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Defending Governmental Entities in Section 1983 Claims

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I. INTRODUCTION

42 U.S.C. § 1983 was enacted as part of the Civil Rights Act of 1871 to allow citizens to bring suit against officials whose actions, made under color of state law, violated their federal statutory or constitutional rights. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105 S. Ct. 2427 (1985). Rarely utilized for approximately 90 years, § 1983 was reinvigorated by the Supreme Court's *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961), decision. *Pape* held that actions by local officials violative of state law were still made "under color of state law" and, therefore, subject to § 1983 liability. The Court further expanded § 1983 jurisprudence in 1978 when it ruled that municipalities themselves may also be sued under § 1983. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018 (1978).

Today § 1983 litigation is, to say the least, alive and well. Municipalities and their employees are under a constant barrage of lawsuits brought pursuant to this enactment. Police officers, in particular, are a common and expected target of § 1983 suits. However, firefighters, EMS personnel, school districts, and even prosecutors commonly find themselves named in § 1983 actions.

This outline is only intended to provide the barest of frameworks for the defense to a typical § 1983 case. Many other excellent sources are available and should be consulted for additional case law and strategy considerations. Among them are the *2009 Handbook of Section 1983 Litigation* by David W. Lee (Aspen Publishers 2009) and Sheldon H. Nahmod's *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* (4th ed. 1997, 2007).

II. AN INITIAL CONSIDERATION: REMOVAL

Section 1983 cases may be filed in either federal or state court. *Beverly Bank v. Bd. of Review of Will County*, 117 Ill. App. 3d 656, 660, 453 N.E.2d 96 (3d Dist. 1983) ("Illinois courts possess concurrent jurisdiction with Federal courts to hear claims founded upon alleged violations of section 1983"). Therefore, if a plaintiff elects to bring a § 1983 action in state court, defense counsel's first decision is whether to remove the case to federal court. In my view, to avoid confusion by a state court judge potentially unfamiliar with § 1983 jurisprudence and its many defenses, the answer to that question is ordinarily "yes."

Removal is governed by 28 U.S.C. §§ 1441, 1443-1448. These sections outline the applicable procedural steps for properly removing a case to federal court and should be applied with great care and attention to detail. Missing a filing deadline can easily bar removal. *See Wingfield v. Franklin Life Ins. Co.,* 41 F. Supp. 2d 594 (E.D. Va. 1999).

The following are some important rules governing removal:

- To affect removal, a defendant must file a notice of removal containing a concise statement of the grounds for removal, and copy of all state court process, pleadings and orders thus far served in the case. 28 U.S.C. § 1446(a).

- A notice of removal must be filed within 30 days after receipt of the complaint or service of summons, whichever is shorter. 28 U.S.C. § 1446(b).

- The right to object to jurisdiction is not waived by filing a notice of removal. *Silva v. City of Madison*, 69 F.3d 1368, 1376 (7th Cir. 1995).

- A notice of removal is deficient if not all defendants support removal in writing. *Gossmeyer v. McDonald*, 128 F.3d 481, 489 (7th Cir. 1997). However, so long as all defendants agree to the procedure, defects arising from one or more defendants failing to join in the notice are waived if the plaintiff fails to timely object. 28 U.S.C. § 1447(c); *Gossmeyer*, 128 F.3d at 489.

- Subject matter jurisdiction is determined based on the allegations in the complaint at the time the notice of removal is filed. Once an action is properly removed to federal

court, an amendment to the complaint designed to avoid federal court jurisdiction does not defeat the removal. *Gossmeyer*, 128 F.3d at 488.

- 28 U.S.C. §1441(c) provides that whenever a cause of action subject to federal question jurisdiction is joined with one or more otherwise non-removable causes of action, "the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates." In other words, a federal district court may elect to rule on pendent state law tort claims filed with a § 1983 action, or it may elect to remand them back to state court after disposing of the federal questions.

III. PROCEDURAL PROHIBITIONS TO SUIT

There exist a number of procedural bars to a § 1983 action. Please consider the following before answering a complaint.

A. Statute of Limitations

1. Section 1983 itself contains no express statute of limitations; instead, the controlling period is the forum state's statute of limitations for personal injury claims. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 123 n.5, 125 S. Ct. 1453 (2005); *Foryoh v. Hannah-Porter*, 428 F. Supp. 2d 816, 819 (N.D. Ill. 2006).

   In Illinois the statute of limitations for § 1983 claims is *two years*. *Id.*

2. Accrual of the limitations period is determined by federal law. *Wallace v. Kato*, 549 U.S. 384, 127 S. Ct. 1091 (2007).

   Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994), is particularly important to the issue of accrual. According to the Supreme Court in *Heck*, a plaintiff may not bring a § 1983 suit that necessarily calls into question the validity of a criminal conviction. This makes sense, since such a suit would amount to an "end around" the appeals process. Such a plaintiff must wait to file suit until his or her underlying conviction is reversed on appeal or otherwise invalidated. Only then does the two-year statute of limitations accrue.

3. Tolling of the limitations period, if applicable, is governed by state law. *Hardin v. Straub*, 490 U.S. 536, 109 S. Ct. 1998 (1989).

B. Eleventh Amendment Immunity

1. The Eleventh Amendment acts as a jurisdictional bar to federal suits for money damages against states and state officials acting in their official capacities, absent the state's consent to suit. *Cannon v. Univ. of Health Sciences/Chicago Med. Sch.*, 710 F.2d 351, 356 (7th Cir. 1983).

2. States and their agencies are not "persons" under § 1983. *Lapides v. Bd. of Regents*, 535 U.S. 613, 122 S. Ct. 1640 (2002).

3. Generally, if a suit ultimately seeks the recovery of money from the state treasury, the court will deem the state to be the real party in interest and dismiss the case pursuant to the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347 (1974); *see also Regents of University of Cal. v. Doe*, 519 U.S. 425, 117 S. Ct. 900 (1997) (federal government's agreement to indemnify state university for litigation costs did not deprive school of Eleventh Amendment protection).

4. Counties, municipalities and other political subdivisions are not entitled to Eleventh Amendment immunity. *Buckhannon Bd. and Care Home v. W. Va. Dept. of Health and Human Servs.*, 532 U.S. 598, 609 n.10, 121 S. Ct. 1835 (2001).

5. Federal courts may grant prospective injunctive and declaratory relief against states and their officers. Use of state funds may be ordered for compliance with the injunction or to pay attorney's fees. *See Hutto v. Finney*, 437 U.S. 678, 98 S. Ct. 2565 (1978); *Buckhanon v. Percy,* 708 F.2d 1209 (7th Cir. 1983); *Harris v. Harvey,* 605 F.2d 330 (7th Cir. 1979).

6. Eleventh Amendment immunity is so fundamental that Rule 11 sanctions may be imposed against anyone who files a meritless suit barred by the Eleventh Amendment. *See Hernandez v. Joliet Police Dept.,* 1998 WL 258469 (N.D. Ill. 1998); *Perry v. Barnard,* 745 F. Supp. 1394 (S.D. Ind. 1989).

C. Exhaustion of administrative remedies only an issue with prisoner cases

1. Generally, there is no requirement that a plaintiff exhaust available state remedies before filing a § 1983 action. *Patsy v. Fla. Bd. of Regents*, 457 U.S. 496, 102 S. Ct. 2557 (1982).

2. Exception: actions filed by state prisoners with respect to prison conditions are governed by the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e(a), which requires exhaustion of all available administrative remedies. This limitation was strengthened by the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134. *See Woodford v. Ngo*,

548 U.S. 81, 126 S. Ct. 2378 (2006); *Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983 (2002); *Booth v. Churner*, 532 U.S. 731, 121 S. Ct. 1819 (2001).

D. *Res judicata* and collateral estoppel. As in other areas of practice, it is important to keep in mind whether claim or issue preclusion can be argued at the outset.

IV. INDIVIDUAL IMMUNITIES TO § 1983 ACTIONS

Various individual immunities bar § 1983 actions, as well. Below is a list of the major immunities that must be raised any time they are potentially applicable. The failure to raise them in a Rule 12(b)(6) motion to dismiss, as an affirmative defense in an answer, and in a Rule 56 motion for summary judgment may result in their waiver.

A. Absolute Immunity

1. Judges are entitled to absolute immunity from § 1983 suits for any and all acts they perform in their judicial capacities. *Dennis v. Sparks*, 449 U.S. 24, 27, 101 S. Ct. 183 (1980); *Snyder v. Nolen*, 380 F.3d 279, 286 (7th Cir. 2004).

2. Prosecutors are entitled to absolute immunity for conduct that is "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*. 424 U.S. 409, 430, 96 S. Ct. 984 (1976).

   Unlike in the case of police officers, "the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Imbler*, 424 U.S. at 427-28; *see also Van de Kamp v. Goldstein*, ___ U.S. ___, 129 S. Ct. 855 (2009).

3. Witnesses are also entitled to absolute immunity for their testimony, as specified by the following cases:

   a. *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108 (1983) – trial testimony

   b. *Kincaid v. Eberle*, 712 F.2d 1023 (7th Cir. 1983), *cert. denied*, 464 U.S. 1018, 104 S. Ct. 551(1983) – grand jury testimony

c. *Curtis v. Bembenek*, 48 F.3d 281, 285 (7th Cir. 1995) – pretrial hearings

B. Qualified Immunity

Qualified immunity is an affirmative defense that provides immunity from suit, rather than a mere defense to liability, and is effectively lost if a case is erroneously permitted to go to trial. *Scott v. Harris*, 550 U.S. 372, 376 n.2, 127 S. Ct. 1769 (2007) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806 (1985)). The doctrine shields "public officials performing discretionary functions . . . unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known" at the time of the incident. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982). Qualified immunity provides protection to all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092 (1986). "This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534 (1991). The inquiry here focuses on the objective legal reasonableness of the action, not the state of mind or good faith of the governmental official in question.

1. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151 (2001): the *Saucier* "two-step"

   Saucier mandated a two-part inquiry in which to analyze the propriety of qualified immunity: (1) whether the facts, taken in the light most favorable to the plaintiff, show that the defendant violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151 (2001); *Jewett v. Anders*, 521 F.3d 818, 822-23 (7th Cir. 2008).

   Until recently, litigants and courts were prohibited from skipping the first step, even when their case would obviously resolve itself based upon the second prong.

2. *Pearson v. Callahan*, ___ U.S. ___, 129 S. Ct. 808 (Jan. 21, 2009): a more flexible approach

   The Supreme Court recently held in that, although the *Saucier* two-step analysis "is often beneficial," it is no longer mandatory. *Id.* at 818. Deciding the question of constitutionality in many cases will still be necessary, since it "may be difficult to decide whether a right is clearly established without deciding precisely what the constitutional right happens to be." *Id.* (quoting *Lyons v. Xenia*, 417 F.3d 565, 581 (6th Cir.

2005) (Sutton, J., concurring)). Conversely, the Court reasoned, there exist plenty of cases in which the facts fail to demonstrate a violation of a clearly established federal right. *Id.* at 818.

From a practical standpoint, I recommend you do not waive the constitutional argument presented by the first prong of the *Saucier* analysis, even if it looks like the second prong will control the court's ruling.

3. The denial of qualified immunity by a trial court is immediately appealable pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806 (1985).

V. ATTACKING THE SUBSTANCE OF THE COMPLAINT

A. Elements of a § 1983 cause of action

"To state a claim under § 1983, a plaintiff must allege two elements: (1) the alleged conduct was committed by a person acting under color of state law; and (2) the activity deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Doe v. Smith*, 470 F.3d 331, 338 (7th Cir. 2006) (citing *Gomez v. Toledo*, 446 U.S. 635, 638, 100 S. Ct. 1920 (1980); *Case v. Milewski*, 327 F.3d 564, 566 (7th Cir. 2003)).

The first inquiry in any § 1983 suit, therefore, is whether the plaintiff was deprived of a right secured by the constitution or federal statute. *Baker v. McCollam*, 443 U.S. 137, 140, 99 S. Ct. 2689 (1979).

The mere possibility of remote or speculative future injury or invasion of rights will not suffice. *See Henderson v. Sheahan*, 196 F.3d 839, 848 (7th Cir. 1999).

B. Individual Liability: personal involvement required

1. As a rule, an individual cannot be held liable in a § 1983 action absent a finding that he or she caused or participated in the alleged federal statutory or constitutional deprivation. *Grossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983).

    a. *Harper v. Albert*, 400 F.3d 1052 (7th Cir. 2005) – Prison guards were not jointly and severally liable to prisoner plaintiffs under § 1983 excessive force theory alleging that a number of guards acted in concert to produce the injury. The prisoners failed to establish that any particular guard touched the plaintiffs, let alone violated their constitutional rights.

b. *Fillmore v. Page*, 358 F.3d 496, 507 (7th Cir. 2004) – Unlike in traditional tort practice, § 1983 joint liability exists "only where all of the defendants have committed the negligent or otherwise illegal act, and so only causation is at issue."

2. Supervisory liability cannot be imposed without establishing that the supervisor was directly responsible for the improper activity. *Rizzo v. Goode*, 423 U.S. 362, 373-77, 96 S. Ct. 598 (1976).

C. Municipal Liability

1. Under § 1983, there is no liability through a theory of *respondeat superior*. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978); *Gable v. City of Chicago*, 296 F.3d 531, 537 (7th Cir. 2002).

2. Section 1983 municipal liability instead exists when "execution of a government[al] policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell*, 436 U.S. at 694. In other words, to maintain a § 1983 claim against a municipality, a plaintiff must establish the requisite culpability (a "policy or custom" attributable to municipal policymakers) and the requisite causation (the policy or custom was the "moving force" behind the constitutional deprivation). *Id.* at 691-94.

3. A municipality itself cannot be liable under § 1983 in the absence of an underlying constitutional violation by someone in its employ. *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571 (1986) (if an officer acts constitutionally, city cannot be held liable); *Woodward v. Correctional Medical Servs.*, 368 F.3d 917, 929 (7th Cir. 2004) (a municipality may not be held liable without a finding that officer is liable on the underlying substantive harm); *Proffitt v. Ridgway*, 279 F.3d 503 (7th Cir. 2002) (because police officer did not violate the plaintiff's constitutional rights, there could be no municipal § 1983 liability).

D. Some specific types of claims

1. Procedural Due Process claims

<u>Negligent acts which unintentionally cause a loss of or injury to life, liberty, or property do not implicate the Due Process Clause.</u> *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1986).

a. False arrest

<u>Probable cause</u> automatically defeats § 1983 false arrest claims. *Schertz v. Waupaca County*, 875 F.2d 578, 582 (7th Cir. 1989). In fact, once a police officer possesses probable cause, he is under no

constitutional duty to take further investigative action. *Schertz*, 875 F.2d at 583.

Probable cause exists when an officer receives information from an individual who reasonably seems to be telling the truth. *Grimm v. Churchill*, 932 F.2d 674, 675 (7th Cir. 1991). The account of a single, credible witness can provide the basis for probable cause. *Beauchamp v. City of Noblesville*, 320 F.3d 733, 743 (7th Cir. 2003); *Woods v. City of Chicago*, 234 F.3d 979, 996 (7th Cir. 2000). Probable cause does not depend on that witness being correct, *Kelley v. Myler*, 149 F.3d 641, 646-47 (7th Cir. 1998), nor does it depend on the subsequent conviction of the arrestee. *See, e.g., Hughes v. Meyer*, 880 F.2d 967, 969 (7th Cir. 1989) (probable cause requires more than bare suspicion, but need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false). Furthermore, "[b]ecause the situations that officers face . . . are more or less ambiguous, probable cause allows for reasonable mistakes by the officer." *United States v. Moore*, 215 F.3d 681, 686 (7th Cir. 2000).

There exists no due process right to a full and complete police investigation. *Carroccia v. Anderson*, 249 F. Supp. 2d 1016 (N.D. Ill. 2003) (police officers are not constitutionally obligated to pursue all investigative possibilities).

b. *Brady* violations

A second procedural due process claim often alleged by § 1983 plaintiffs pertains to prosecutors' and police officers' duties to disclose potentially exculpatory evidence as mandated by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and its progeny. To demonstrate a "*Brady* violation," a plaintiff must establish three elements: (1) the evidence at issue is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by an agent of the government, either willfully or inadvertently; and (3) the suppressed evidence resulted in prejudice to the accused. *Strickler v. Greene*, 527 U.S. 263, 281-82, 199 S. Ct. 1936 (1999); *Harris v. Kuba*, 486 F.3d 1010, 1014 (7th Cir. 2007).

The relevant inquiry often centers around the final element of prejudice, which is akin to "materiality." *United States v. Wilson*, 481 F.3d 475, 480 (7th Cir. 2007). To demonstrate prejudice, a plaintiff must show that there exists a reasonable probability that the suppressed evidence would have produced a different verdict

at the conclusion of the criminal trial. *Strickler*, 527 U.S. 263, 281 (1999).

In *dicta*, the Seventh Circuit recently stated, "we are doubtful . . . that an acquitted defendant can ever establish the requisite prejudice for a *Brady* violation." *Carvajal v. Dominguez*, 542 F.3d 561, 570 (7th Cir. 2008).

c. Failure to intervene claims

A police officer who is present but fails to take reasonable steps to protect the victim of a fellow officer's use of excessive force may be held liable under § 1983. *Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005).

For liability to attach to a police officer's failure to intervene, the officer must have reason to know that a constitutional deprivation was taking place and that he had a realistic opportunity to intervene to prevent the deprivation. *Montano v. City of Chicago*, 535 F.3d 558, 569 (7th Cir. 2008).

d. Deliberate indifference claims

Fourteenth Amendment "deliberate indifference" claims apply exclusively to pre-trial detainees. The Eighth Amendment provides for such claims by convicted prisoners.

Under either provision, the plaintiff has the burden of demonstrating: (1) that the harm suffered was objectively serious; and (2) that the defendant official was deliberately indifferent to the plaintiff's health or safety. *Cavalieri v. Shepard*, 321 F.3d 616, 620 (7th Cir. 2003) (citing *Farmer v. Brennan*, 511 U.S. 825, 833, 114 S. Ct. 1970 (1994); *Payne v. Churchich*, 161 F.3d 1030, 1039-41 (7th Cir. 1998)).

"Exercising poor judgment . . . falls short of meeting the standard of consciously disregarding a known risk to . . . safety." *Lewis v. Richards*, 107 F.3d 549, 553-54 (7th Cir. 1997).

e. Public Employment: Liberty and Property Interests

i. Public employees possess a liberty interest in maintaining reputations sufficient to fairly seek employment in their chosen field. *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S. Ct. 507 (1971).

ii. Public school teachers possess a property interest in their tenured teaching positions. *See* 105 ILCS 5/24-11; *Townsend v. Vallas*, 256 F.3d 661, 673 (7th Cir. 2001).

4. Substantive Due Process Claims

To successfully present a substantive due process claim pursuant to § 1983, a plaintiff must demonstrate that the defendant's conduct "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 854-55, 118 S. Ct. 1708 (1998)

a. Police chases

In the absence of deliberate conduct, a plaintiff must show that police officers' actions in conducting a high-speed pursuit would "shock the conscience"; *County of Sacramento v. Lewis*, 523 U.S. 833, 854-55, 118 S. Ct. 1708 (1998); *see also Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769 (2007).

b. Failure to protect

In the absence of a "special relationship" between the state and an individual, the Due Process Clause does not require state officials to protect the life, liberty or property of citizens against invasion by private actors. *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 109 S. Ct. 998 (1989).

When a municipality affirmatively places a person in a position of danger but fails to protect that person, § 1983 liability may exist. *Ellsworth v. City of Racine*, 774 F.2d 182 (7th Cir. 1985).

There was no substantive due process violation where school suspended student but failed to protect her from her ensuing emotional distress and suicide. *Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701 (7th Cir. 2002).

c. Malicious Prosecution

Substantive due process claims for malicious prosecution are now effectively eliminated as a cause of action. *See Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807 (1994).

5. Equal Protection claims

a. Claims of deferential treatment based upon a suspect classification

<u>Elements</u>: (1) Plaintiff is similarly situated to members of the unprotected class; (2) she was treated differently from members of the unprotected class; and (3) the defendant acted with discriminatory intent. *Greer v. Amesqua*, 212 F.3d 358, 370 (7th Cir. 2000); *see also Johnson v. City of Fort Wayne*, 91 F.3d 922, 944-45 (7th Cir.1996).

b. Claims of selective enforcement of the law

These may be cognizable under § 1983 so long as there exists proof of purposeful discrimination. *Gardenhire v. Schubert*, 205 F.3d 303, 318-21 (6th Cir. 2000). In other words, a case for selective enforcement in this context requires proof that a government official singled out an individual from a protected group and chose to uniquely enforce a law against that person and not others outside the protected class. *Gardenhire*, 205 F.3d at 319.

c. "Class of one" equal protection claims

A "class of one" equal protection claim may only succeed when: (1) a plaintiff alleges that she was intentionally treated differently from other similarly situated persons; and (2) there is no rational basis for the difference in treatment or the cause of the different treatment was the "totally illegitimate animus" against the plaintiff by the defendant. *McDonald v. Village of Winnetka*, 371 F.3d 992, 1001 (7th Cir. 2004). It is very difficult to prove such claims. *McDonald*, 371 F.2d at 1001; *see also Lamers Dairy, Inc. v. U.S. Dept. of Agric.*, 379 F.3d 466, 473 (7th Cir. 2004) ("[g]overnmental action only fails rational basis scrutiny if no sound reason for the action can be hypothesized").

"Class of one" claims automatically fail when the plaintiff is unable to "identify someone who is similarly situated but intentionally treated differently than he." *Lunini v. Grayeb*, 395 F.3d 761, 770 (7th Cir. 2005). To be similarly situated, the individual must be "prima facie identical in all relevant respects." *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002).

6. Conspiracy

A § 1983 conspiracy claim has two requirements. First, a plaintiff must show that there was an express or implied agreement (or "meeting of the minds") among the defendants to deprive the plaintiff of a constitutional right. Secondly, the agreement must result in an actual deprivation of that right through overt acts made by the defendants in furtherance of their agreement. *See Flood v. O'Grady*, 748 F. Supp. 595, 599 (N.D. Ill. 1990).

Both elements must be satisfied. *Hampton v. Hanrahan*, 600 F.2d 600, 622 (7th Cir. 1979).

Conspiracy claims brought pursuant to § 1983 may not consist of mere conclusory allegations. *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 533 (10th Cir. 1998).

7. First Amendment claims

Although First Amendment § 1983 claims may be filed by any citizen against a public official or entity, they are most commonly seen in the context of a public employee suing his or her employer for alleged violations of the employee's freedoms of speech or association.

Any First Amendment freedom of speech suit brought by an employee is now subject to the Supreme Court's ruling in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006). According to the Court, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421.

8. Second Amendment claims – coming soon?

E. "Laws actions" – although far less common than claims predicated upon alleged constitutional deprivations, plaintiffs may bring § 1983 claims against persons acting under color of state law for violating their federal statutory (or even treaty) rights.