



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

**Touro Law Review**

---

Volume 11 | Number 2

Article 4


---

1995

## What's Happening With Respect to the Second Circuit

Hon. George C. Pratt  
*Touro Law Center*

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>

 Part of the [Civil Rights and Discrimination Commons](#), [Courts Commons](#), [Criminal Law Commons](#), [First Amendment Commons](#), [Judges Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Pratt, Hon. George C. (1995) "What's Happening With Respect to the Second Circuit," *Touro Law Review*. Vol. 11: No. 2, Article 4.  
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol11/iss2/4>

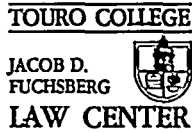
This Symposium: The Supreme Court and Local Government Law is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

# TOURO LAW REVIEW

---

Vol. 11, No. 2

---



---

Winter 1995

---

## WHAT'S HAPPENING WITH RESPECT TO THE SECOND CIRCUIT

*Hon. Leon D. Lazer:*

Good morning. It is time to start the substantive portion of the program which deals with the Supreme Court's decisions of last Term. Our scope, of course, is much broader than simply cases involving state and local government. We deal with a breadth of cases ranging from the First Amendment to various federal statutes to matters at the state and local government end.

It is our tradition here to commence with a discussion of the Civil Rights Law of 1968, 42 U.S.C. § 1983, which has achieved great prominence in litigation, particularly in establishing constitutional rights and rights under federal law.

To preside over that aspect of the program, we are honored to be able to present to you a full-time professor at this law school, one of America's very distinguished judges of the United States Court of Appeals for the Second Circuit. I am always proud to be able to introduce Judge Pratt because he and I share a background as municipal lawyers. I think those of you here who are also municipal lawyers should appreciate that as well.

He is not only a graduate of Yale Law School and a former clerk to Judge Charles W. Froessel of the New York State Court of Appeals, but he was also special counsel to the Board of Supervisors of Nassau County and special counsel to many of the villages. Until the time he ascended to the federal district court, he was a municipal law practitioner. It is my pleasure to now introduce to you, for the purpose of discussing the overall picture with section 1983 and a particular picture relative to the Second Circuit, the Honorable George C. Pratt.

*Hon. George C. Pratt\*:*

Thank you, Leon, and good morning. This symposium, of course, is about the Supreme Court and its relationship to local government. For most of the day that is what you are going to hear about. However, I have been designated moderator for this morning and that means I am supposed to say something here at the beginning. I hope you will forgive me if I choose to talk a little bit about my own court, the Second Circuit.

Like the symposium last year, you might entitle my comments here: What's Happening with Respect to the Second Circuit. What the Supreme Court does is significant, but only to the extent that lower courts, lawyers, and citizens respond to what they do. Therefore, taking a look at how other people interpret the work of the Supreme Court is as significant, perhaps even more significant in a practical sense, than what the Supreme Court itself does. That is simply because what we do is supposed to reflect the results of what the Supreme Court has done. Thus, what the Second Circuit has done this past year is, generally speaking, we hope, a reflection of what the Supreme Court was at work doing in prior years.

Last year, I told this assembly three things about the Second Circuit's work. First, the two largest groups of section 1983<sup>1</sup> cases

---

\* The Honorable George C. Pratt is a full-time Professor of Law at Touro College Jacob D. Fuchsberg Law Center. Judge Pratt was appointed to the United States District Court for the Eastern District of New York in 1976 and served there until 1982, when he was appointed to the Second Circuit of the United States Court of Appeals.

1. 42 U.S.C. § 1983 (1988). This section provides in pertinent part:

we heard involved qualified immunity<sup>2</sup> and municipal liability.<sup>3</sup> Secondly, the most frequent substantive claim to be asserted in our court was a claim for retaliation.<sup>4</sup> And thirdly, I directed and

---

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.

*Id.*

2. *See, e.g.,* Frank v. Relin, 1 F.3d 1317 (2d Cir.), *cert. denied*, 114 S. Ct. 604 (1993) (vacating and remanding grant of summary judgment in favor of district attorney in a civil rights suit brought by a non-lawyer employee of the district attorney's office as qualified immunity was not a proper defense to an official capacity claim); Calhoun v. New York State Div. of Parole Officers, 999 F.2d 647, 655 (2d Cir. 1993) (granting prison officials qualified immunity since at the time of the incident "it was not clearly established . . . that imposing a short period of 'delinquency time' without providing a final parole-revocation hearing would violate due process"); Mozzochi v. Borden, 959 F.2d 1174 (2d Cir. 1992) (holding that defendants were entitled to qualified immunity from suit under § 1983 as the plaintiff's criminal arrest and subsequent prosecution was supported by probable cause).

3. *See, e.g.,* Hertz Corp. v. City of N.Y., 1 F.3d 121 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1054 (1994) (asserting that a declaratory judgment invalidating a city law which based motor vehicle rental fees and decisions on residence should be granted); Dwares v. City of N.Y., 985 F.2d 94 (2d Cir. 1993) (stating that § 1983 complaint alleging that officers conspired with skinheads to allow the skinheads to assault flag burners did not sufficiently set forth facts to establish that there was a municipal custom or policy that had contributed to plaintiff's injuries).

4. *See, e.g.,* Termite Control Corp. v. Horowitz, 28 F.3d 1335 (2d Cir. 1994) (asserting both RICO and civil rights claims against Board of Education and various inspectors for canceling maintenance and repair contracts after plaintiff revealed kickback scheme that ostensibly violated plaintiff's constitutional rights); Sands v. Runyon, 28 F.3d 1323, 1331 (2d Cir. 1994) (affirming denial of relief of expungement of negative information from plaintiff's personnel file as plaintiff "failed to present specific evidence of 'purposeful retaliation . . . while on the job which caused him to be harmed,' and therefore no justification existed to even review the personnel file"); Lambert v. Genesee Hosp., 10 F.3d 46 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1612 (1994) (holding that evidence was insufficient to establish a claim of retaliation where the basis for the claim was several informal complaints alleging unequal pay and sexual discrimination made to a supervisor);

invited the audience's attention to the problem created by the Supreme Court case of *Siegert v. Gilley*,<sup>5</sup> which held that the proper way for a circuit court to approach a qualified immunity appeal is to first determine whether there had been a violation of a constitutional right. Only then may the court move on and address the issue of immunity.<sup>6</sup> I suggested at that time that this approach threatened to create an end run around the federal-court principle of finality, which requires a final judgment for federal appeals.<sup>7</sup> The way to get interlocutory review of the denial of a motion to dismiss is by later moving to dismiss on qualified immunity grounds. An order denying that motion has been held to be appealable. On the appeal, under *Siegert*, you can get the constitutional question reviewed as well as the immunity question.

The Supreme Court says, first you have to review whether or not the complaint alleges a violation of a constitutional right. It seems to me that this might create an undermining of the integrity of the final judgment rule in the court. I felt this was an important development from last year, so I thought I would bring it to your attention.

Now, let me report to you about those statements. As to number one, it is still half true, because it is based on what happened roughly last June, 1993, through June, 1994.

Qualified immunity is still an issue in a large group of the appeals that come before our court.<sup>8</sup> Municipal liability is an issue;

---

Saulpaugh v. Monroe Community Hosp., 4 F.3d 134 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1189 (1994) (affirming district court's finding that plaintiff met her burden of proving that she was discharged in retaliation for complaints she made alleging sexual harassment by her supervisor).

5. 500 U.S. 226 (1991).

6. *Id.* at 231.

7. George C. Pratt, *What's Happening with Respect to the Second Circuit*, 10 TOURO L. REV. 297, 302 (1994).

8. See cases cited *supra* note 2; see also *Goldberg v. Town of Rocky Hill*, 973 F.2d 70 (2d Cir. 1992) (stating that there is no immunity available to a municipality sought to be held liable under § 1983 in an action brought by a former police officer claiming that the elimination of his position was in retaliation for his having supported the chief of police on a controversial issue); *DiMarco v. Rome Hosp.*, 952 F.2d 661 (2d Cir. 1992) (holding that order denying summary judgment was not appealable in a civil rights action brought

however, it generally boils down to a question of whether or not there is a municipal policy, and the volume of cases presenting that issue has just fallen way off.

As for number two, the issue of retaliation is still a relatively frequent claim in our court.<sup>9</sup> More than that, the claim seems to be gaining more respect. That is, the judges are becoming more familiar and more comfortable with the whole idea of retaliation claims. In a surprising number of cases, that is, surprising to me, it is proving to be a successful claim.<sup>10</sup> It seems to be one that appeals particularly to juries.<sup>11</sup>

As for number three, the business of *Siebert v. Gilley*, the end run I predicted simply has not happened yet. Whether it will or not, I do not know. In some cases, it seems that my colleagues have

---

against hospital officials and the hospital by the plaintiff who claimed that they retaliated against him for his exercise of free speech).

9. See *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir. 1994) (claiming that town refused to enforce zoning regulations in retaliation for a complaint plaintiff-homeowner made against neighbor); *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033 (2d Cir. 1993) (holding that a female employee made a prima facie showing that she was fired because she filed a sexual harassment complaint with the EEOC against her employer).

10. See *Gagliardi*, 18 F.3d 188 (reversing dismissal of retaliation claim where plaintiff's allegations were sufficient to allow an inference that defendant's acts were motivated by plaintiff's exercise of free speech rights); *Sheppard v. Beerman*, 18 F.3d 147 (2d Cir.), *cert. denied*, 115 S. Ct. 73 (1994) (vacating dismissal of plaintiff's claim for retaliation finding that district court made inappropriate factual determinations in holding that plaintiff failed to state a First Amendment violation); *Piesco v. Koch*, 12 F.3d 332 (2d Cir. 1993) (precluding summary judgment where plaintiff's testimony before legislative committee was an exercise of free speech as a determination of summary judgment necessarily includes drawing factual inferences and weighing the credibility of parties).

11. See *Malarkey v. Texaco, Inc.*, 983 F.2d 1204 (2d Cir. 1993) (affirming finding by jury that defendant engaged in retaliatory discrimination as well as district court's doubling of the jury award of \$65,000 to \$130,000); *Dunlap-McCuller v. Riese Org.*, 980 F.2d 153 (2d Cir. 1992), *cert. denied*, 114 S. Ct. 290 (1993) (increasing on appeal a jury award of \$1,500 by \$5,720 as verdict for retaliation was inadequate).

ignored *Siebert v. Gilley* and addressed qualified immunity without ever having addressed the alleged constitutional violation.<sup>12</sup>

In those cases, the allegation of a constitutional violation was apparent. Thus, it did not warrant discussion. So far, I think there was only one case in our circuit where we said, wait a minute, this is a qualified immunity appeal, but we are not going to reach that issue. We are going to reverse the district court because there was not even a proper allegation of a constitutional right.<sup>13</sup> So much for last year and what happened.

As you know, section 1983 is the device by which municipal governmental decisions get reviewed for their constitutionality. Section 1983 is essentially what we are talking about when we have a Supreme Court conference about municipal government. You get into federal court through section 1983.

Let us take a closer look at the Second Circuit's work on section 1983 this past year, looking at the reported opinions of the court, roughly for the period, as I said, June 1993 to June 1994. Overall, in this past year, the Second Circuit wrote fifty opinions involving section 1983 cases. This represents the work output of approximately two judges of the court, nearly ten percent of our work capacity. To interpolate that further, we write opinions in roughly one-third of the cases that we decide. Two-thirds of the cases get disposed of by summary order. Those are cases that do not represent any new issues that are worthy of opinions in the

---

12. See, e.g., *Moore v. Comesanas*, 32 F.3d 670 (2d Cir. 1994) (vacating as moot the district court's grant of qualified immunity while reversing that portion of the judgment that set aside the jury's verdict as a matter of law); *O'Neill v. Town of Babylon*, 986 F.2d 646, 649 (2d Cir. 1993) (stating that a police officer will receive qualified immunity from an unlawful arrest suit if "it was objectively reasonable for him to believe his actions were lawful"). But see *Velardi v. Walsh*, 40 F.3d 569 (2d Cir. 1994) (affirming the district court's grant of summary judgment on the basis of qualified immunity after addressing the constitutionality of the procurement of two search warrants and the execution of one of them).

13. See *Knipe v. Skinner*, 19 F.3d 72, 76 (2d Cir. 1994) (concluding that the government had grounds for Rule 11 sanctions against the plaintiff because plaintiff "offer[ed] no authority demonstrating that [government]'s alleged conduct would violate any clearly established constitutional right").

views of the judges, and which result in affirmances, since we do not reverse by summary order.

To interpolate about fifty opinions, figure you can assume that we have about 150 cases under section 1983 that were calendared, scheduled, and decided. We receive roughly 1,500 cases in all areas of the law. Therefore, about ten percent of the work of the Second Circuit deals with section 1983.

What kinds of cases do we have in terms of subject matter? The largest group by far this past year was public employment cases, which totaled approximately thirty-four percent or seventeen out of fifty cases. Some were discharge cases, some dealt with a denial of promotion, some involved a claim of sexual harassment, and some were disciplinary claims. These cases arose out of the fact that the government employs people and under section 1983, potential constitutional rights are thus involved.

Twenty-two percent of the cases, approximately eleven of them, arose in the prison context. Most of these were challenges, to some extent, to the prison disciplinary hearing process, which is undergoing an intensive examination at the present time. This is not a problem that generally affects municipal government, however, it is one that largely concerns the state attorney general.

Due process problems are being generated from the manner in which the state handles disciplinary problems within the prisons. Some of the prison cases involved claims of excess force where guards were either too rough or did not prevent another prisoner from getting too rough with the plaintiff.

Seven of the cases are what I think of as the typical police-type case involving false arrest, malicious prosecution, or excessive force. Five cases, about ten percent of the total, involved property claims of one sort or another, whether it be land use planning, zoning, or claims for public benefits.

At least one case involved an interesting claim that the city of New York was holding up payments to a contractor, in part for retaliation,<sup>14</sup> because the contractor had talked to the press about

---

14. *Termite Control Corp. v. Horowitz*, 28 F.3d 1335 (2d Cir. 1994).



the kickbacks he had to make to the school inspectors.<sup>15</sup> This type of claim is being asserted with increasing frequency around the country, but that is the only one I could find in the Second Circuit itself. Two of the cases represented federal statutory rights as opposed to constitutional rights, and there are miscellaneous other kinds of cases.

Within that subject matter context, about fifteen of the fifty opinions involve the issue of qualified immunity. Five of them were retaliation-type claims where the claimant was saying, "I did something that was constitutionally protected, and in turn, you deprived me of some benefit or inflicted some kind of punishment on me." Most of those involved the employment context, but not all of them. Some of them came up in the police context. There were a couple of cases that involved *res judicata* issues, largely arising out of prior decisions where the plaintiff was unhappy with the result in federal court.<sup>16</sup> There are some tricky issues there.

That is basically a snapshot of the kind of work that our court has done this past year.

If you look at what the Supreme Court did this past year, the parallels are remarkable. They have one case each evolving out of the employment, property, statutory rights, and a police situation. They had two cases involving prisoner-type claims with respect to the recurring issues. There is one opinion on retaliation<sup>17</sup> and

---

15. For a recitation of the relevant facts, see the Eastern District of New York's decision in *Nu-Life Constr. Corp. v. Board of Educ.*, 809 F. Supp. 171 (E.D.N.Y. 1992), *aff'd in part and vacated in part sub nom. Termite Control Corp. v. Horowitz*, 28 F.3d 1335 (2d Cir. 1994).

16. See *Burgos v. Hopkins*, 14 F.3d 787 (2d Cir. 1994). In this case, plaintiff, an inmate at Rikers Island, instituted a § 1983 action against certain prison employees after being attacked by another inmate. *Id.* at 788. The district court dismissed the action on summary judgment, stating that the claim was barred by *res judicata* in that the same claim was decided in a prior state court habeas corpus action. *Id.* at 789. However, the Second Circuit reversed the decision and remanded the case back to the district court, stating that the action was not barred, as the court in the prior action had no authority to grant the relief the plaintiff was presently requesting. *Id.* at 792.

17. *Waters v. Churchill*, 114 S. Ct. 1878 (1994). Plaintiff, a hospital nurse, was allegedly fired for making negative comments about the obstetric department to a nurse who was contemplating transferring into the department. *Id.* at 1882. Subsequently, that nurse decided not to transfer into the department.

another on qualified immunity.<sup>18</sup> Everything there, except res judicata, is almost identical to the work that is facing our circuit court. Obviously, there is no surprise in the kind of work that is being done in the courts, which clearly is a reflection of what kind of problems we have out there in life. However, in terms of the Supreme Court, the problems that you litigants were having four years ago were the kinds of things that this past year are filtering up to their level. The difference between our two courts is largely a question of timing and how this trickle-up process operates.

The Supreme Court this past year, as I said, handed down opinions in each of these areas of law. They write opinions only in cases where they think they want to shape, change, or massage the law one way or another. They write, largely, for the benefit of the lower court judges. They are very careful about picking cases that will have some significance and utility in guiding the law. They are not concerned with the results in a particular case, even if they think somebody got a raw deal from the policymaking body. They make adjustments in the law as they see fit.

What that means for our court, and for the rest of us, is that we have a lot of re-examining to do about what we understand the law to be. In other words, we are engaged in the continuing process of fine tuning when, for example, the Supreme Court hands down a retaliation decision. We have got to read the decision and then re-examine our thinking in light of what the Supreme Court now says are the principles that are supposed to be applied in similar situations. So, not only do you have a lot of thinking to do about the types of cases that come before you in your practice, but we judges also have to re-think the section 1983 cases we get because the Supreme Court has, in effect, changed, clarified, or modified the law in almost every area on which we have written in the last year.

I have one other comment that may be of some concern to you - it deals with the question of punitive damages. It seems to me that

---

*Id.* Plaintiff was fired and then filed suit under § 1983, claiming that her First Amendment freedom of speech rights were violated. *Id.* at 1883.

18. *Elder v. Holloway*, 114 S. Ct. 1019 (1994) (addressing the use of relevant legal authority and standard of judicial review of qualified immunity claims).

there are storms gathering all over the country dealing with the problem of punitive damages. There are all kinds of problems that have been raised. They have been addressed, in part, by state legislatures. The Supreme Court has also wrestled with some aspects of it. Constitutionally, this involves the due process provision, the excessive fines provision, and the Eighth Amendment. They have looked at whether there needs to be some kind of relationship between the amount of compensatory and punitive damages.

Nobody, however, has looked too seriously at the problem of serial awards of punitive damages. In other words, if certain types of outrageous conduct affects more than one person, can successive plaintiffs each recover punitive damages for that conduct, or is the first award, which is designed to punish the defendant for having engaged in the conduct and to deter the defendant and others from engaging in similar conduct, enough? Is it that they got one award and when the second plaintiff comes along, it looks something like double jeopardy?

The law of punitive damages is just not harmonious. There is no consistent theory. Eventually, it will have to be straightened out, whether it is done by Congress or by the Supreme Court. They have experimented with caps on punitive damages and tried to determine who should get them. Should it be the plaintiff or is it just a windfall to the plaintiff? If part of the function is to deter, then it sounds like a criminal-law type thing, so perhaps it should be viewed as a fine. Should they be paid in court? I am sure the judges would like the idea if they made some kind of a judges' welfare fund and all punitive damages would be paid into that. However, that would reduce the incentive for attorneys to pursue them.

Will punitive damages be straightened out in my lifetime? Probably not. However, I have great faith in our system. Eventually, we will find a rational way to deal with punitive damages. Certainly the present system is somewhat insane. Even if it is constitutional, it is still insane.

What does all this mean? Why have I taken fifteen minutes here to tell you a lot of statistics and what we are doing, highlighting

details in which you probably have little interest? It is just a way of demonstrating that section 1983, the basic subject of this conference, is still a very dynamic area of the law that has great significance at all levels of our system.

You people are to be congratulated in your wisdom in attending this symposium, which is designed to keep you up with the latest developments of the Supreme Court in this turbulent area of the law. I hope you find the rest of the program to be informative and rewarding.

