel members believe "that no jurisprudential purpose would be served by a written opinion". See: § 0.23 Rules of the Second Circuit.) We do not know how many such summary dispositions of §1983 cases there were. In general, however, approximately 60% of the court's dispositions have been by summary order over the past several years.

If that pattern held true during the period examined here, and if §1983 cases received a proportion of summary orders similar to other cases, then in addition to the 70 opinions filed, there were approximately 105 additional §1983 cases decided by summary order, probably all of which were affirmances. Thus, the total number of §1983 cases decided during the year was approximately 175.

STATISTICAL OVERVIEW

The total number of opinions found in §1983 cases was 70. The court reversed wholly or partially in 39 cases and affirmed completely in 31. If you factor in the approximately 105 summary-order affirmances this would produce an overall reversal rate of about 18%.

Plaintiffs appealed in 53 of the opinion cases (76%), defendants in 17 (24%). Plaintiffs prevailed in 37 cases (53%), defendants in 33 (47%).

WHO WAS SUING?

Citizens arrested: 11 cases (16%). These represent the Monroe v. Pape type of case charging unauthorized, abusive conduct that usually arises out of a search, arrest, or prosecution.

Prisoners: 20 cases (29%). 8 of these involved prison disciplinary hearings. Sandin v. Conner, 115 S.Ct. 2293 (1995), decided over 3 years ago, still creates problems in determining whether segregated confinement (i.e., SHU, keeplock, or solitary confinement) is atypical and creates significant hardship.

Employees: 13 cases (19%), including claims of retaliation, due process, and discrimination.

Businesses: In 6 cases (9%) a business challenged various forms of governmental regulation, usually on due-process grounds.

Other: 20 cases (29%). Plaintiffs in this miscellaneous category included such diverse parties as students, a litigant, property owners, and doctors.

WHO WERE THE DEFENDANTS?

By and large, the defendants are the ones to be expected opposing the various types of plaintiffs -- police, corrections officers, school boards and officials, and zoning authorities. 36 of the cases (51%) included an "entity" defendant, either alone or jointly with individual officials. None of the opinions addressed the issue of whether or not there was an unconstitutional "policy" under Monell v. Dept. of Social Services, 436 US 658 (1978).

PROCEDURAL CONSIDERATIONS

Procedural issues were prominent, sometimes dispositive, in 14 cases (20%):

Collateral estoppel and res judicata: Ferris, Marisol, and Irish.

Waiver: Arce, McCardle, and Phillips.

Standing: Jaghory and Muhammed.

Evidence: Ariza, Hynes, and Vitello.

Discovery: M.B. and Spencer.

Jurisdiction: Thomas.

16 of the appeals (23%) were taken from judgments entered after trial --9 jury trials and 7 bench trials. Summary judgments accounted for 25 (36%), and

15 (21%) involved dismissals under rule 12(b)(6). 4 appeals (6%) were from preliminary injunction orders.

Denial of immunity was the basis for 6 interlocutory appeals (9%), with defendants succeeding on 5 of those.

Of the 70 cases, 46 (66%) were heard by panels on which one of the three judges was a “visiting judge”, either from one the district courts in the second circuit or from outside the circuit. 10 of the 70 opinions were written by visiting judges. These unusual statistics simply reflect the extraordinary burdens placed on the judges of the circuit as a result of the four vacancies on the court that prevailed through most of the year. To ease those burdens the court has sought help from visitors.

The year revealed an unusually high number of First Amendment cases: (18, or 26% of the total). 15 involved claims of freedom of speech or association and 3 involved religious issues.

Prisoner litigation continues to command considerable attention from the Second Circuit. Altogether, the court wrote 20 opinions in cases brought by prisoners based on events or conditions in the states’ prisons. The trend of an increasing number of pro se appellants seems to be continuing. The court wrote opinions in 9 cases where the appellant appeared pro se – all of them prisoners. An interesting twist this year was the number of pro se appellants who were successful. At one time a pro se was almost certainly doomed to fail on appeal. Evidently, that is no longer the case because 5 of them were successful in getting the judgment reversed.

CASES of PUBLIC SIGNIFICANCE

Many people think of section 1983 actions as dealing only with claims involving police, corrections officers, arrestees, and prisoners. This is far too narrow a view of the usefulness and adaptability of a 1983 action. Many cases of significant public interest are brought and decided under section 1983. Among the significant public issues that the Second Circuit’s opinions dealt with last year were the following: [All the cases with full citations are listed alphabetically in the Appendix.]

Bad Frog (state liquor authority’s regulation of label on beer cans).

Bavaro (politically motivated discharge).

Beatie (NYC’s ban on cigar smoking in public places).

Bronx (statute prohibiting religious services on public school premises).

Buscetti (zoning ordinance regulating location of adult entertainment places).

Cappillino (entitlement to appropriate education under Americans with Disabilities Act).

Carlos (power of town to abolish its police department).

Coogan (politically motivated discharge).

Danahy (politically motivated discharge).

DeCarlo (restoration of professional license).

DeSario (validity of state system for allocating durable medical equipment among those needing it).

Doe (validity of New York's "Megan's Law").

Eclipse (regulation of sale of trading cards depicting crime and violence).

Elewski (constitutionality of Christmas cheche display).

Ferris (right of citizens to place proposition on ballot).

Harman (validity of agency's requirement for employees to obtain permission before speaking to press).

Irish (right of gay and lesbian group to participate in parade).

Jaghory (discrimination in licensing foreign trained physicians).

Marisol (claims of abused children on welfare for mishandling of their cases).

McEvoy (politically motivated discharge).

New York Magazine (regulation of ads on sides of MTA busses).

Ormiston (confinement of mentally ill people).

Sal (validity of ordinance regulating refuse collection in a town).

Thomas (validity of new, stringent requirements for taxicabs in NYC).

Vona (politically motivated discharge).

OPINIONS OF SPECIAL IMPORTANCE

Some of the Second Circuit's opinions deserve special comment because of their new or unusual rulings.

There were five opinions dealing with politically motivated discharges. In four of them (Bavaro, Danahy, McEvoy, and Vona), the discharging defendant was successful either because the employee was a "policy maker" as a matter of law, or because there was sufficient doubt to allow qualified immunity to the defendant. The fifth case, Coogan, is discussed below:

Annis. In gender discrimination case, a six-year gap between events defeats, apparently as a matter of law, a claim of a "continuing violation". Also, plaintiff's uncorroborated testimony of emotional distress was insufficient to establish any "concrete emotional problems". A new trial on damages only was ordered.

Atkins. Plaintiff who received nominal damages for his excessive force claim received a new trial because the jury also found the arrest was unlawful. The court reasoned: If there was no probable cause for arrest, defendant police officer could not reasonably use any force. Since plaintiff was admittedly bruised, at least, a compensatory award was required.

Coogan. In a politically motivated discharge case, the court applied the mixed-motive approach of Mt. Healthy School District v. Doyle, 429 US 274 (1977), to a city council's decision not to reappoint the city clerk. Remanding a judgment for the defendants, the court reasoned: "[W]e direct the district court to analyze each of the defendant[council members] individually, and determine whether a majority of them have established that they had a legitimate, nonpolitical motive for . . . voting against Coogan's reappointment . . ." The court added that if a majority of the council members had a legitimate motive, none of the members could be held liable. "[E]ven if some defendants based their decision solely on impermissible grounds, a finding that a majority of

defendants acted adversely to the plaintiff on legitimate grounds is sufficient for all to escape liability.”

Danahy. Qualified immunity defeated political discharge claim of medicaid fraud investigators, because at the time of discharge it was reasonable for defendants to believe the plaintiffs were policymaker/confidential employees. Question is for the court, not the jury.

Ferris. Court extends “in privity” concept to apply res judicata and defeat second claim by members of group seeking to require a referendum on campaign finance reform in New York City.

Harman. Court affirmed injunction against requirement of New York City’s Child Welfare Administration that its employees get advance permission before talking to the press. Pickering v. Board of Education protects the employees’ speech on matters of public concern.

Hemphill. Although a claim against an officer for using excessive force during an arrest may be asserted only under the fourth amendment, a claim that during an arrest the officer aided and abetted a private citizen to harm the plaintiff may be made under the 14th amendment’s due process clause.

Hili. Like federal probation officers, New York State probation officers are absolutely immune from damage claims based on the contents of a presentence report.

Hynes. When a district judge reviews a magistrate judge’s recommendation on a motion for summary judgment it is not error to consider additional evidence; nor is it error to refuse to consider additional evidence. It is a discretionary matter.

Mathie. In a case of homosexual abuse of a prisoner by a jailer, the circuit court affirmed compensatory damages of \$250,000, but reduced a punitive damage award from \$500,000 to \$200,000. On punitive damages the court held that the fact that defendant was being indemnified by the county provided a legitimate reason not to consider the defendant’s personal wealth. In addition, although the district court’s award satisfied the three “guideposts” for limiting the amount of punitive damages, as established in BMW v. Gore, 116 S.Ct. 1589 (1996), the court, by considering other punitive awards in comparable cases, determined that this award shocked the judicial conscience and therefore reduced it to \$200,000. Is the circuit court signaling an increased willingness to interfere with damage awards?

McCardle. In a case arising out of a traffic stop, the court carefully analyzes the intersection of a Terry stop with the illegal-search rules. Also, defendant’s failure to press qualified immunity claim until his JNOV motion caused a waiver of the defense.

McEvoy. Analyzing the interaction of Elrod v. Burns (politically motivated discharges) with Pickering v. Board of Education (free speech of public employees), the court concluded that “since a public employer is permitted to dismiss or demote a policymaking employee merely because it dislikes the employee’s political affiliation, the employer should be permitted to take the same action when the employee not only belongs to a disfavored party or holds the ‘wrong’ political beliefs, but additionally disrupts the workplace by speaking out.”

Monsky. Plaintiff claimed that when she visited the state-court clerk's office a dog owned by a state judge sniffed her under her skirt. The judge allegedly saw these incidents and did nothing to stop the dog. The circuit court held there was state action, because the dog was there only because the defendant was a judge. However, plaintiff's constitutional claim of a denial of access to the courts was held to be deficient, and plaintiff was left to her state-court remedies under Connecticut's "dog bite" statute.

Murphy. In a malicious prosecution case arising out of a traffic stop, the court held that simply being required to attend court proceedings and being prohibited from leaving the state constituted a seizure and therefore satisfied the Supreme Court's requirement of a deprivation of liberty rights under the fourth amendment. Additional holdings: (1) Existence of adequate state law remedy does not bar, under Parratt v. Taylor, a malicious prosecution claim based on the fourth amendment. (2) Dismissal for lack of prosecution constitutes a favorable termination in New York (good survey of law on favorable terminations). (3) Court let stand an award of attorneys fees based on \$200 per hour.

Phillips. As a matter of first impression, the court held that a grand jury's failure to indict does not establish as a matter of law that there was no probable cause to arrest.

Ricciuti. "When a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors he violates the accused's constitutional right to a fair trial, and the harm occasioned by such an unconscionable action is redressable in an action for damages under 42 U.S.C. § 1983."

Scott. As a matter of first impression, the court decided that in determining whether a prisoner's confinement imposed an "atypical or significant hardship" under Sandin v. Conner, 515 US 472 (1995), the court should look to the actual punishment imposed rather than the potential punishment.

Varrone. In a case based on a strip search of a visitor to prison, the qualified immunity available to the supervisor because he had a reasonable suspicion of drug smuggling into the prison also protected the subordinate officers who were merely executing an order to search the plaintiff, but who knew nothing of the background circumstances. The court questions the earlier decisions that tie qualified immunity to the "discretion" possessed by a public official. These defendants were performing ministerial tasks, with no discretion available to them; yet they derived their immunity from the person who gave the order to search.

ALPHABETICAL LIST OF CIVIL RIGHTS OPINIONS IN THE SECOND CIRCUIT 6-1-97 TO 5-31-98

Alexandre v. Cortes, 140 F.3d 406: NYC procedures for arrestee's recovery of seized property do not provide sufficient procedural protection. In 1972, Second Circuit set forth criteria to insure proper procedure, and City has still failed to implement some of them. Summary judgment for City reversed.

Annis v. County of Westchester, 136 F.3d 239: Affirmed finding of liability on plaintiff's claim of gender discrimination; damage verdict reversed because (1) evidence of pre-limitations period actions should be excluded, and (2) plaintiff's own testimony of mental distress is insufficient.

Arce v. Walker, 139 F.3d 329: Sandia v. Conner's "atypical and significant hardship" test applies to administrative as well as disciplinary segregation claims; plaintiff did not waive access-to-court claim by moving for summary judgment only on segregation claim.

Ariza v. City of New York, 139 F.3d 132: Court affirmed verdict for defendant on plaintiff's retaliation claim. District Court properly excluded evidence under FRE 803(8)(c), because proffered report was not based on factual findings and thus was not presumed trustworthy.

Atkins v. New York City, 143 F.3d 100: Jury verdict that plaintiff was the victim of false arrest and excessive force was inconsistent with award of nominal damages. Where finding of false arrest exists, excessive force can never be justified; therefore, compensatory damages are recoverable.

Bad Frog Brewery v. NYS Liquor Authority, 134 F.3d 87: NYS Liquor Authority's ban of Bad Frog's beer label violated commercial speech rights. Injunction granted, but qualified immunity barred 1983 damage claim and state-law damage claims were properly dismissed under supplemental jurisdiction, because they were novel or complex.

Bavaro v. Pataki, 130 F.3d 46: Dismissal of attorneys based on political affiliation was permissible under Elrod & Branti where positions were not protected by civil service and plaintiffs' positions allowed them to speak on behalf of the Health Commissioner, a policy maker.

Beatie v. City of New York, 123 F.3d 707: Ban on cigar smoking does not violate substantive due process even though studies are inconclusive with respect to the effects of cigar smoking. So long as legislature acts rationally in concluding cigar smoke is harmful, legislation will be upheld.

Bronx Household v. Community School District, 127 F.3d 207: Statute that prohibits religious services and teachings on school premises is not unconstitutional because it allows for free discussion of religious ideas and is viewpoint neutral.

Buzzetti v. City of New York, 140 F.3d 134: Obscenity ordinance regulating location of adult entertainment establishments does not violate 1st amendment or equal protection because City had substantial interest in regulating negative secondary effects of such businesses.

Cappillino v. Hyde Park Central School District, 135 F.3d 263: District court abused discretion in denying plaintiff's Rule 60(b) motion, which was timely even though filed nine months after district court dismissed plaintiff's request to cancel settlement agreement.

Carlos v. Santos, 123 F.3d 61: Town board members are legislatively immune for abolition of town police department. No injunction against town, but plaintiff police officers may have damage claim.

Catanzaro v. Weiden, 140 F.3d 91: Issues of fact barred summary judgment on plaintiff's equal protection and due process claims for damages from demolition of damaged buildings.

Chance v. Armstrong, 143 F.3d 698: Pro se prisoner plaintiff sufficiently alleged potential 8th amendment violation and deliberate indifference for failure to provide dental care for his severe tooth pain. 12(b)(6) dismissal was premature.

Coogan v. Smyers, 134 F.3d 479: In political discharge of city clerk where mixed motive analysis applies to city council's action, court must examine motives of each council member. If a majority had legitimate motives, no member is liable.

Danahy v. Buscaglia, 134 F.3d 1185: Political discharge of medicaid prosecutors, claimed to be policymaking/confidential employees. Qualified immunity barred claims.

Davidson v. Mann, 129 F.3d 700: Pro se inmate failed to show that limitations on purchase of stamps interfered with ability to send non-legal mail. Restriction was reasonably related to legitimate penological interest in limiting currency within prison.

DeCarlo v. Fry, 141 F.3d 56: Home day care provider's damages for delay in reinstating license remanded for clarification as to liability in official capacity.

DeSario v. Thomas, 139 F.3d 80: Court vacated injunction against Connecticut's Dept. of Social Services on system for allocating durable medical equipment. There is no right to receive any & all medical devices that might alleviate a medical condition. DSS has flexibility in designating equipment.

Doe v. Pataki, 120 F.3d 1263: Court evaluates New York's "Megan's Law" for ex-post facto violation and holds that legislation was enacted for a legitimate governmental purpose other than to punish sex offenders and is not punitive in effect. Therefore, no violation.

Eclipse v. Gulotta, 134 F.3d 63: County's ban on trading cards depicting violence or criminal activity violated 1st amendment because there was insufficient evidence that this was a necessary and effective method to further compelling interest in preventing juvenile crime.

Elewski v. City of Syracuse, 123 F.3d 51: Christmas creche did not violate 1st amendment. Strong dissent by Cabranes, CJ.

Ferris v. Cuevas, 118 F.3d 122: Plaintiff's federal court action barred by res judicata. Plaintiffs were in privity with those in state court action seeking to require referendum on campaign finance reform. Connection between the parties is very strong and issues should have been litigated in state court.

Fischl v. Armitage, 128 F.3d 50: Inmate's claim that corrections officer opened his cell to allow other inmates to beat him should not have been dismissed on summary judgment. Trial judge did not draw all favorable inferences in favor of the plaintiff and engaged in credibility assessments.

Hankard v. Town of Avon, 126 F.3d 418: Police advisory board was not protected by 1st amendment where board refused to reconsider and resubmit report of racial bias in the police department requested by police chief. Police chief was ultimate authority, and board's refusal amounted to insubordination.

Harman v. City of New York, 140 F.3d 111: Pursuant to Renton, city's Child Welfare Agency cannot require its employees to seek preauthorization to speak to the press about the internal policies at the agency. Matter is of great public concern and preapproval would deter employees from speaking.

Hemmings v. Gorczyk, 134 F.3d 104: Pro se prisoner's "deliberate indifference" claim for serious medical injury should not have been dismissed summarily.

Hemphill v. Schott, 141 F.3d 412: District court erred in resolving sharply disputed issues in favor of the defendants on a summary judgment motion. Qualified immunity should have been denied because there was evidence of defendant's unconstitutional motive for use of force.

Hendricks v. Coughlin, 114 F.3d 390: No determination on prisoner's retaliation claim because district court improperly denied plaintiff counsel. Plaintiff need not survive a dispositive motion to be eligible for legal assistance. Assistance may determine whether plaintiff can survive the motion.

Hili v. Sciarrotta, 140 F.3d 210: Probation officers are entitled to absolute immunity from suit for damages based on statements made in presentence report.

Hynes v. Squillace, 143 F.3d 653: District court has authority to consider supplemental evidence offered after magistrate judge issues recommendation. Here, plaintiff did not suffer any prejudice from district court's consideration and failed to offer any evidence to controvert the new evidence.

Ierardi v. Sisco, 119 F.3d 183: Sexual harassment is not within the scope of employment of a corrections officer and is not protected by the immunity granted by NY Corrs. Law Sec 24.

Irish Lesbian and Gay Organization v. Giuliani, 143 F.3d 638: As-applied challenge to city parade ordinance was not barred by previous case on facial challenge. Issue was not moot because capable of repetition yet evading review. Organization has standing to recover compensatory damages.

Jackson v. Suffolk County Homicide Bureau, 135 F.3d 254: Dismissal of pro se arrestee's claims surrounding arrest was improper under Heck v. Humphrey, because claims did not affect validity of plaintiff's conviction in state court. Stay appropriate pending state-court appeal.

Jaghory v. NYS Dept of Education, 131 F.3d 326: All physicians in NY are required to do a one-year residency before licensing. Therefore, naturalized citizen educated in foreign school did not suffer injury in fact when he was given a two-year credit towards three-year requirement for nonresidents.

LaBounty v. Coughlin, 137 F.3d 68: In pro se prisoner's 8th amendment claim, court reversed grant of qualified immunity, finding that in 1991-92 a reasonable person would have understood that exposure to friable asbestos could constitute an 8th amendment violation.

LeBlanc-Sternberg v. Fletcher, 143 F.3d 748: Award of nominal damages and injunctive relief was sufficient to support grant of attorneys' fees to prevailing party in 1983 discrimination claim where relief substantially altered the legal relations of the parties.

LeBlanc-Sternberg v. Fletcher, 143 F.3d 765: Jury verdict in favor of defendant in plaintiff's 1983 claim was insufficient in and of itself to entitle prevailing defendant to attorneys' fees. Insufficient evidence to conclude that plaintiff's claim was frivolous, groundless, or unreasonable.

M.B. v. R.M.Reish, 119 F.3d 230: Pro se prisoner argues that failure by the court to advise him of the consequences of failing to answer summary judgment

motion mandates reversal. Even if true, however, the plaintiff answered the motion with a motion, cross-motion, and exhibits.

Marisol v. Giuliani, 126 F.3d 372: Court affirmed class certification of allegedly abused children in suit against welfare officials for mishandling their cases. Plaintiffs met requirements under FRCP 23 for class certification.

Mathie v. Fries, 121 F.3d 808: Court affirmed \$250,000 compensatory award in case of sexual abuse of prisoner by jailer and remands \$500,000 punitive dmg award to DC, not to exceed \$200,000. Ct applied stnds from *BMW v. Gore* and holds punitive dmgs are not in line with similar cases.

McCardle v. Haddad, 131 F.3d 43: In context of search after a Terry Stop, court discusses liability issues. \$1.00 to P and \$.33 attorney's fee affirmed. Because defendant did not follow procedural requirements, he waived his qualified immunity defense.

McEvoy v. Spencer, 124 F.3d 92: Where the lines between protected speech and political affiliation are blurred, adverse action may be taken against a policy maker based upon political affiliation even if the employer was also motivated in part by speech protected under Pickering.

Monsky v. Moraghan, 127 F.3d 243: Judge's dog's sniffing under plaintiff's skirt was not a constitutional violation. Ability to bring his dog into Clerk's office was due solely to his stature as a judge and satisfied "under color of state law" element.

Muhammad v. City of N.Y. Dept of Corrections, 126 F.3d 119: Plaintiff's request for injunction was denied and case dismissed as moot because plaintiff was paroled after filing complaint alleging violation of 1st amendment freedom of religion. Court held that plaintiff no longer had a personal stake.

Murphy v. Lynn, 118 F.3d 938: Court held that a 4th amendment post-deprivation liberty interest violation supporting malicious prosecution claim occurred when the plaintiff was arrested without probable cause and was required to remain within the state and attend court hearings.

New York Magazine v. Metropolitan Transit Authority, 136 F.3d 123: Advertisements displayed on the side of MTA buses criticizing the mayor are protected by 1st amendment. MTA has created a public forum by displaying commercial and political ads; therefore, MTA cannot discriminate based on viewpoint.

Ormiston v. Nelson, 117 F.3d 69: Statute of limitations' accrual date in a 1983 action for medical or psychiatric confinement will depend on the specific circumstances of the confinement. For mental patients "Singleton rule" (initial date of confinement) is not appropriate.

Phelps v. Kapnolas, 123 F.3d 91: Seven-day bread diet may constitute a violation of the 8th amendment. Sec. 1915 dismissal wrong; appointment of counsel was warranted.

Phillips v. Corbin, 132 F.3d 867: Notice of appeal must be filed within 10 days of verdict even though motion for reconsideration of jury verdict, filed more than 10 days after verdict, is pending. Grand jury's failure to indict does not establish lack of probable cause to arrest.

Pirozzi v. City of New York, 117 F.3d 722: No 5th amendment violaton occurs when incriminating statments made by a police officer during an internal

investigation are turned over to the DA's office so long as the DA does not use such statements. No due process violation because no reasonable expectation of privacy from DA's office.

Ricciuti v. N.Y.C. Transit Authority, 124 F.3d 123: Summary judgment premature where there were genuine issues of material fact as to whether defendants falsified police reports.

Sal Tinnerello & Sons v. Stonington, 141 F.3d 46: No preliminary injunction against ordinance prohibiting private contractors from collecting waste in the town. Plaintiff showed neither irreparable harm nor likelihood of success under commerce clause or impairment of obligations clause.

Samuels v. Mockry, 142 F.3d 134: Summary judgment for jailer reversed where district court engaged in resolution of disputed factual issues and district court failed to engage in Sandin v. Conner analysis for prison disciplinary proceedings.

Schwapp v. Town of Avon, 118 F.3d 106: Summary judgment reversed in hostile work environment claim (racial) because district court did not consider incidents where plaintiff was not present, and wrongly rejected affidavits as vague and conclusory. Must consider all circumstances.

Scott v. Albury, 138 F.3d 474: Prisoner's disciplinary claim reversed because district court applied wrong regulations. Court declared (first impression) that the period of time to be considered in a Sandin v. Conner case is the "actual" confinement period, not the maximum allowable period.

Scotto v. Almenas, 143 F.3d 105: Parole officers enjoy qualified, not absolute, immunity for issuance of warrant to arrest parolee in violation. Here, issues of one parole officer's motive cannot properly be decided on 12(b)(6). Remanded.

Sealey v. Giltner, 116 F.3d 47: Plaintiff alleged due process violation, arguing that his confinement was disciplinary in nature and the length of confinement was indefinite. District court must consider whether defendants acted in bad faith by labeling as administrative a confinement that was punitive.

Simms v. Village of Albion, 115 F.3d 1098: Arresting officers get qualified immunity even if warrant is invalid, because it was reasonable to rely on issuing magistrate.

Spencer v. Doe, 139 F.3d 107: Rule 41(b) dismissal of pro se inmate's complaint was error. 41(b) dismissals should be reserved for rare cases because of their preclusive effect. Plaintiff acted diligently and in good faith to comply with court order to provide addresses of the named defendant.

Taylor v. Brentwood, 143 F.3d 679: Principal's reporting allegations of corporal punishment was not proximate cause of school teacher's suspension, because it was school board's intervening decision that suspended plaintiff.

Thomas v. City of New York, 143 F.3d 31: Minority livery owners' claim that NYC ordinance violated equal protection, substantive due process, and procedural due process was rejected. Plaintiff did not offer sufficient evidence of discriminatory intent. Procedural due process claim not ripe for review because none of plaintiffs had yet been denied a permit.

Tiernev v. Davidson, 133 F.3d 189: Entry into plaintiff's home on call of domestic violence, resulting search of premises, and restraining plaintiff by

wrists all were reasonable where known history of domestic violence existed. Qualified immunity should have been granted.

Tucker v. Outwater, 118 F.3d 930: Judicial immunity applies to even the gravest procedural errors so long as judge acts within her jurisdiction. Town justice arraigned plaintiff, an act within her jurisdiction. Even though procedural errors occurred, Judge was entitled to judicial immunity.

Valentin v. Dinkins, 121 F.3d 72: Prisoner, acting pro se, was unable to obtain information to identify police officer who assaulted plaintiff. District court dismissed plaintiff's case. Held, district court has an obligation to assist a pro se litigant in obtaining the information.

Varrone v. Bilotti, 123 F.3d 75: Subordinate corrections officers who performed strip search had qualified immunity because they merely executed the order of their superior who had discretion and qualified immunity. Ministerial/discretionary distinction for qualified immunity was questioned.

Vitello v. Ambrogio, 130 F.3d 59: Summary dismissal of plaintiff's due process claim not supported by record. Sua sponte dismissal of equal protection claim improper because district court did not give plaintiff notice that it intended to dismiss.

Vona v. County of Niagara, 119 F.3d 201: 1st amendment protection against politically motivated dismissal does not extend to Assistant Social Service Attorneys since political loyalty is reasonably connected to performance of the duties inherent in the office. Summary judgment for defendant affirmed.

Walker v. McClellan, 126 F.3d 127: A hearing officer is justified in denying inmate the right to call witnesses in a disciplinary hearing when the inmate fails to articulate the relevancy of the witnesses' testimony. Qualified immunity proper.

Wright v. Coughlin, 132 F.3d 133: In evaluating whether disciplinary proceedings are "atypical and significant" under Sandin, the district court must consider length of confinement. 288 days in disciplinary confinement may constitute "atypical and significant" actions. Summary dismissal reversed.