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TRYING AND DEFENDING 42 U.S.C. SECTION 1983 CLAIMS

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I. PLEADING

A. Essential Elements

1. Violation of federal constitutional or statutory right;

   a. Under § 1983, plaintiffs have a remedy for the violation of any rights, privileges or immunities secured by the United States Constitution. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972). This generally includes constitutional rights, federal statutes and treaties. (*See* Part II *infra.*)

2. Person acting under color of state law:

   a. Section 1983 remedies are only available for actions taken by persons acting under color of state law. Courts ask "whether the state was sufficiently involved to treat that decisive conduct as state action . . . Thus, in the usual case we ask whether the state provided a mantle of authority that enhanced the power of the harm-causing individual actor." *NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988) (holding that a state university's enforcement of the rules of a private association did not transform the private association into a state actor).

   b. The Supreme Court has recognized that "although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional restraints." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 610 (1991).

   c. Where a private party engages in essentially public acts, the line between public and private action is blurred. Thus, the Fourth Circuit has recognized several factors courts may employ to determine whether a private party will be deemed a state actor for Section 1983 purposes.

      1. When the state has coerced the private sector to commit an act that would be unconstitutional if done by the state;

      2. When the state has sought to evade a constitutional duty through delegation of private actor;

3. When the state has delegated the traditionally and exclusively public function to a private act; and

4. When the state has committed an unconstitutional act in the course of enforcing the right of a private citizen.

See DeBauche v. Trani, 191 F.3d 499, 507 (4th Cir. 1999); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995); *Edmonson*, *supra*, see *also Mentavlos v. Anderson*, 249 F.3d 301 (4th Cir. 2001) (citing *DeBauche* and recognizing that the proper factors will depend on the specific case); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 342 (4th Cir. 2000) (listing such factors as the extent of public benefits accorded the private entity, the extent of governmental regulation over the private entity, and whether the state itself views the private entity as a state actor).

B. Federal Rule of Civil Procedure 8: Notice Pleading v. Heightened Pleading Requirements

1. The Supreme Court has rejected heightened pleading requirements for § 1983 municipality claims. *Leatherman v. Tarrant County Narcots Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

2. Despite the Supreme Court's decision in *Leatherman*, some courts have adopted heightened pleading rules for § 1983 claims that are subject to a qualified immunity defense. *See GJR Investments Inc. v. County of Escambia*, 132 F.3d 1359 (11th Cir. 1998). The Fourth Circuit, however, has rejected such a standard based, in large part, on the Supreme Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998), which suggested implicitly that heightened pleading requirements are not appropriate even in claims subject to a qualified immunity defense. *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001).

C. Individual versus Official Capacity

1. Individual Capacity: Individual capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. *Kentucky v. Graham*, 473 U.S. 159 (1985). Judgment in individual capacity cases are executed against the official's personal assets. *Id.*

2. Official Capacity: A suit against a government official in his official capacity is "only another way of pleading an action against an entity of

which an officer is an agent." *Id.* at 165-66. Thus, judgments in official capacity suits are executed against the government entity itself.

3. Significant differences between individual and official capacity suits:

   a. Policy or practice rule: In individual capacity suits, plaintiffs need only show that the official's conduct caused the deprivation of the federally protected right. However, plaintiffs in official capacity actions must show that enforcement of the entity's policy or practice was a violation of federal rights. *Id.*; *Hafer v. Mello*, 502 U.S. 21 (1991).

   b. Different immunities apply: In individual capacity suits, common law absolute and qualified immunities apply. In official capacity suits, the Eleventh Amendment, which gives states' sovereign immunity, applies and municipal immunity against punitive damages also applies. *See* Volume 2A, Martin A. Schwartz, John E. Kirklin, *§ 1983 Litigation: Claims and Defenses*, § 6.5 at 606 (3d ed. 1997).

4. The Fourth Circuit does not assume that the failure to plead a suit as one against an official in her individual capacity is only brought against her in her official capacity. *Biggs v. Meadows*, 66 F.3d 56 (4th Cir. 1995). However, if a complaint specifically alleges a capacity, that designation controls. *Amos v. Maryland Dep't of Pub. Safety & Correctional Servs.*, 126 F.3d 589 (4th Cir. 1997) *vacated on other grounds*, 524 U.S. 935 (1998).

D. Venue

1. When a public official is sued in an official capacity, generally the place where the officer performs his official duties is regarded as his residence for purposes of venue. 15 C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure*, § 3805 (West 1999).

2. Note that in some cases the state officer may have more than one official residence. *Id.*

E. Class Actions

In order to bring a class action under § 1983, plaintiffs must comply with the requirements of Federal Rules of Civil Procedure 23 (Fed. R. Civ. P.). In seeking to bring class actions, plaintiffs should be particularly cognizant of standing issues. *See Walters v. Edgar*, 163 F.3d 430 (7th Cir. 1998). *See also* discussion of standing under Part 3, Defenses, *infra*.

II. SUBSTANCE OF CLAIMS

A. Federal Statutes

1. Not all federal statutes are enforceable under § 1983. Generally, federal statutes are enforceable under § 1983 unless: (1) Congress did not intend for the statute to create enforceable rights; or (2) Congress intended to preclude the enforcement of the statute under § 1983. *Wilder v. Va. Hosp. Assoc.*, 496 U.S. 498 (1990).

2. Most recently, the Supreme Court has held that the Federal Education Rights and Privacy Act ("FERPA") is not enforceable under § 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). Moreover, courts, including the Fourth Circuit, have ruled that claims for violation of the Age Discrimination and Employment Act ("ADEA") may not be brought pursuant to § 1983. *See Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364 (4th Cir. 1989); *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997).

3. Other significant statutes that have been denied enforcement under § 1983 include the Americans with Disabilities Act ("ADA"), *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), the Fair Labor Standards Act ("FLSA"), *Kendall v. City of Chesapeake*, 174 F.3d 437 (4th Cir. 1999), and the Social Security Act ("SSA"), *Tomlinson v. Soc. Sec. Admin.*, 939 F. Supp. 571 (E.D. Mich. 1996). For a more comprehensive list of statutes that have been denied enforcement under § 1983 as well as those that have been granted enforcement, *see Schwartz and Kirklin*, 2001-1 Cumulative Supplement at §§ 4.5, 4.6.

B. Federal Regulations

The Fourth Circuit has held that an administrative regulation cannot alone create an enforceable § 1983 interest that is not implicit in the enforcing statute. *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987); *Harris v. James*, 127 F.3d 993 (11th Cir. 1997) (holding regulations unenforceable under § 1983). Other circuits, however, have held that federal regulations do create enforceable rights under § 1983. *See Boatman v. Hammons*, 164 F.3d 286 (6th Cir. 1998) (holding that federal regulations are enforceable under § 1983); *King v. Town of Hempstead*, 161 F.3d 112 (2d Cir. 1998) (noting circuit split but declining to address the issue on its merits).

C. Federal Treaties

Section 1983 actions brought to enforce federal treaty rights are proper. *U.S. v. State of Washington*, 935 F.2d 1059 (9th Cir. 1991). However, an action to interpret a federal treaty or define the right it confers may not be brought under § 1983. *Id.*

D. State Law versus Constitutional Law

1. Section 1983 does not create remedies for violations of state law or state constitutions. Thus, for example, defamation by a state or local official does not give rise to a § 1983 action. *Paul v. Davis*, 424 U.S. 693 (1976).

III. DEFENSES

A. Qualified Immunity

1. General. State officials performing discretionary functions are shielded from liability for monetary damages if they can prove that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995); *Gholson v. Murry*, 953 F. Supp. 709 (E.D. Va. 1997). Qualified immunity exists fundamentally to protect state officials in the performance of their duties unless they are "plainly incompetent" or they "knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

2. Purpose. Qualified immunity provides a defendant an entitlement not to stand trial or face other burdens of litigation. *Turner v. Dammon*, 848 F.2d 440, 443 (4th Cir. 1988).

3. Affirmative Defense. Qualified immunity must be pled as an affirmative defense. *Gomez v. Toledo*, 446 U.S. 635 (1980).

4. Motions to Dismiss and Motions for Summary Judgment. These motions, based on qualified immunity, should be decided as soon as possible so that public officials are not subject to costly discovery and trial. *Hunter v. Bryant*, 502 U.S. 224 (1991); *Harlow v. Fitzgerald*; *Anderson v. Creighton*.

5. Interlocutory Appeals. Most qualified immunity determinations are subject to an immediate interlocutory appeal. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). An interlocutory appeal may address only questions of

law, not fact. Case law indicates that most issues affecting qualified immunity will be treated as legal issues rather than factual. *See Hunter v. Bryant, supra* (whether officer reasonably believed he had probable cause to arrest was a question of law, not fact); *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Ornelas v. U.S.*, 517 U.S. 690 (1996) (issue of whether facts constitute reasonable suspicion or probable cause is for judge, even though it raises mixed questions of law and fact).

There is no federal right to an interlocutory appeal of a qualified immunity denial if the case is pending in state court. *Johnson v. Fankell*, 520 U.S. 911 (1997).

6. Standard for Summary Judgment. On summary judgment, the judge may determine not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to know that the law forbade conduct not previously identified as unlawful. If the law was clearly established, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct. *David v. Mosley*, 915 F. Supp. 776 (E.D. Va. 1996) (citing *Harlow*, 457 U.S. at 818-19), *aff'd*, 103 F.3d 117, 1996 WL 680723 (4th Cir. 1996).

7. Elements. To establish qualified immunity, the defendant must show: (1) that there was no previously established law prohibiting or restricting the conduct in question at the time it occurred; and (2) if the law was clearly established, that a reasonable official under the circumstances would not have known the conduct was illegal. *Gomez v. Toledo, supra.*

8. Clearly Established Right. Plaintiff must allege a constitutional right that was well-established at the time of the incident. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law, the unlawfulness must be apparent. *Anderson v. Creighton*, 483 U.S. 635. When there is a legitimate question as to whether the official's conduct constituted a constitutional violation, then the official is entitled to qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Wiley v. Doory*, 14 F.3d 993 (4th Cir. 1994). Whether the law was clearly established is a question of law for the court. It is the defendant's, not the plaintiff's, burden to prove the status of the law. *Elder v. Holloway*, 510 U.S. 510 (1994).

Where the general legal principle has not been established, the law changed, the legal standard had been stated only in broad and amorphous terms, or the conduct at issue was not clearly proscribed, qualified immunity is appropriate. *Somers v. Thurman*, 109 F.3d 614 (9th Cir. 1997); *Brown v. City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997); *Anderson v. Romero*, 72 F.3d 518 (7th Cir. 1995); *Trigalet v. Young*, 54 F.3d 645 (10th Cir. 1995).

A public official who performs an act, clearly established to be beyond the scope of his discretionary authority, cannot receive qualified immunity. The official bears the burden to prove that his conduct is within the scope of his duties. *In re Allen*, 106 F.3d 582 (4th Cir. 1997).

9. Reasonable Official. If the court determines that a plaintiff has alleged a clearly established right at the time the incident occurred, then the analysis shifts to a determination of whether a reasonable official would have known that his actions violated that right. *Gordon v. Kidd*, 971 F.2d 1087, 1093 (4th Cir. 1992); *Collinson v. Gott*, 895 F.2d 994, 998 (4th Cir. 1990).

The standard is one of "objective legal reasonableness." A government official can now claim immunity, despite the clear existence of a constitutional principle that governs the case, if a reasonably well-trained officer would not have known that his conduct would violate plaintiff's constitutional rights. *Anderson v. Creighton*; *Simmons v. Poe*, 47 F.3d 1370 (4th Cir. 1995).

The objective reasonableness of the official's actions is a question of law. *Johnson v. Jones*, 515 U.S. 304 (1995); *Pritchett v. Alford*, 973 F.2d 307 (4th Cir. 1992); *Torchinsky v. Siwinski*, 942 F.2d 257 (4th Cir. 1991); *Holder v. Kaiser*, No. 2:95cv880, 1996 U.S. Dist. LEXIS 8978 (E.D. Va. March 28, 1996).

10. Motive and Bad Faith. Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's objective intent is simply irrelevant to the defense. *Crawford-El v. Britton*. However, evidence of improper motive may be an essential element of the plaintiff's affirmative case where the primary focus is not on any possible animus directed at the plaintiff, but an intent to disadvantage all members of a class that includes plaintiff, or to deter public comment on a specific issue of public importance. *Id.*; *Washington v. Davis*, 426 U.S. 229 (1976).

B. Significant Qualified Immunity Decisions

1. ***Wilson v. Layne***, 526 U.S. 603 (1999).

   a. Facts. A reporter and photographer accompanied members of the U.S. Marshal's Service into a private home during the attempted execution of an arrest warrant. The owners of the home brought suit against the law enforcement officers in their personal capacities, claiming that the actions of the officers in bringing members of the media into their home to observe and record the attempted execution of the arrest warrant violated their Fourth Amendment rights.

   b. Holding. A court evaluating a claim of qualified immunity "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all and, if so, proceed to determine whether that right was clearly established at the time of the alleged violation." Because the presence of reporters inside the home was not related to the objectives of the authorized intrusion by the police, the court found a violation of the Fourth Amendment. Despite this constitutional violation, the court held that it was not unreasonable for a police officer in April 1992 to have believed that bringing media observers along during the execution of an arrest warrant was lawful. The state of the case law in this area was particularly undeveloped, with the only published opinion on the subject being a state intermediate court decision which held that such conduct was not unreasonable. Furthermore, the officers were justified in relying on the Marshal's Service ride-along policy which explicitly contemplated this situation.

2. ***Board of County Commissioners of Bryan County, Oklahoma, v. Brown***, 520 U.S. 397 (1997).

   a. Facts. After a high-speed car chase, a female passenger who twice failed to respond to orders to exit the vehicle was dragged from the car by a deputy and thrown to the ground, suffering severe injuries to her knees. Plaintiff filed a § 1983 action against the county under the theory that the sheriff had failed to adequately review the deputy's background which included a history of misdemeanor convictions, and, therefore, was deliberately indifferent to her federally protected right to be free from the use of excessive force.

   b. Holding. The county is not liable for the sheriff's isolated decision to hire the deputy without adequate screening because plaintiff had not demonstrated that the decision reflected a conscious disregard

for a high risk that the deputy would use excessive force in violation of her federally protected right. In its decision, the court cited *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), in explaining that a plaintiff must identify a municipal "policy" or "custom" that caused the injury and must prove that, through deliberate conduct, a municipality was the "moving force" behind the injury. A municipality may not be held liable under § 1983 solely because an employee is a tortfeasor.

3. ***Anderson v. Creighton***, 483 U.S. 635 (1987).

   a. Facts. An FBI agent conducted a forcible, warrantless search of a home in the mistaken belief that a bank robbery suspect might be found there.

   b. Holding. Summary judgment is appropriate under qualified immunity grounds if an officer can establish as a matter of law that a reasonable officer could have believed that the search comported with the Fourth Amendment, even though it actually did not. The Court commented that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and in such cases, those officials, like other officials who act in ways they reasonably believe to be lawful, should not be held personally liable. The same is true of their conclusions regarding exigent circumstances.

C. Statute of Limitations for § 1983 Actions

1. In drafting 42 U.S.C. § 1983, Congress provided no limitation period for actions brought under this statute.

2. In light of congressional silence on the subject, the United States Supreme Court has directed the federal courts to look to the law of the state where the alleged civil rights violation occurred and apply that state's most analogous personal injury limitation period. *Wilson v. Garcia*, 471 U.S. 261, 276-80 (1985).

3. Virginia Code Ann. § 8.01-243(A) states, in pertinent part, that "every action for personal injuries, whatever the theory of recovery . . . shall be brought within two years after the cause of action accrues."

4. The United States District Court for the Eastern District of Virginia and the Fourth Circuit Court of Appeals have consistently applied the two-year statute of limitations in Virginia for personal injury actions to § 1983 claims. *See, e.g., Clay v. LaParta*, 815 F. Supp. 911, 913 (E.D. Va. 1993),

aff'd, 36 F.3d 1091, 1994 WL 520975 (4th Cir. 1994); *McCausland v. Mason County Bd. of Educ.*, 649 F.2d 278, 279 (4th Cir. 1981); *Johnson v. Hill*, 965 F. Supp. 1487 (E.D. Va. 1997); *Knight v. Hoggard*, 182 F.3d 908, 1999 U.S. App. LEXIS 13217 (4th Cir. 1999).

5. Accrual. The question of when a cause of action accrues under 42 U.S.C. § 1983 remains one of federal law. *Nasim v. Warden, Md. House of Corrections*, 64 F.3d 951, 955 (4th Cir. 1995) (*en banc*). A cause of action accrues "either when the plaintiff has knowledge of his claim or when he is put on notice – *e.g.*, by the knowledge of the fact of injury and who caused it – to make reasonable inquiry and that inquiry would reveal the existence of a colorable claim." *Id.* Therefore, the statute of limitations begins to run when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action. *Id.*; *Knight*; *Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996).

6. Tolling. Equitable estoppel may bar a defendant from raising a statute of limitations defense if the defendant has obstructed the plaintiff from asserting a claim by fraudulent concealment of a potential cause of action. *See Boykins Narrow Fabrics Corp. v. Weldon Roofing & Sheet Metal, Inc.*, 221 Va. 81, 86, 266 S.E.2d 887, 890 (1980); *Knight*. The elements of equitable estoppel include proof that: (1) a material fact was falsely represented or concealed; (2) the representation or concealment was made with knowledge of the fact; (3) the party to whom the representation was made was ignorant of the truth of the matter; (4) the representation was made with the intention that the other party should act upon it; and (5) the party claiming estoppel was misled to his injury. *Id.*

D. Standing

1. Basic Principles: To have standing, a party seeking to invoke federal court jurisdiction must demonstrate three things: (1) injury in fact, which means the invasion of an interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Northeastern Florida Chap. of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663 (1993).

2. First Amendment Standing: The Fourth Circuit has held that an individual's direct contact with an unwelcome religious display is sufficient injury for the party to have constitutional standing to initiate a First Amendment suit. *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997).

3. Standing for Injunctive Relief. In seeking injunctive relief, plaintiff must show that there is a real or immediate threat that the plaintiff will be wronged again. A hypothetical chance of future injury is not sufficient for standing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 97-98 (1983).

4. Standing of Associations.

   (a) An association may have standing where there is sufficient likelihood that some members of the association will be affected by a challenged policy. *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773 (4th Cir. 1995).

   (b) Even if some members of an association dissent from the decision to litigate, an association may still have standing. *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856 (7th Cir. 1996).

   (c) In some circumstances, conflicts of interest among members of an association may defeat the association's standing. Thus, if members of the association must join the suit individually in order to protect their own interests, the association itself will not have standing. *Md. Highways Contractors Ass'n v. State of Md.*, 933 F.2d 1246, 1252 (4th Cir. 1991).

5. Ripeness. The doctrine of ripeness is closely associated with the doctrine of standing. In determining whether a claim is ripe, courts first address the fitness of the issue for judicial decision and then assess the hardship to the parties of withholding court's consideration of the issue. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). For example, the Second Circuit has held that a First Amendment challenge to a school board directive was not sufficiently ripe where the plaintiff teacher could not show sufficient likelihood that the directive would be applied unconstitutionally. *Marchi v. Bd. of Cooperational Educational Servs.*, 173 F.3d 469 (2d Cir. 1999). *See also Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997) (finding Eighth Amendment challenge to sexual offender statute ripe where the plaintiffs had already been labeled sex offenders).

6. Third Party Standing. Absent special circumstances, third parties generally do not have standing to bring constitutional challenges on behalf of another. *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999) (ruling that prison physician has no standing to bring Eighth Amendment challenge on behalf of prisoners).

E. *Parratt* Doctrine

1. Under the *Parratt* Doctrine, a litigant's procedural due process claims may be barred where existing state procedures are sufficient to comply with due process concerns. *Parratt v. Taylor*, 451 U.S. 527 (1981). The essential thrust of the *Parratt* Doctrine is that even where a person acting under color of state law has deprived a citizen of life or liberty without due process the state may implement a post-deprivation procedure that will effectively immunize it from any claims of violations of the citizen's procedural due process right.

2. In order for the *Parratt* Doctrine to apply, the conduct must be "random" and "unauthorized." *See Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877 (2d Cir. 1996). Thus, where the risk of deprivation of a citizen's right is "foreseeable" such that the state may address it by prescribing pre-deprivation procedures, the *Parratt* Doctrine does not apply. *Fields v. Durham*, 909 F.2d 94 (4th Cir. 1990).

F. Punitive Damages

1. Punitive damages are not available against municipalities. *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981).

2. Punitive damages are not available against a state or state agency unless the state has waived its Eleventh Amendment immunity. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

3. Punitive damages are available against state or local officials in their individual capacities. *Smith v. Wade*, 461 U.S. 30 (1983). Thus, since plaintiffs may recover punitive damages against officials in their individual capacities and not against the municipality or state agency, often the punitive damages issue is the most significant issue in a suit against an official in his or her individual capacity.

   a. Fourth Circuit Law: In *Cooper v. Dyke*, 814 F.2d 941 (4th Cir. 1987), the court upheld a punitive damage award where the official showed deliberate indifference to an arrestee's serious medical needs.

   b. Supreme Court Law: In a significant recent decision, the Supreme Court has limited the scope of punitive damage awards generally. *State Farm Mut. Auto Ins. v. Campbell*, No. 01-1289, 2003 U.S. LEXIS 2713, 71 U.S.L.W. 4282 (April 7, 2003). The Court addressed in depth the due process limitations on punitive damages awards. Significantly, the State Farm decision held that few

punitive damages awards that are more than nine times the amount awarded in compensatory damages will be considered constitutional. *Id.* (For further discussion of *Campbell*, *see* Part V, *infra.*)

IV. ATTORNEYS' FEES

A. 42 U.S.C. § 1988

Pursuant to 42 U.S.C. § 1988 (hereinafter "§ 1988") in proceedings to enforce a provision of § 1983, the court in its discretion, may allow the prevailing party, other than the United States, reasonable attorneys' fee as part of the costs.

B. Prevailing Parties

1. "Materially Alters" Standard. Under § 1988, a plaintiff is the prevailing party when "actual relief from the merits of this claim materially alters the legal relationship between the parties by modifying the defendants' behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111 (1992).

2. Prevailing on Procedural Issues. Simply prevailing on procedural or evidentiary rulings is not sufficient under § 1988. *Hanrahan v. Hampton*, 446 U.S. 754 (1980). Thus, where plaintiff is merely granted class certification or a temporary restraining order preserving the status quo but not addressing the merits of the claim, courts have ruled that plaintiffs are not prevailing parties. *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1253 (2d Cir. 1984) (class certification); *Paragould Music Co. v. City of Paragould*, 738 F.2d 973 (8th Cir. 1984) (temporary restraining order).

3. Multiple Claims. The plaintiff may be a prevailing party when he or she wins on the merits of one claim even though other claims have yet to be resolved. *Hanrahan*, 445 U.S. at 757-58.

4. Partial Victory/Degree of Overall Success. Where the plaintiff has prevailed on some claims but lost on others, the Fourth Circuit has directed lower courts in determining prevailing party fees to "consider the relationship between the claims raised by the plaintiff and the degree of overall success obtained." *Brodziak v. Runyon*, 145 F.3d 194, 197 (4th Cir. 1998).

5. Preliminary Injunctive Relief Not Sufficient For Prevailing Party Status. Under recent Fourth Circuit authority, a party's success in acquiring a

preliminary injunction is not sufficient for "prevailing party" status. *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 112 (2002).

6. "Catalyst Theory" Rejected. The Supreme Court has rejected the much-maligned "catalyst theory," whereby a party could achieve prevailing party status simply because the defendant took some action after the filing of the lawsuit consistent with the plaintiff's objectives. *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

7. Private Settlements not a Basis for Prevailing Party Status. In *Rivero*, the Fourth Circuit specifically rejected the idea that a private settlement could provide a basis for a finding of prevailing party status. 282 F.3d at 279-80. Only where the court enters the equivalent of a "consent decree" that details the terms of the agreement and provides a "continuing basis of jurisdiction to enforce the terms of the resolution" of the case will parties be considered prevailing, regardless of the terms of the private settlement agreement. *Id.*

   Thus, "the obligation to comply with a settlement's terms must be expressly made part of a court's order . . . ." *Id.* at 283. "Either incorporation of the terms of the agreement or a separate provision retaining jurisdiction over the agreement will suffice for this purpose." *Id.*

B. Calculating the fee award: The *Lodestar* Approach

1. Courts apply the *Lodestar* approach to determine a proper fee under § 1988. City of Burlinton v. Dague, 501 U.S. 868 (1992). Under this analysis, courts begin by multiplying the reasonable number of hours spent on the litigation by the reasonable hourly fee to arrive at a lodestar figure. *See Penn. Envtl. Def. Found. v. Canon-McMillan Sch. Dist.*, 152 F.3d 228 (3d Cir. 1998).

2. In determining the proper lodestar figure and adjustments to the lodestar figure, courts typically evaluate the case in terms of the twelve factor analysis set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), including:

   (a) the time and labor required;
   (b) the novelty and difficulty of the questions the case presents;
   (c) the skills requisite to perform the legal service properly;
   (d) the preclusion of other employment by the attorney due to acceptance of the case;

(e) the customary fee in the community for work of a similar nature;
(f) whether the fee is fixed or contingent;
(g) time limitations imposed by the client or the circumstances;
(h) the amount involved and the results obtained;
(i) the experience, reputation and ability of the attorneys;
(j) the "undesirability" of the case;
(k) the nature and length of the professional relationship with the client; and
(l) awards in similar cases.

3. District courts have wide discretion in determining the reasonable hours. *See Case v. Unified Sch. Dist No. 233*, 157 F.3d 1243 (10th Cir. 1998); *Luciano v. Olsten Corp.*, 109 F.3d 111 (2nd Cir. 1997); *Wegner v. Standard Ins. Co.*, 129 F.3d 814 (5th Cir. 1997).

4. In establishing reasonable rates, courts use the market value standard. The plaintiff bears the burden of producing sufficient evidence of a "reasonable market rate for the essential character and complexity of the legal services rendered . . . ." *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 131 (3d Cir. 1999). Once the plaintiff has carried this burden, the defendant may contest the plaintiff's evidence with record evidence of its own. *Id.* However, the district court decision must be based on evidence in the record rather than a "generalized sense of what is customary or proper." *Id. See also Reed v. Rhodes*, 179 F.3d 453 (6th Cir. 1999) (noting that in setting reasonable rates, a "renowned lawyer who customarily receives $250 an hour in a field in which competent and experienced lawyers and their agents normally receive $85 an hour is to be compensated at the lower rate").

V. SIGNIFICANT RECENT DECISIONS IN § 1983 LITIGATION

A. State versus Private Action

1. ***Rossignol v. Voorhaar***, 316 F.3d 516 (4th Cir. 2003).

The plaintiff, a newspaper publisher, sued a group of sheriff's deputies after the deputies conspired together to purchase all of the newspapers on the eve of an election for sheriff because the newspaper was critical of the police department. Although the deputies were off duty, in plain clothes and driving private cars, the Fourth Circuit held that they acted under color of state law because the deputies' private actions were linked to events which arose out of their official status. In addition, the court found that the deputies' status as police officers assisted them in carrying out the

mass-purchase, which violated state law. For example, when a convenience store clerk informed the deputies they were not permitted to purchase all of the papers, the deputies intimidated him by suggesting they would make his life "a living hell." Finally, the court found the deputies' behavior to be exactly the kind of censorship the First Amendment had been designed to prevent. It stated that, "censorship is equally virulent whether carried out by official representatives of the state or by private individuals acting out of a self-interested hope in receiving or maintaining benefits from the state." *Id.* at 526-27.

2. ***Mentavlos v. Anderson***, 249 F.3d 301 (4th Cir.), *cert. denied*, 534 U.S. 952 (2001).

The plaintiff, a female cadet at the Citadel, sued under § 1983 alleging that male cadets were acting under color of state law when they allegedly engaged in gender discrimination and harassment in forcing her to withdraw from school. The court ruled, however, that neither the fact of state financial assistance nor the fact that male cadets were asked to assist in the instruction of freshman cadets established that they were acting under color of state law.

B. Qualified Immunity

1. ***Mansoor v. Trank***, 319 F.3d 133 (4th Cir. 2003).

In *Mansoor*, the Fourth Circuit held that county officials were not entitled to qualified immunity in connection with a suit brought by a police officer. The officer had been placed on administrative leave. The officials then sought to condition his return to work on agreement to a "Plan of Assistance" that restricted the officer from making comments about his employment, including comments on matters of public concern. In affirming the district court's ruling, the Fourth Circuit Court of Appeals noted that even if the County had a legitimate interest in restricting the officer's unprotected comments about his employment, that interest did not justify the Plan's restriction on the officer's prospective speech about matters of public concern as a private citizen.

2. ***Hope v. Pelzer***, 536 U.S. 730 (2002).

In a § 1983 suit alleging cruel and unusual punishment in violation of the Eighth Amendment, prison guards were denied qualified immunity for handcuffing a disruptive prisoner to a hitching post and leaving him for an extended period of time in the sun. The United States Supreme Court ruled that any safety concerns had long since abated from the time the prisoner was handcuffed. Despite the clear lack of an emergency, the

prisoner was subjected to punishment that was totally without penalogical justification, with a substantial risk of physical harm, unnecessary pain, unnecessary exposure to the sun and substantial risk of particular discomfort and humiliation. The court held that a reasonable officer should have known using the hitching post in such a manner was unlawful.

3. ***Robles v. Prince George's County, Md.***, 302 F.3d 262 (4th Cir. 2002).

In what one Fourth Circuit judge has called "a breathtaking expansion of the qualified immunity doctrine," (Luttig, J., dissenting from denial of rehearing *en banc*, 308 F.3d 437 (4th Cir. 2002)), the court ruled that the acts of police officers in handcuffing a man to a pole in the middle of the night and leaving him there alone are protected by qualified immunity. The officers admitted that their actions were not taken for any legitimate law enforcement purpose. In fact, the purpose was to make a point to a neighboring county's police department with which the officers were feuding. While the court found the actions to be more than *de minimus* and a violation of the man's constitutional rights, it further found that the officers were not on notice that such acts would constitute violations and thus were entitled to qualified immunity.

3. ***Reedy v. City of Hampton***, No. 4:02cv56 (E.D. Va. Jan. 2, 2003).

In a lawsuit alleging gross negligence, intentional conduct and § 1983 violations arising from a police pursuit of the plaintiff during which plaintiff was shot and killed, the court held that the officer was entitled to qualified immunity. The court found that the officer was objectively reasonable in using deadly force when he shot the decedent because he believed another officer's life was in danger. In addition, the court granted the City's motion for summary judgment based on the City's provision of training on felony traffic stops at the police academy and the absence of evidence of deliberate indifference motivating the City's decision not to implement a policy on high risk traffic stops.

4. ***Wilson v. Kittoe***, 229 F. Supp. 2d 520 (W.D. Va. 2002).

In *Wilson*, the district court denied summary judgment on qualified immunity where a police officer arrested an attorney who showed up on the scene of an arrest. The officer was in the process of arresting the son of the attorney's neighbor when the attorney walked over to see what was happening. The attorney, having assisted the family before, asked the son if he needed representation. The son replied yes and said he wanted to retain him. The attorney then told the officer he wanted to speak with the son whenever the officer was through and informed the officer that any

information he elicited from the son from that point on would be inadmissible evidence. The police officer promptly handcuffed the attorney and took him to jail. The court ruled that there was a clearly established right to peacefully criticize police officers but left the question as to whether the circumstances were sufficiently "tense" to justify the police officer's actions for the jury.

C. Substantive Liability Issues Under § 1983

1. ***Myers v. Shaver***, No. 7:02cv654, 2003 WL 402844 (W.D. Va. Feb. 19, 2003).

   In a § 1983 lawsuit filed by a former state trooper who claimed defendant law enforcement officials falsely arrested him and charged him with brandishing a firearm at his wife, the court found that the officials did not violate the plaintiff's liberty or property interests and that qualified immunity shielded them from the suit. The evidence did not show that the officials detained plaintiff at the area office as an implied condition of his employment, nor did it show they physically restrained him or implicitly threatened to use force to keep him there. Accordingly, plaintiff was not "seized" within the meaning of the Fourth Amendment. Moreover, a summons was issued in lieu of arresting plaintiff. Even if service of the summons and surrounding events amounted to a seizure under the Fourth Amendment, the search was not unreasonable because there was probable cause to issue the warrant for plaintiff's arrest. Notably, a police officer investigating a domestic dispute reasonably could have concluded from the wife changing her story, among other evidence, that the wife was covering for her husband or intimidated by him.

2. ***Randall v. Prince George's County, Md.***, 302 F.3d 188 (4th Cir. 2002).

   In a civil rights suit arising from police searches and detentions of multiple plaintiffs occurring in the wake of the murder of a police officer as he sat in his police cruiser, the Fourth Circuit Court of Appeals found there was insufficient evidence to support the jury verdict against three supervising officers on either a theory of "bystander liability" or "supervisory liability." In making its determination, the Fourth Circuit adopted a standard to assess bystander liability law whereby an officer possesses an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers. Consequently, in the future an officer may be liable under § 1983 on a theory of bystander liability if he knows that a fellow officer is violating an individual's constitutional rights, has a reasonable opportunity to prevent the harm, and chooses not to act. Knowledge is a key component to the analysis. Likewise, with respect to stating a claim for supervisory liability, the court

reiterated its prior holdings requiring conduct that poses a "pervasive and unreasonable' risk of constitutional injury, which equated to a showing that it was customary for the police to detain witnesses against their will in the absence of probable cause.

3. ***Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls***, 536 U.S. 822 (2002).

The Supreme Court has ruled that a public school policy of drug testing all middle and high school students who wish to participate in extracurricular activities is constitutional. A student brought a § 1983 action for equitable relief claiming the policy violated the Fourth Amendment's prohibition against unreasonable search and seizure. The Court, however, held the policy was a reasonable means of furthering the school district's important interest in preventing and deterring drug use among its school children. The decision stated that a finding of probable cause to drug test is unnecessary in the public school context because it would unduly interfere with the maintenance of the swift and informal disciplinary procedures that are needed. Moreover, school children have a limited expectation of privacy, particularly those who participate in extracurricular activities. Ultimately, the Court found the invasion of the students' privacy interest to be minimal and held the policy effectively served the district's interest in protecting its students safety and health.

D. Attorneys' Fees

1. ***Smyth v. Rivero***, 282 F.3d 268 (4th Cir.), *cert. denied*, 123 S. Ct. 112 (2002).

In a recent case cited previously in this outline, the Fourth Circuit Court of Appeals held that a party who wins a preliminary injunction is not eligible for a fee award under 42 U.S.C. § 1988. Plaintiffs challenged the constitutionality of a Virginia policy which required applicants for temporary assistance for needy families to identify the father of any child for whom aid was sought or provide the names of all potential fathers if paternity was uncertain. After the district court granted a preliminary injunction, the state agreed to make its policy prospective. Thus, the plaintiffs' cases became moot and were dismissed. Notwithstanding the state's agreement not to seek recoupment and plaintiffs' success in gaining a preliminary injunction, the Fourth Circuit reversed the district court's award of approximately $195,000 in attorneys' fees, holding that the grant of a preliminary injunction was not sufficiently akin to an enforceable judgment on the merits to make the plaintiffs the prevailing parties.

2. ***Buckhannon Bd. & Care Home v. W. Va. Dep't of Health and Human Res.***, 532 U.S. 598 (2001).

The Supreme Court ruled that a "defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur" to make the plaintiff a prevailing party. In the case the plaintiffs challenged a state law as being in violation of the Fair Housing Amendments Act. Before resolution on the merits, the defendants eliminated the law's requirement, thus making the case moot. Both the trial and appellate courts denied the plaintiff's request for attorneys' fees, and the Supreme Court affirmed.

3. ***Cook v. Andrews***, 7 F. Supp.2d 783 (E.D. Va. 1998).

Plaintiff prevailed at trial and petitioned for an award of expenses and attorneys' fees pursuant to § 1988. The court held that the prevailing market rate for attorneys' fees may be established through affidavits reciting the precise fees that counsel with similar qualifications have received in comparable cases; information concerning recent fee awards by courts in comparable cases; and specific evidence of counsel's actual billing practice or other evidence of the actual rates which counsel can command in the market.

In *Cook*, the plaintiff sought $2.5 million but recovered only $27,000. The court ruled that even though plaintiff's counsel had already reduced their original request by thirty-three percent (33%) in recognition of the small monetary verdict, the court felt that an additional reduction of thirty percent (30%) of the hours billed was appropriate to achieve fairness in equity in the attorneys' fees award for this case. In addition, while § 1988 speaks only of recovering attorneys' fees, the court held that a prevailing plaintiff is also entitled to its reasonable expenses under § 1988. The court in this case granted fifty percent (50%) of the requested amount, covering expert witness expenses.

4. ***Carr v. Super 8 Motel Developers, Inc.***, 964 F. Supp. 1046 (E.D. Va. 1997).

Defendant offered to pay an offer of judgment to plaintiff in the amount of $10,000. Plaintiff rejected the offer and lost the case at trial. Defendant requested attorneys' fees and costs.

Rule 68 of the Federal Rules of Civil Procedure provides that if a plaintiff rejects a defendant's formal settlement offer and if the judgment finally obtained by the offeree is not more favorable than the offer, then the plaintiff must pay the costs incurred after the making of the offer. The

court ruled that Rule 68 does not apply in this case because it applies only to offers made by the defendant and only to judgment obtained by the plaintiff.

Under 42 U.S.C. § 1988, an attorney's fee award can only be made to prevailing defendants if the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Hughes v. Rowe*, 449 U.S. 5 (1980). Here, the court found no evidence that the plaintiff's action was frivolous, unreasonable or without foundation. Therefore, the facts and circumstances of this case did not warrant an award of attorneys' fees and costs.

5. ***Hetzel v. County of Prince William***, 89 F.3d 169 (4th Cir. 1996).

Plaintiff sought injunctive relief, promotion and $9.3 million in damages under Title VII and § 1983. The jury rejected seven out of eight (8) counts and awarded plaintiff $750,000 in damages for emotional distress. After reducing the verdict to $500,000, the trial court awarded plaintiff in excess of $180,000 in attorneys' fees and costs.

On appeal, the court held that the award of attorneys' fees in this case was "clearly wrong." Given the limited results plaintiff obtained, plaintiff was not entitled to an award of significant, much less full, attorneys' fees. "'Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.' (*quoting Farrar v. Hobby*, 506 U.S. 103, 114 (1992)) . . . . A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of litigation as a whole." (*quoting Hensley v. Eckerhart*, 461 U.S. 424 at 435, 436 (1983)). The most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Id.* at 173.

6. ***Sheppard v. Riverview Nursing Ctr., Inc.***, 88 F.3d 1332 (4th Cir. 1996).

In a gender discrimination claim under Title VII, plaintiff was awarded declaratory relief and costs of $167 at trial. The district court ordered attorneys' fees of $40,000. Prior to trial, defendant had tendered a $5,000 settlement offer which was rejected. The court cited *Farrar v. Hobby*, 506 U.S. 103 (1992), in stating that when assessing whether to grant fees, the court must consider the relationship between the fees and the degree of the plaintiff's success. The court remanded the case for further consideration of attorneys' fees and commented, "*Farrar* was designed to prevent a situation in which a client receives a pyrrhic victory and the lawyers take a pot of gold." *Id.* at 1339.

E. Punitive Damages

1. ***State Farm Mut. Auto Ins. v. Campbell***, No. 01-1289, 2003 U.S. LEXIS 2713, 71 U.S.L.W. 4282 (April 7, 2003).

In *Campbell*, the plaintiff was awarded $2.6 million in compensatory damages and $145 million in punitive damages in a bad faith lawsuit against his insurance company, based in large part on evidence of State Farm's nationwide practices. After trial, the court reduced the awards to $1 million and $25 million, respectively. On appeal, the Utah Supreme Court reinstated the $145 million punitive damage award.

The U.S. Supreme Court granted *certiorari* and reversed. It held that three guideposts should be considered by courts in addressing the constitutional scope of punitive damage awards: 1) the degree of reprehensibility of the defendant's misconduct; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. It then found that by these lights, the punitive damage award violated due process.

The Court made several significant observations in its ruling. First, it held that, "[a] defendant's acts [that bear no relation to the plaintiff's harm], independent from the acts upon which liability was premised, may not serve as a basis for punitive damages." Second, it stated that, "few [punitive damage] awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Third, it found that, while possible criminal penalties for the same conduct could be considered in assessing a punitive damages award, "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of criminal sanction does not automatically sustain a punitive damages award."