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Section 1983 in the Second Circuit

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SECTION 1983 IN THE SECOND CIRCUIT

Hon. Leon D. Lazer:

We have a little bonus in this program today. We are going to review the significant holdings of the United States Court of Appeals for the Second Circuit. Judge Pratt, Professor of Law at Touro Law Center, will discuss the Second Circuit holdings.

Judge Pratt, as you know, served as a member of the Court of Appeals for the Second Circuit following his distinguished career as a Federal District Judge for the City of New York. He came to that bench with a great background, particularly in municipal law. He has served as a law clerk to Judge Froessel of the New York Court of Appeals. He has served as Special Counsel to the Board of Supervisors of Nassau County and to many of the municipalities in Nassau County. He is a graduate of Yale Law School and he is a professor of this law school, of whom we are extremely proud. So, Judge Pratt and Professor Pratt, we would love to hear about the Second Circuit.

Hon. George C. Pratt:

Thank you, Leon. Professor Schwartz, you upset me. For many years, I have been training myself in everything that I had written to get rid of the Latinisms. I had always been under the impression that when a lawyer or a judge uses a Latinism, it is because things have gone out of focus. They do not really know what they are talking about, and if they cover it up with a Latinism, then nobody else will really understand it either because they do not understand the Latinism. Now, you say the Supreme Court uses a Latinism to say we really mean it. And you have told me now that by eliminating all the Latinisms from my opinions you say I never really meant anything. I have been

teaching students in appellate advocacy not to use Latinisms. My whole writing style has to change.

You may wonder why, in a Supreme Court conference, I am here talking about the Second Circuit. Well, I am here and that is what I am going to talk about. From the point of view of this ex-Second Circuit Judge, even while I was on the Circuit, you look at the Supreme Court and you cannot help but get the impression that with their legal and philosophical abilities, playing around with a lot of the theory and doctrine, they are trying to keep the conceptual process together. But in the Circuit Court, where appeals are taken as a matter of right and there is no choice, you deal with everything. And you are much closer to being down there in the mud, rubbing around resolving everyday, real problems. Of course, the Supreme Court stands there, ready to review whatever the Second Circuit may have done wrong.

It is of some amusement to me to take a look at what the Second Circuit does in the area of municipal litigation, which is basically Section 1983.¹ I look at it year by year, June to June. This past year, ending this past June, is the first year that the Second Circuit has been operating for a full year without my presence. How did they do? Well, to begin with, I was told last week by Judge Altimari² - I do not know if he is accurate on his numbers, but I have no reason to doubt them - there were twelve appeals from the Second Circuit to the Supreme Court that the Supreme Court took³ Significantly, the one case which they affirmed is an opinion by Judge Altimari.⁴

Anyway, what has the Second Circuit done over this past year? One of the basic overall patterns in this area of Section 1983

1. 42 U.S.C. § 1983.

2. Judge Frank X. Altimari is a Senior Judge for the United States Court of Appeals for the Second Circuit.

3. *See Performance in the U.S. Supreme Court*, N.Y. L.J., September 27, 1996, at 3.

4. *See Lewis v. United States*, 116 S. Ct. 2163, 2168 (1996) (affirming the Second Circuit's holding that the offense of obstructing the mail, which carries a 6 month maximum prison sentence, should be treated as a petty offense, thus not entitling the defendant to a jury trial even when several counts are tried together).

concerned the municipalities and municipal officials.⁵ The pattern is very similar to what it was the previous year. They wrote opinions in 55 cases. The previous year they wrote 50. Of course, that is not the full extent of the Section 1983 litigation.

The Second Circuit uses a summary order procedure, and you can generally figure that it is roughly two summary orders for every opinion. There is no way to know precisely how many of the summary orders relate to Section 1983 issues because the orders simply resolve the issues in the case. Without full discussion, the judgment decrees that the district judge is affirmed, maybe for the reasons set by the district court, or maybe just affirmed, period. They use that type of order, of course, when they find there is no jurisprudential purpose in writing an opinion.

At least in 55 cases they found there was a jurisprudential purpose in writing an opinion. Overall, this represents the work of roughly 10 percent of the Court. In handling them, there were 32 reversals and 23 affirmances. Adding summary orders, all of which are affirmances, you get a reversal rate of somewhere around 24 percent, which is not far off, and is normally what is expected in the Circuit Court.

In terms of the opinion cases, who is winning? In 42 percent of the cases, the plaintiff won in the Circuit Court and in 58 percent, the defendants won. In short, there is nothing really startling about this overall picture and the flow of litigation during the past year.

In terms of who is bringing these cases up to the Circuit Court, the cases that get the attention in terms of opinions, not surprisingly, come from people most familiar with the work of the courts. The greatest number, 36 percent, which consists of a

5. *See, e.g., Kaplan v. County of Sullivan*, 74 F.3d 398 (2d Cir. 1996) (concerning a county resident's action to set aside a county redistricting plan alleging that the plan diluted his vote for county legislator by excluding prisoners from the population base for redistricting purposes); *Greenwich Citizens Committee, Inc. v. Counties of Warren and Washington Industrial Development Agency*, 77 F.3d 26, 31 (2d Cir. 1996) (holding that retaliatory intent is required for governmental liability in retaliatory First Amendment claims).

third of the cases in which they wrote opinions, involve prisoners.⁶ It is not surprising that the number of cases brought by prisoners has increased because we have doubled the number of prisoners. We keep throwing people in jail and give them nothing to do. Why should not they be generating litigation? It is a national pastime for them. Many of the cases they bring complain about the disciplinary proceedings within the prison.⁷ They are not noted for careful observance of due process rights,⁸ but they are getting a little better in New York. Others cases complain about the various types of prison conditions, whether they are getting kosher meals, or color television, or whatever. They have all kinds of grievances. But the prisoners are becoming better and better in framing those grievances under Section 1983.⁹ Some of them get more and more attention of the Courts and even more and more attention of the Second Circuit.

6. *See, e.g.*, *Champion v. Artuz*, 76 F.3d 483 (2d Cir. 1996) (rejecting a prisoner's claims under 42 U.S.C. § 1983 against prison officials for revocation of his conjugal rights and a search of his prison cell in retaliation for his complaints about denial of conjugal visits); *Hayes v. New York City Dep't of Corrections*, 84 F.3d 614 (1996) (dismissing a prisoner's appeal from a decision granting summary judgment against his Eighth Amendment claim); *Koehl v. Dalsheim*, 85 F.3d 86 (2d Cir. 1996) (remanding a prisoner's appeal claiming an unconstitutional deprivation of medical attention for his eye condition); *Laza v. Reish*, 84 F.3d 578 (2d Cir. 1996) (raising a 42 U.S.C. § 1983 action claiming punitive detention and deprivation of prisoner's liberty interest by segregating him from the general population without a hearing).

7. *See, e.g.*, *Black v. Coughlin III*, 76 F.3d 72 (1996) (regarding a prisoner's 42 U.S.C. § 1983 action to recover damages as a result of an improperly conducted disciplinary hearing).

8. *See, e.g.*, *Branhan v. Meachum*, 77 F.3d 626 (2d Cir. 1996) (claiming Eighth Amendment and Due Process violations); *Laza v. Reish*, 84 F.3d 578 (2d Cir. 1996) (claiming Due Process and Fifth Amendment violations); *Champion v. Artuz*, 76 F.3d 483 (2d Cir. 1996) (claiming Due Process and Equal Protection violations).

9. *See, e.g.*, *Laza v. Reish*, 84 F.3d 578 (2d Cir. 1996) (addressing a prisoner's claim that he was subjected to unlawful punishment upon his transfer from state to federal prison brought under 42 U.S.C. § 1983); *Johnson v. Bax*, 63 F.3d 154 (2d Cir. 1996) (instituting a 42 U.S.C. § 1983 action against the police department and the City of New York for First Amendment deprivation when demonstrator was arrested for displaying an anti-Clinton sign); *Allen v. Coughlin III*, 64 F.3d 77 (2d Cir. 1996) (bringing an action

About 16 percent of the cases that the Court wrote on involved what many people think of as a typical Section 1983 case: confrontations between citizens and police,¹⁰ false arrest,¹¹ malicious prosecution,¹² and brutality cases.¹³ Employees involved about 15 percent of the claims that were addressed.¹⁴ Business owners complaining about excess municipal regulation account for about 9 percent.¹⁵ About 7 percent concerned students complaining about what is going on in the schools.¹⁶ And then there is a whole bunch of other cases.¹⁷ Not an atypical

under 42 U.S.C. §§ 1981 and 1983 alleging authorities violated the inmate's rights to due process and equal protection by seizing his newspaper clippings).

10. *See, e.g.*, *Lennon v. Miller*, 66 F.3d 416 (2d Cir. 1996) (instituting an action against police officers under 42 U.S.C. § 1983 for forcibly removing woman from an automobile after she refused to do so voluntarily).

11. *Id.*

12. *See, e.g.*, *Johnson v. Bax*, 63 F.3d 154 (2d Cir. 1996).

13. *See, e.g.*, *Blisset v. Coughlin III*, 66 F.3d 531 (2d Cir. 1995) (affirming a judgment in favor of an inmate for claims of unnecessary force and his condition of confinement by correctional officers); *Allen v. Coughlin III*, 64 F.3d 77 (2d Cir. 1996) (finding prison officials were entitled to qualified immunity when guards seized newspaper clippings twice from prisoner).

14. *See, e.g.*, *Jayaraj v. Scappini*, 66 F.3d 36 (2d Cir. 1996) (challenging the City's failure to renew the municipal employee's employment contract under 42 U.S.C. § 1983); *Jemmott v. Coughlin*, 85 F.3d 61 (2d Cir. 1996) (claiming racial discrimination against an employee by co-employees in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1), and in violation of U.S.C. §§ 1981 and 1983).

15. *See, e.g.*, *Blue v. Koren*, 72 F.3d 1075 (2d Cir. 1995) (alleging that Medicare participants in nursing home were subject to over-rigorous governmental regulations and inspections).

16. *See, e.g.*, *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996) (addressing a claim by students against their school district under the Equal Access Act, 20 U.S.C. §§ 4071-4074, for denial of a provision in their Bible study club charter restricting officers of the club to the Christian faith); *Gant v. Wallingsord Board of Education*, 69 F.3d 669 (2d Cir. 1995) (asserting racial discrimination as the basis of the school board's decision of a first grade kindergarten student being left back one grade).

17. *See, e.g.*, *Kolonsi v. New York State Office of Mental Retardation and Developmental Disabilities*, 64 F.3d 810 (2d Cir. 1996) (discussing a 42 U.S.C. § 1983 claim brought by a former psychologist alleging the state violated his Fourteenth Amendment substantive and procedural due process

array of types of people who are complaining. It is kind of staggering, the problems that governments can get into. Of course, the prison conditions are always there as are the problems with the police, false arrest and brutality.¹⁸

One of the cases that the Court dealt with was a SLAPP suit, which stands for Strategic Litigation Against Public Participation.¹⁹ It typically comes up in the zoning context. For example, somebody applies for a permit, and the civic association or neighborhood association takes concerted action before the boards, and sometimes in Court, to prevent the project from going ahead. Whenever you delay a construction project, you cause extra costs to the developer, and those costs sometimes can be recovered in a SLAPP suit. The Greenwich case, however, was different: it was a claim against a municipality for bringing a SLAPP suit.²⁰ Because it falls within the classic cases that Professor Schwartz mentioned, retaliation cases, the Supreme Court had already dealt with what the standards should be.²¹

There were many other types of issues that were involved in these Section 1983 actions. One challenged a state requirement for bumper tests on cars.²² Another was whether the rule that

rights when it suspended him without pay even though he was found falsely accused of sexual misconduct); *Kaluczky v. City of White Plains*, 57 F.3d 202 (2d Cir. 1995) (alleging the mayor and his administration violated a city personnel officer's First and Fourteenth Amendment rights).

18. See *supra* notes 6 and 9.

19. See *Greenwich Citizens Committee, Inc. v. Counties of Warren and Washington Industrial Development Agency*, 77 F.3d 26 (2d Cir. 1996). The issue in *Greenwich* was "whether a governmental defendant in an underlying state court lawsuit must be shown to have acted with retaliatory intent in filing counterclaims before it may be held liable for chilling the First Amendment rights of the plaintiffs who brought the lawsuit." *Id.* at 27-28.

20. See generally William B. Chapman, *LaPointe v. West Contra Costa Sanitary District*, C935 ALI-ABA 155 (1994) (describing the first successful SLAPP suit initiated under 42 U.S.C. § 1983).

21. In *Greenwich*, the Second Circuit explains that "[t]he question in each case . . . [is] whether the underlying constitutional right contains any state-of-mind requirement." *Greenwich*, 77 F.3d at 30.

22. See *Ass'n of Int'l Auto. Mfrs. v. Abrams*, 84 F.3d 602 (2d Cir. 1996) (concerning whether a statute relating to car bumpers violates the Commerce and Due Process Clauses).

denies prisoners the right to vote²³ is unconstitutional because it discriminates against blacks and Hispanics, based upon disproportionate numbers of prisoners in those racial categories.²⁴ The Town of Smithtown had problems in the Second Circuit with a garbage flow control ordinance.²⁵ It required that all the garbage in Smithtown be processed in the way Smithtown said.²⁶ But they cannot do it, according to the Second Circuit, since it violates the commerce clause.²⁷ A claim under Section 1983 regarding retaliatory inspections of nursing homes also came under the Second Circuit's scrutiny,²⁸ as did questions of the conditions under which a religious club can operate in a public school.²⁹ There was still another school case, whether or not a school could require a student's public service as a condition of graduation.³⁰ There were also a couple of reapportionment cases before the Second Circuit.³¹

All of these cases come under Section 1983. They present the kinds of problems that municipal lawyers may have to face. You can directly challenge the ordinance, or assert that the municipal policy or custom violates some constitutional provision.³² In none of the cases where opinions were written was there any discussion about the issue of whether or not there was a municipal policy or custom. This used to be one of the issues that kept coming up time and time again, but it seems to have disappeared, at least temporarily, from the radar screen.

23. N.Y. ELEC. LAW § 5-106(2)-(5) (McKinney 1978).

24. *See Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996).

25. *See SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995).

26. *Id.* at 507.

27. *Id.* at 518.

28. *See Blue v. Koren*, 72 F.3d 1075 (2d Cir. 1995).

29. *See Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996); *supra* note 16.

30. *See Immediato v. Rye Neck School District*, 73 F.3d 454 (2d Cir. 1996).

31. *See, e.g., Roxbury v. Delaware Co. Bd. of Supervisors*, 80 F.3d 42 (2d Cir. 1996) (finding no equal protection violation on claim brought under 42 U.S.C. § 1983 challenging the weighted voting system).

32. *Id.* at 44 (alleging that the method of electing members of the Board violates the Equal Protection Clause of the Fourteenth Amendment).

Now, not surprisingly, the big issues in the Second Circuit are similar to the big issues in the Supreme Court. Litigation runs in phases, fads. Courts seem to focus on similar types of issues around the country at given times. I guess this is because lawyers come to seminars and do things to get ideas. And the two big Section 1983 issues before the Circuit Court are the same as the two big issues before the Supreme Court this past year, qualified immunity³³ and retaliation claims.³⁴ The goal of the Supreme Court in adopting their qualified immunity standard in *Harlowe v. Fitzgerald*³⁵ was to get rid of more of these Section 1983 cases than had been disposed of by means of summary judgment. Cut them off at the pass, in effect. When you take *Harlow* and combine it with the right of interlocutory appeal, it casts a design on the big board, Professor Schwartz said it probably does not exist in the Supreme Court, but it certainly appears to. The design is, first, you get rid of the subjective standard of qualified immunity so you can dispose of it by summary judgment.³⁶ Then, you get it ruled upon definitively at the beginning of the case and you get rid of a lot of cases.

Well, this past term the design worked very nicely. There were ten immunity appeals of an interlocutory nature.³⁷ Defendants succeeded in seven of them, which means that seven cases

33. See, e.g., *Lowth v. Town of Cheektowaga*, 82 F.3d 563 (2d Cir. 1996) (granting qualified immunity to police for all charges except resisting arrest); *Harlow v. Fitzgerald* 457 U.S. 800 (1982) (identifying that qualified immunity would not be available if an official “*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [person], or if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury”) (alteration in original) (citation omitted).

34. See, e.g., *Rivera v. Senkowski*, 62 F.3d 80 (2d Cir. 1995) (alleging retaliation for filing various grievances).

35. 457 U.S. 800 (1982).

36. See, e.g., *Blue v. Koren*, 72 F.3d 1075 (2d Cir. 1995) (granting summary judgment for qualified immunity in retaliation claim); *Colon v. Coughlin* 58 F.3d 865, 868 (affirming summary judgment on prisoner’s retaliation claim challenging retaliatory imposition of discipline).

37. See, e.g., *Jemmott v. Coughlin*, 85 F.3d 61 (2d Cir. 1996); *Bove v. Kennedy*, 101 F.3d 108 (2d Cir. 1996); *Genas v. State of New York Dep’t of Correctional Servs.*, 75 F.3d 825 (2d Cir. 1996).

appealed immediately, and were thrown out. This is more than just a mere delay from the plaintiff's point of view. They lost, period, at least those seven cases. Earlier today, Professor Schwartz did talk about this balancing chart. Somebody in the Supreme Court said, well, we have helped the plaintiffs here by recognizing retaliation claims, therefore we will help the defendants by doing qualified immunity, something similar to what they did a while back with municipalities where they said that they do not have any qualified immunity,³⁸ but to make up for that the court held they cannot be held liable for punitive damages.³⁹ And they did that within a couple weeks of each other, as I recall. I do not know if they have such a balancing chart and whether that is good or bad, I do not know. It does not matter, and whether or not there is a balancing chart, these two issues of qualified immunity and retaliation get to intersect, as they did in the Second Circuit in *Blue v. Koren*.⁴⁰ Let me hold the *Blue* case for just a minute. I think I can finish up with that.

I would like to say a little bit more about the retaliation problems in the Second Circuit. The idea of a retaliation claim got its start in the First Amendment area, the idea that you speak out and get knocked down because you spoke. If government can do that to you, they are indirectly depriving you of your right to speak. The theory behind this is, if you look at it generally, it can be applied to any right that a person has. If he can be penalized in some way for asserting that right, it detracts from the right. It makes it less meaningful or maybe deprives him entirely of the right. In analytical terms, you can compare it to an outright discrimination claim. A typical race discrimination claim is when you treat someone differently because of their race.⁴¹ It is really that you treat them differently because of what they are. A retaliation claim is simply that you treat them differently

38. See *Owen v. City of Independence*, 445 U.S. 622 (1980).

39. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

40. 72 F.3d 1075 (2d Cir. 1995).

41. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216, 218 (1944) (holding that although restrictions curtailing rights of a particular racial group are subject to "the most rigid scrutiny," it was not beyond the power of Congress to place restrictions on Japanese citizens for the public safety).

because of what they did. If what a person does is something they have a right to do, a federal right to do, or more narrowly a constitutional right to do, then it should fit into this retaliation type analysis. It is only gradually that the courts have begun to recognize this. Without a retaliation claim, many of the constitutional rights would be, or could be, eroded by government. So, the retaliation claim has, for a long time, presented a potent weapon for plaintiffs and a serious caution for defendants in the civil rights litigation area.

It is only in the last three or four years that we have been seeing serious recognition of a retaliation claim in the circuit courts, and now even the Supreme Court is getting into the act. These claims can be applied to a variety of situations; just this past year these retaliation claims were recognized in the Second Circuit: an over-rigorous inspection of nursing homes,⁴² a SLAPP suit case,⁴³ employment discharge,⁴⁴ or disciplinary action against an employee.⁴⁵ It does not have to be a discharge. It can be failure to promote, it can be that someone was sent to Siberia or something, simply for making a complaint. This is a whistle-blower-type thing, bringing a lawsuit.

A Seventh Day Adventist said his employer was not making a reasonable accommodation to his inability to work on Saturday, and brought a suit and won.⁴⁶ The employer dumped on him in other ways, and there was a retaliation claim recognized in that context.⁴⁷

An arrest was made of someone for carrying an anti-Clinton sign at a political demonstration in the City of New York.⁴⁸ The claim was based on retaliation, not on whether there was probable cause, but whether the only reason that police arrested him was because of the political message that he had on the sign.

42. *See id.*

43. *See* Greenwich Citizens Committee, Inc. v. Counties of Warren and Washington Industrial Development Agency, 77 F.3d 26 (2d Cir. 1996).

44. *See* Bernheim v. Litt, 79 F.3d 318 (2d Cir. 1996).

45. *Id.*

46. *See* Genas v. DOCS and Coughlin, 75 F.3d 154 (2d Cir. 1995).

47. *Id.*

48. *See* Johnson v. Bax, 63 F.3d 154 (2d Cir. 1995).

In another arrest situation, a person claimed that he was arrested because he objected to the police for the brutal treatment they were giving to his friend.⁴⁹ And they said, "Oh, yeah? You don't like what we're doing? You're under arrest, too." The issue was liability for retaliatory arrest. Frequently we get retaliation claims in a prison situation. A prisoner files a grievance, and then the administration dumps on him. The prisoner argues: "The reason you dumped on me is because I objected."

There is a wide variety of possible examples.⁵⁰ In general, in any situation where you have someone who has authority over someone else, you have the potential for a retaliation claim. Of course, this is not only employer-employee, but anybody who is issuing permits, anybody who does inspections, anybody who does arrests, and so on and so forth. The potential of the use for this retaliation-type claim is enormous.⁵¹

Judge Winter went into a good analysis of the problems of dealing with a retaliation-type claim. One of the significant things is that he says that these claims are better analyzed under due process analysis.⁵² It has always seemed to me that they come a little closer to an equal protection-type analysis, but Judge Winter is speaking as a judge, and this would be the approach that the Second Circuit would take until the Supreme Court descends into this maelstrom and gives us further guidance.

49. See *Ricketts v. City of Hartford*, 74 F.3d 1397 (2d Cir. 1996).

50. See, e.g., *Colon v. Coughlin*, 58 F.3d 865 (2d Cir. 1995); *Rivera v. Senkowski*, 62 F.3d 80 (2d Cir. 1995).

51. See, e.g., *Bernheim v. Litt*, 79 F.3d 318 (2d Cir. 1996); *Blue v. Koren*, 72 F.3d 1075 (2d Cir. 1995); *Colon v. Coughlin*, 58 F.3d 865 (2d Cir. 1995); *Rivera v. Senkowski*, 62 F.3d 80 (2d Cir. 1995); *Genas v. DOCS and Coughlin*, 75 F.3d 154 (2d Cir. 1995); *Greenwich Citizens Committee, Inc. v. Counties of Warren and Washington Industrial Development Agency*, 77 F.3d 26 (2d Cir. 1996); *Johnson v. Bax*, 63 F.3d 154 (2d Cir. 1995); *Kaluczky v. City of White Plains*, 57 F.3d 202 (2d Cir. 1995); *Planned Parenthood of Dutchess-Ulster v. Steinhuis*, 60 F.3d 122 (2d Cir. 1996); *Ricketts v. City of Hartford*, 74 F.3d 1397 (2d Cir. 1996).

52. *Blue v. Koren*, 72 F.3d at 1081. Judge Winter explains that retaliation claim should be analyzed under a due process standard since "the pertinent conduct of the officials can be scrutinized as a whole, rather than in the piecemeal, compartmentalized fashion necessary under more specific constitutional provisions." *Id.*

Judge Winter said that “[i]n order to state a valid due process claim for retaliation, a plaintiff must allege that he or she engaged in conduct that was constitutionally protected.”⁵³ I think it would be more accurate to say “federally protected,” because we are talking about a claim under Section 1983 and that would include statutory, as well as constitutional, rights. If the conduct is protected, there is liability if the retaliation against the protected conduct was a substantial or motivating factor in the defendant's actions. That “substantial or motivating factor” is the language and the idea, incorporated over from the equal protection-type analysis.

But then, in the last sentence, Judge Winter went further and analyzed in some detail a qualified immunity summary judgment motion in a retaliation case.⁵⁴ This is where qualified immunity and retaliation intersect. Retaliation involves why did the defendant do what he did? It gets into the subjective area. And, of course, with qualified immunity, the purpose of the Supreme Court is to get rid of these cases, get the subjective element out of it. In the retaliation cases, you cannot really get it out.

The response of the circuits had been to impose a heightened pleading requirement. If we are going to let this case go ahead, we really have to know the plaintiff has got something. We cannot just take general allegations. But, the Supreme Court pretty well signaled that heightened pleading requirements, particularly against municipalities, are not allowed.⁵⁵ You cannot raise the initial barrier to get into the lawsuit game.

53. *Id.* at 1082. “[I]n order to state a valid due process claim for retaliation, a plaintiff must allege that he or she engaged in conduct that was constitutionally protected and that retaliation against the protected conduct was a ‘substantial’ or ‘motivating’ factor in the defendant’s actions.” *Id.* (quoting *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

54. *Blue*, 72 F.3d at 1082. Judge Winter explains that the plaintiff did not provide “legally sufficient evidence of retaliatory motive to survive a motion of summary judgment based on the defense of qualified immunity.” *Id.*

55. *Leatherman v. Tarrant Counties Narcotics Intelligence and Coordinating Unit*, 507 U.S. 163 (1993). The Supreme Court held that a federal court may not require “heightened pleadings” in Section 1983 cases brought against municipalities. *Id.* at 168. The Court explained that the

But, what do you do with your qualified immunity claim that also has this subjective element in it? Ultimately the Supreme Court is going to have to deal with this, and give everybody some guidance. But Judge Winter's suggestion is that while you do not have a heightened pleading standard, you really have a heightened standard on the summary judgment motion.⁵⁶ So when the defendant moves, he says: "I have qualified immunity" and "I did not know I was violating constitutional rights." It raises the question what was in his mind. And Judge Winter says the plaintiff has the obligation on the summary judgment motion to come forward and show whatever evidence they have that the defendant acted with this improper mental state.⁵⁷ So the court moved, essentially, the heightened *pleading* standard into a heightened *summary judgment* standard.⁵⁸ But Judge Winter points out accurately it really is not a "heightened" standard at all, because Rule 56⁵⁹ requires that a plaintiff come forward with the evidence that is available to the plaintiff to establish an essential element of the case.⁶⁰

"heightened pleading standard" conflicts with the requirements of the Federal Rules of Civil Procedure which call for "a short plain statement of the claim." *Id.* (quoting FED. R. CIV. P. 8(a)(2)).

56. *Blue*, 72 F.3d at 1083-84. Judge Winter states that "[w]e agree that the plaintiffs must offer specific evidence of improper motivation, but confess considerable doubt as to whether the 'heightened' standard is really heightened or is simply an application of the rule that conclusory assertions are insufficient to defeat a motion for summary judgment." *Id.*

57. *Id.* at 1084. Judge winter explains that:

[U]pon a motion for summary judgment asserting a qualified immunity defense in an action in which an official's conduct is objectively reasonable but an unconstitutional subjective intent is alleged, the plaintiff must proffer particularized evidence of direct or circumstantial facts . . . supporting the claim of an improper motive in order to avoid summary judgment.

Id.

58. *Id.*

59. FED. R. CIV. P. 56.

60. *Blue*, 72 F.3d at 1083. The court explains that it is "doubtful" that the heightened standard "imposes a burden greater than is already required under FED. R. CIV. P. 56." *Id.*

Two final points. One, I do not see that much significance in the Supreme Court case⁶¹ that says you can make two motions; that 12(b)(6)⁶² motion for qualified immunity never should have been made in the first place. Qualified immunity is an affirmative defense and until it is put in the case by the answer it just does not belong there. I do not know why the Supreme Court ever granted certiorari in the case.

The other thing, in the cases that the Second Circuit decided during the last year, there are four novel rulings that relate to Section 1983.⁶³ One technically is not a Section 1983 case, but they held that the provision of the New York Corrections Law⁶⁴ that requires suits against correction officers to be brought in the State Court of Claims is not a procedural but a substantive requirement and you cannot bring a pendent claim in federal court against a corrections officer.⁶⁵ Essentially, this provision creates an immunity in federal court from suits against corrections officers under state law.⁶⁶ It does not bar a Section 1983 claim from the Federal Court.

The second novel ruling is that there is no Section 1983 claim for a *Miranda*⁶⁷ violation.⁶⁸ The opinion says this is not constitutional and that "the remedy for a *Miranda* violation is exclusion from evidence."⁶⁹ That is rather bizarre to me in light of statements in the Supreme Court that we should not apply the exclusionary rule to *Miranda* violations because there was a

61. *Leatherman v. Tarrant Counties Narcotics Intelligence and Coordinating Unit*, 507 U.S. 163 (1993).

62. FED. R. CIV. P. 12(b)(6).

63. *See, e.g., Baker v. Coughlin*, 77 F.3d 12 (2d Cir. 1996); *Neighbor v. Covert*, 689 F.3d 1508 (2d Cir. 1995); *Gant v. Wallingford*, 69 F.3d 669 (2d Cir. 1995).

64. N.Y. CORRECT. LAW § 24 (McKinney 1987).

65. *See Baker v. Coughlin III*, 77 F.3d 12 (2d Cir. 1996).

66. N.Y. CORRECT. LAW § 24 (McKinney 1987).

67. *Miranda v. Arizona*, 384 U.S. 436 (1966).

68. *See Neighbor v. Covert*, 68 F.3d 1508 (2d Cir. 1995).

69. *Id.* at 1510. The court states that "the remedy for a *Miranda* violation is the exclusion from evidence of any ensuing self-incriminating statements." *Id.*

Section 1983 remedy for a person who is deprived of that right. But this is the law for the time being in the Second Circuit.

Another novel ruling, it seems to me, is that Section 1983 claim does apply in a case brought by black parents for emotional distress suffered when their child was demoted from the first grade to kindergarten.⁷⁰ Why parents suffered a constitutional injury because of something that happened to their child, I am not sure. But the implications for recovery by third parties under Section 1983 are rather intriguing.

Probably the most highly visible case that the Court dealt with was the assisted suicide case, where the Second Circuit held not that there was a constitutional right to die, which the Ninth Circuit had held, but that the New York statute that bars assisted suicide violates equal protection.⁷¹ Of course, that now goes to the Supreme Court.⁷² While the case got a lot of publicity in the Court of Appeals, it does not make that much difference, because the Supreme Court has decided to review both cases.

That is all I have to say about the Second Circuit in this past year. Thank you very much.

Hon. Leon D. Lazer:

That fantastic statistic of Second Circuit success in the Supreme Court reminds me of the statistics we used to maintain when I was in the Appellate Division as to how we were doing vis-à-vis the other departments. Over a number of years, we found that the rate of reverse or modification of Appellate Division rulings, orders, judgments, whatever, ran at about 30 to 35 percent, it may be of some interest to you, and of course we were always interested in the Second Department as to how it was doing in relation to the others, and we were doing pretty well. One of the other departments was not, and was a consistent loser. But that has changed with the appointment of a number of very effective judges in that department. But at 35 percent we did somewhat

70. *See Gant v. Wallingford*, 69 F.3d 1508 (2d Cir. 1995).

71. *See Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996).

72. *Vacco v. Quill*, 117 S. Ct. 36 (1996).

better than the Second Circuit, at least since you have departed, Judge. At this point we are going to take a ten-minute break. We have, following the break, I think two of the most interesting presentations we are going to have today, the First Amendment and the criminal law holdings, so let us please hold it to ten minutes. (Recess taken).