# Recent Developments in Civil Rights

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## I. INTRODUCTION

One of the most significant developments in civil rights litigation is the expansion of immunity doctrines. Even though immunity is not mentioned in 42 U.S.C. § 1983,[1] the United States Supreme Court has given some governmental officials the benefit of a qualified immunity from damages,[2] and other officials an absolute immunity from damages.[3] Further, the Court has opened the door to municipal liability, but it has limited this liability to situations in which municipal officials act pursuant to governmental policy or custom.[4] Neither states, state agencies, nor state officials acting in their official capacity can be sued under section 1983 because they are not "persons."[5] In addition, the eleventh amendment protects states from federal court judgments that would be satisfied from the state treasury.[6] Although the immunity doctrines can be viewed simply as an attempt by the Court to allocate the loss in

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1. 42 U.S.C. § 1983 (1988) reads as follows:

> 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.

2. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635 (1987) (qualified immunity is applicable to federal law enforcement officer who participates in a search that violates the fourth amendment); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (executive officials in general are usually entitled to only qualified immunity); Wood v. Strickland, 420 U.S. 308 (1975) (school officials entitled to qualified immunity from liability for damages under § 1983).

3. *See, e.g.*, Briscoe v. LaHue, 460 U.S. 325 (1983) (trial witnesses); Stump v. Sparkman, 435 U.S. 349 (1978) (judicial function); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutorial function); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislative function).

4. Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978).

5. Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2312 (1989).

6. *See, e.g.*, Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) (an unconsenting state is immune from suits brought in federal courts by its citizens or citizens of another state); Edelman v. Jordan, 415 U.S. 651 (1974) (suits by private parties seeking to impose liability that must be paid from public funds in the state treasury are barred by the eleventh amendment).

civil rights cases, the doctrines all too frequently allow the wrongdoers to avoid the loss entirely.

In a related but different development, the Supreme Court has seriously restricted the liability of private employers engaging in racial discrimination. In *Patterson v. McLean Credit Union*,[7] the Court limited the reach of 42 U.S.C. § 1981[8] to race discrimination in the making and enforcement of contracts,[9] thereby eliminating racial harassment claims and most likely discharge claims as well. This interpretation of section 1981 is important because of the limited remedies available under Title VII of the Civil Rights Act of 1964.[10] Although section 1981 filled the gap in many race discrimination cases, the inadequacy of the remedies under Title VII often leaves the victims of sexual harassment without a remedy.[11] Congress attempted to fill the gap with the Civil Rights Act of 1990;[12] however, this was vetoed by President Bush in late October 1990.

## II. Immunities

When government officials are sued for damages in their individual capacity under section 1983, they should consider raising qualified im-

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7. 109 S. Ct. 2363 (1989).

8. 42 U.S.C. § 1981 (1988) reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

9. *Patterson*, 109 S. Ct. at 2372-73.

10. 42 U.S.C. §§ 2000e to 2000e-17 (1988). *See, e.g.*, King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990) (compensatory, nominal, and punitive damages not available under Title VII).

11. *See, e.g.*, Guess v. Bethlehem Steel Corp., 913 F.2d 463, 464 (7th Cir. 1990) (sexual harassment by co-employee is not a violation of Title VII unless employer knew or should have known of harassment and failed to take immediate and appropriate corrective action); Swanson v. Elmhurst Chrysler/Plymouth, 882 F.2d 1235, 1239-40 (7th Cir. 1989) (relief under Title VII is limited to equitable relief; damages are not available), *cert denied*, 110 S. Ct. 758 (1990). *Cf.* Bohen v. East Chicago, Ind., 799 F.2d 1180, 1184 (7th Cir. 1986) (although plaintiff was without a remedy under Title VII, she had a remedy under § 1983 because she was employed by a municipality).

12. The purpose of this Act, S. 2104, 101st Cong., 2d Sess. (1990), was "to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by these decisions," and "to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination." *Id.* § 2(b). Section 8 of the 1990 Act would have amended Title VII of the Civil Rights Act of 1964 by providing for compensatory and punitive damages, along with trial by jury.

munity as an affirmative defense.[13] This defense is available when the substantive law that the plaintiff seeks to enforce through section 1983 was not "clearly established" at the time of the challenged conduct.[14] In other words, the question is whether it was clear at the time of the officials' challenged conduct that they were violating the plaintiff's rights. If the law was not clearly established, the officials will not be held personally liable for damages even though the plaintiff prevails and is entitled to injunctive relief and damages from the officials' employer. If the law was clearly established, the officials generally can be held personally liable for damages.

Qualified immunity is actually more extensive than a protection from individual liability. When the immunity is available, the Supreme Court has held that government officials should not have to defend damage actions.[15] Therefore, the Court has made every effort to reduce the qualified immunity issue to an objective, legal determination that can be resolved at an early stage in litigation through a motion for summary judgment.[16] Furthermore, when the defendant official raises the defense in a motion for summary judgment[17] and the motion is denied, the defendant is entitled to an immediate appeal under the collateral order

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13. Gomez v. Toledo, 446 U.S. 635, 640 (1980). If the defense is not raised and pursued in a timely fashion, it will be considered waived. *See, e.g.*, Merritt v. Broglin, 891 F.2d 169, 171-72 n.4 (7th Cir. 1989); Apostol v. Gallion, 870 F.2d 1335, 1339 (7th Cir. 1989); Walsh v. Mellas, 837 F.2d 789, 799-800 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988). *Cf.* Rakovich v. Wade, 850 F.2d 1180, 1204 (7th Cir.) (immunity issue was properly preserved for appeal when defendant raised it in a motion for directed verdict at the close of plaintiff's case), *cert. denied*, 488 U.S. 968 (1988).

14. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Court in *Harlow* abandoned the subjective part of the test (that is, whether the official took the action with the malicious intention to cause a deprivation of rights) in order to facilitate the use of summary judgment. However, even when the law is clearly established, the official can still establish the defense if she can prove "extraordinary circumstances" as to why she neither knew nor should have known the relevant legal standard. *Id.* at 818-19. *See also* Youngberg v. Romeo, 457 U.S. 307, 323 (1982).

15. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). *See also* Apostol v. Gallion, 870 F.2d 1335, 1338 (7th Cir. 1989) (qualified immunity "yields a right not to endure the cost and travail of trial").

16. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

17. Although the Court stressed the use of summary judgment to resolve the immunity issue at an early stage in the litigation, a defendant can raise the issue through a motion to dismiss. *See, e.g.*, Landstrom v. Illinois Dep't of Children & Family Servs., 892 F.2d 670, 675 n.8 (7th Cir. 1990). The disadvantages of this method are that the plaintiff's factual allegations in the complaint must be accepted as true and that the defendant does not have an opportunity to bring additional evidence to the attention of the court through discovery and affidavits.

doctrine.[18] The rationale is that the right to be free from defending such a damage action can be fully protected only if the denial of summary judgment can be appealed immediately.

Although the Court's approach might sound quite reasonable in the abstract, it ignores the realities of litigation and unnecessarily tips the scale in favor of defendant officials. Some of the problems with the Court's approach are demonstrated by the following examples. In the first example, a section 1983 plaintiff alleges the use of excessive force by the police in making an arrest in violation of the fourth amendment to the United States Constitution.[19] The defendants are the arresting officer and the municipality employing the officer. In addition to the section 1983 claim to enforce the fourth amendment, the plaintiff includes a pendent state tort claim.[20] Under section 1983, the plaintiff seeks compensatory and punitive damages from the officer in her individual capacity and compensatory damages from the municipality.[21] Based upon the state tort claim, the complaint seeks compensatory and punitive damages from all defendants. Without getting into the conflict issues that arise when one attorney represents both defendants,[22] the individual

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18. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

19. *See, e.g.*, Keller v. Frink, 745 F. Supp. 1428 (S.D. Ind. 1990).

20. The reference to a "pendent" state claim assumes the case was filed in federal court. Pendent jurisdiction is now codified as "supplemental" jurisdiction under 28 U.S.C. § 1367 (1991). Section 1983 actions can, of course, be brought in state court and, absent a "valid excuse," a state court cannot refuse to exercise jurisdiction over § 1983 actions. Howlett v. Rose, 110 S. Ct. 2430, 2438-42 (1990). When a § 1983 action is filed in state court, it is generally governed by federal law. Felder v. Casey, 487 U.S. 131, 151-53 (1988).

21. Punitive damages are generally not available against municipalities. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). However, if a state statute that indemnifies officials for individual liability does not exclude indemnity for punitive damages, this constitutes a waiver of the punitive damages protection for municipalities. *See, e.g.*, Kolar v. County of Sangamon of Ill., 756 F.2d 564, 567 (7th Cir. 1985); Bell v. City of Milwaukee, 746 F.2d 1205, 1270-71 (7th Cir. 1984). Indiana law, IND. CODE § 34-4-16.7-1 (1988), allows state or local government to "pay any judgment, compromise, or settlement of [a] claim or suit" when a present or former public employee could be subjected to personal liability because of an "act or omission within the scope of his [or her] employment which violates the civil rights laws of the United States" if the governor, in the case of a claim against a state employee, or the governing body of a political subdivision, in the case of a claim against a local governmental entity, "determines that paying the judgment, compromise, or settlement is in the best interest of the governmental entity." This provision does *not* exclude indemnity for punitive damages. *Id.*

22. In Ross v. United States, 910 F.2d 1422 (7th Cir. 1990), where the same firm represented both the defendant county and its defendant employee, the court stated:

> A serious potential for conflict exists in the differing interests of the county and its employee. While this circuit has rejected the almost absolute prohibition on dual representation of a municipality and its employees espoused in *Dunton*

officer can seek to avoid personal liability under section 1983 by raising the qualified immunity defense. The municipality can seek to avoid section 1983 liability by arguing that the officer was not acting pursuant to official policy or custom.[23] Liability on the state claim will, of course, depend upon state law, including compliance with the state notice of tort claim provision,[24] but respondeat superior is generally less of a problem. Regardless of technical liability, actual payment of a judgment will depend on whether state law provides for municipal indemnification of its officials[25] and/or whether the defendants are covered by liability insurance.

If the police officer is a member of the state police department, the issues are further complicated. Although the state police officer can be sued for damages in her individual capacity under section 1983, neither the state, the state police department, nor the officer in her official capacity is considered to be a "person" within the meaning of section 1983.[26] Thus, the only defendant in federal court would be the individual officer, who could raise the qualified immunity defense. The presence of the pendent state claim does not solve the problem because the federal court is still limited by the eleventh amendment and cannot award damages under state law which would have to be paid from the state treasury.[27] The plaintiff could, however, choose to bring the entire case in state court, thereby eliminating the eleventh amendment problem but not the section 1983 problems, including the definition of "person" and qualified immunity.

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> *v. Suffolk County*, 729 F.2d 903 (2d Cir. 1984), we have remained sensitive to the fact that such conflicts can arise. (citation omitted) It is not enough that the county would be liable for any compensatory damage award that Deputy Johnson would pay, (citation omitted); Johnson will still suffer the effect of any punitive damages not to mention the injury to his reputation as a law enforcement officer. The law firm representing Johnson and Lake County has made every effort to avoid this conflict, but some conflicts are unavoidable.

*Id.* at 1432.

23. Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978).

24. *See* IND. CODE §§ 34-4-16.5-1 to -20 (1988). *See also* Felder v. Casey, 487 U.S. 131 (1988) (although § 1983 plaintiff filing in state court does not have to comply with such provisions, the Court's holding does not exempt compliance before bringing pendent state tort claims).

25. *See* IND. CODE §§ 34-4-16.7-1 to -4 (1988).

26. Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2312 (1989). *See also* Rodenbeck v. Indiana, 742 F. Supp. 1442, 1448 (N.D. Ind. 1990); Colburn v. Trustees of Ind. Univ., 739 F. Supp. 1268, 1279-80 (S.D. Ind. 1990); Parsons v. Bourff, 739 F. Supp. 1266 (S.D. Ind. 1989); Grosz v. Indiana, 730 F. Supp. 1474, 1477-78 (S.D. Ind. 1990).

27. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 103-23 (1984) (eleventh amendment prohibits even injunctive relief based on a violation of state law).

In *Graham v. Connor*,[28] the Supreme Court made it clear that excessive force cases against law enforcement officials should be analyzed under the fourth amendment and its "reasonableness" standard, rather than under the substantive aspect of the due process clause in the fourteenth amendment.[29] When deciding whether the force used in a particular case is reasonable, courts require a balancing of the nature and the quality of the intrusion on fourth amendment interests against the governmental interest at stake.[30] Reasonableness must be judged on an objective basis from the perspective "of a reasonable officer on the scene," rather than from the 20/20 vision of hindsight.[31] A fourth amendment "seizure" occurs when a person is "stopped by the very instrumentality set in motion or put in place in order to achieve that result."[32] Thus, it has been stated that "a seizure is a [(1)] governmental [(2)] termination of freedom of movement [(3)] through means intentionally applied."[33] The Court also held that the use of deadly force is constitutional only if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[34]

Assume that the police officer in the first example sees two individuals drag a deer, which has been shot out of season, into a van and one of the individuals jumps into the rear of the van with the deer while the other runs to the side of the van as the van pulls away.[35] In an attempt to apprehend the two individuals, the officer fires a twelve-gauge shotgun slug through the rear of the van, striking the driver in the back. All three individuals are arrested and charged with illegal possession of game. The van driver sues the police officer as well as the officer's municipal employer, seeking damages under section 1983. In defense, the officer raises qualified immunity and files a motion for summary judgment contending that she believed the shotgun was loaded with buckshot instead of a slug and that she was only trying to "mark" the van for later identification when she fired the shotgun.

If the challenged conduct took place after the Supreme Court decisions in *Garner*, *Graham*, and *Brower*,[36] is the officer insulated from

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28. 109 S. Ct. 1865 (1989).

29. *Id.* at 1871. *See also* Chathas v. Smith, 884 F.2d 980, 988-89 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1169 (1990).

30. *Graham*, 109 S. Ct. at 1871.

31. *Id.* at 1872.

32. Brower v. Inyo County, 489 U.S. 593, 599 (1989).

33. Keller v. Frink, 745 F. Supp. 1428, 1431 (S.D. Ind. 1990) (emphasis omitted).

34. Tennessee v. Garner, 471 U.S. 1, 11 (1985).

35. *See Keller*, 745 F. Supp. at 1429.

36. *See supra* notes 34, 28, and 32.

a damage award by the qualified immunity defense? The plaintiff's fourth amendment right "must be sufficiently clear that a reasonable official would understand that what [she] is doing violates that right,"[37] and the plaintiff bears the initial burden of proving the existence of a clearly established right.[38] Although it is not necessary for the plaintiff to point to a case involving the exact fact situation, clearly established general principles under the fourth amendment will not suffice.[39] The plaintiff must show that "in the light of preexisting law the unlawfulness of the action is apparent."[40] In other words, the right allegedly violated must be defined with specificity, and the plaintiff must point to something other than a broad constitutional right that is clearly established.

The Supreme Court has clearly indicated its preference for resolving the qualified immunity issue on a motion for summary judgment, but it has not changed the standard for determining when summary judgment is appropriate.[41] Thus, a motion for summary judgment raising the qualified immunity defense can be defeated by showing that there is a genuine dispute as to material facts. In this situation, the court can determine the status of the law at the time of the challenged conduct; however, the jury should resolve the factual disputes and determine whether the defendant's conduct was reasonable in light of the law.[42]

The question raised by the motion for summary judgment is whether the police officer, when she fired a shotgun slug through the rear of

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37. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

38. Hannon v. Turnage, 892 F.2d 653, 656 (7th Cir.), *cert. denied*, 111 S. Ct. 69 (1990); Lenea v. Lane, 882 F.2d 1171, 1177 (7th Cir. 1989); Keller v. Frink, 745 F. Supp. 1428, 1433 (S.D. Ind. 1990). *Cf.* Williams v. Lane, 851 F.2d 867, 882 (7th Cir. 1988) (defendant has burden of proof to establish qualified immunity as an affirmative defense), *cert. denied*, 488 U.S. 1070 (1989).

39. *See* Anderson, 483 U.S. at 640; Auriemma v. Rice, 910 F.2d 1449, 1455-56 (7th Cir. 1990); Keller v. Frink, 745 F. Supp. 1428, 1433 (S.D. Ind. 1990). *See also* Jackson v. Mowery, 743 F. Supp. 600, 604 (N.D. Ind. 1990) (even though the Supreme Court had established the right to marry as implicit in the Constitution, it did not apply this right in the prison context until *after* the requests made in this case; therefore, qualified immunity defense succeeds).

40. Auriemma, 910 F.2d at 1456. *See also* Hedge v. County of Tippecanoe, 890 F.2d 4, 6-8 (7th Cir. 1989); Hartbarger v. Blackford County D.P.W., 733 F. Supp. 300, 302-03 (N.D. Ind. 1990).

41. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

42. Mitchell v. Forsyth, 472 U.S. 511, 528 (1985). Although the Seventh Circuit has held that the question of qualified immunity is for the judge to decide, Hughes v. Meyer, 880 F.2d 967, 969 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 2172 (1990), when there are unresolved factual issues, these issues should be decided by the jury through special interrogatories. Warren v. Dwyer, 906 F.2d 70, 76 (2d Cir.), *cert. denied*, 111 S. Ct. 431 (1990).

the van striking the driver in the back, was violating the driver's clearly established fourth amendment rights. Remember, the fourth amendment standard is whether the officer's conduct was reasonable when judged "from the perspective of a reasonable officer on the scene."[43] Also, deadly force is constitutional only if the suspect poses a threat of serious physical harm.[44] These determinations can be made only after it is ascertained what happened at the scene. As with other factual issues, discovery should be permitted to give the parties every reasonable opportunity to develop the facts fully.[45] If the pleadings, affidavits, and discovery disclose that the officer's version of what happened at the scene differs from that of the plaintiff, and the plaintiff's version does not support the qualified immunity defense, then summary judgment is not appropriate.[46] Further, when the case goes to trial, the factual questions relevant to the qualified immunity issue should be submitted to the jury through special interrogatories.[47] The question of the reasonableness of the officer's conduct should also be determined by the jury.[48]

When the motion for summary judgment on the qualified immunity issue is denied because the court finds the plaintiff's rights were clearly established, the order is immediately appealable under the collateral order

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43. *Graham*, 109 S. Ct. at 1872.

44. *Garner*, 471 U.S. at 3.

45. In *Anderson*, the Court stated that "[o]ne of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government.'" *Anderson*, 483 U.S. at 646-47 n.6 (citation omitted). However, the Court recognized that when a defendant is not entitled to the qualified immunity under the plaintiff's version of the facts, and the plaintiff's version differs from that of the defendant, then discovery "tailored specifically to the question of [the defendant's] qualified immunity" may be necessary. *Id. See also* Green v. Carlson, 826 F.2d 647, 652 (7th Cir. 1987); Tucker v. Firks, 731 F. Supp. 1355, 1359 (N.D. Ind. 1989) (when there are issues of disputed fact upon which the question of immunity turns, the case must proceed to trial). When plaintiffs anticipate a qualified immunity defense, they should be more specific in pleading the violation of a constitutional right, Landstrom v. Illinois Dep't of Children & Family Serv., 892 F.2d 670, 675-76 (7th Cir. 1990), and "must include 'all the factual allegations necessary to sustain a conclusion that defendant violated clearly established law.'" Sawyer v. County of Creek, 908 F.2d 663, 667 (10th Cir. 1990) (citing Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988)); Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir. 1990).

46. *Mitchell*, 472 U.S. at 528. *See also* Green v. Carlson, 826 F.2d 647, 652 (7th Cir. 1987); Tucker v. Firks, 731 F. Supp. 1355, 1359 (N.D. Ind. 1989).

47. Warren v. Dwyer, 906 F.2d 70, 76 (2d Cir.), *cert. denied*, 111 S. Ct. 431 (1990).

48. *Mitchell*, 472 U.S. at 528; Keller v. Frink, 745 F. Supp. at 1433 (S.D. Ind. 1990); *Tucker*, 731 F. Supp. at 1359.

doctrine.[49] This is true because the Court believes that the official's right to be free from defending the damage claim can be fully protected only if she can file an immediate appeal.[50] If an immediate appeal is not taken, the summary judgment ruling can be challenged with an appeal after the case is completed.[51]

The second example is a section 1983 action alleging a violation of the first amendment as a result of a political discharge of a municipal employee. The defendants, the mayor and the municipality, admit that the discharge was politically motivated, but contend it was not in violation of the first amendment because the plaintiff fits the policymaker exception.[52] The issues are generally the same as in the first example when the defendant is a municipal police officer, but application of the qualified immunity doctrine is different because the plaintiff raises a first amendment claim instead of a fourth amendment claim.

When the mayor seeks summary judgment on the qualified immunity issue, the pleadings, affidavits, and discovery reveal a factual dispute as to the functions, duties, and responsibilities of the plaintiff. Therefore, the motion should be denied. In the alternative, there may be no facts in dispute, but the trial court could conclude that under clearly established law, the plaintiff was not a policymaker and therefore was protected by the first amendment. Here, the order denying summary judgment is immediately appealable.

It is not clear that the Supreme Court, in providing for an immediate appeal of a denial of summary judgment on the qualified immunity

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49. *Mitchell*, 472 U.S. at 525-30; Apostol v. Gallion, 870 F.2d 1335, 1338 (7th Cir. 1989). In the Seventh Circuit, this is true even when the complaint seeks injunctive relief as well as damages. Scott v. Lacy, 811 F.2d 1153 (7th Cir. 1987). *Cf.* Prisco v. United States Dep't of Justice, 851 F.2d 93, 96 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2428 (1989); Kaiter v. Town of Boxford, 836 F.2d 704, 706 (1st Cir. 1988). In Hunafa v. Murphy, 907 F.2d 46, 48-49 (7th Cir. 1990), the court held that when a substantial equitable claim will subject officers to suit, it is better to weigh it and develop a more complete record before attempting to decide whether defendants are subject to liability for damages. *Id.*

Some courts have held that when summary judgment is denied because of unresolved factual questions, the denial should not be viewed as a final appealable order. *See, e.g.*, White v. Frank, 855 F.2d 956, 958 (2d Cir. 1988); Marx v. Gumbinner, 855 F.2d 783, 792 (11th Cir. 1988). There is support for this in *Mitchell* because the Court held the denial of a claim of qualified immunity is an appealable final decision "to the extent that it turns on an issue of law." 472 U.S. at 530.

50. *Mitchell*, 472 U.S. at 527-30; *Apostol*, 870 F.2d at 1338.

51. Kurowski v. Krajewski, 848 F.2d 767, 772-73 (7th Cir.), *cert. denied*, 488 U.S. 926 (1988).

52. This exception was recently addressed by the Seventh Circuit in Hudson v. Burke, 913 F.2d 427, 430-34 (7th Cir. 1990), and Lohorn v. Michal, 913 F.2d 327, 331-35 (7th Cir. 1990).

issue, fully considered the practical significance of its ruling. This can be demonstrated by the previous two examples. Keep in mind that the primary impetus for allowing an immediate appeal is the Court's desire to fully protect the defendant's right to avoid trial when the qualified immunity defense applies.[53] Thus, according to the Court, the immunity protects much more than the right to be free from damage liability.[54] In these examples, if an immediate appeal by the defendant official divests the trial court of jurisdiction,[55] the case is effectively put on hold until the appeal is completed. This is true despite the following factors: 1) In the first example, the individual officer will still have to defend a claim for damages based on state law, which claim arises out of the same factual situation as the section 1983 claim and, therefore, requires identical discovery and investigation; 2) in both examples, the municipality, which may be represented by the same attorney as the official or provide the official with separate representation, will have to defend the section 1983 claim for compensatory damages regardless of the outcome on the qualified immunity issue;[56] 3) in the second example, the mayor will remain in the case, in his official capacity, to defend the plaintiff's request for equitable relief, that is, reinstatement;[57] and 4) the municipalities, or their liability insurers, may be paying not only for the individual officials' defense but also any monetary judgment entered against the officials.[58]

This suggests that the qualified immunity defense and the immediate appeal may give government officials more protection than is necessary, either because they have no real risk of personal liability or because they will have to defend a damage claim based on state law regardless of the outcome of the immunity issue under section 1983. This is unfortunate in light of the adverse consequences suffered by the plaintiffs

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53. *Mitchell*, 472 U.S. at 527-30; *Apostol*, 870 F.2d at 1338.

54. *Mitchell*, 472 U.S. at 527-30; *Apostol*, 870 F.2d at 1338.

55. *Apostol*, 870 F.2d at 1338. "[A] proper *Forsyth* appeal divests the district court of jurisdiction (that is, authority) to require the appealing defendants to appear for trial." *Id.* The court also noted that "[a]s a rule, only one tribunal handles a case at a time." *Id.* at 1337. *Cf.* Wilson v. O'Leary, 895 F.2d 378, 382 (7th Cir. 1990) (when court of appeals hears an appeal from a "collateral order," the district court may proceed with the merits).

56. *See* Owen v. City of Independence, Missouri, 445 U.S. 622 (1980). *See also* Hedge v. County of Tippecanoe, 890 F.2d 4, 8-9 (7th Cir. 1989); Pennington v. Hobson, 719 F. Supp. 760, 773-74 (S.D. Ind. 1989).

57. Lenea v. Lane, 882 F.2d 1171, 1178-79 (7th Cir. 1989); Conner v. Reinhard, 847 F.2d 384, 387 (7th Cir.), *cert denied*, 488 U.S. 856 (1988); Scott v. Lacy, 811 F.2d 1153, 1154 (7th Cir. 1987); Colburn v. Trustees of Ind. Univ., 739 F. Supp. 1268, 1299 (S.D. Ind. 1990).

58. *See* IND. CODE §§ 34-4-16.7-1 to -4 (1988). *See also supra* note 22 regarding potential conflicts when the same law firm represents both the entity and the individuals.

and, in some cases, other defendants when an order denying the qualified immunity defense is immediately appealed. Unless the appeal is frivolous, it will usually lead to a stay of proceedings against the appealing official.[59] As a practical matter, district court proceedings will be stayed entirely because in most cases it would not make sense to have a state law damage claim and/or a section 1983 damage claim against the municipality proceeding on a different track than the damage claim against the individual official, particularly when all claims arise out of the same fact situation. This is true because there will be only one trial.[60] Other defendants, like the municipality, could be injured by the delay when a discharged plaintiff seeks reinstatement. A delay in the trial increases the amount of lost wages, plus prejudgment interest,[61] recoverable by a prevailing plaintiff who has made reasonable efforts to mitigate, but without success.[62] If after a prompt trial the plaintiff is reinstated, the municipality is paying for work, rather than back wages, for which it gets no services.

When the defendant entity in these two examples is changed to a state instead of a local municipality, the issues become even more complex. Based on the decision in *Will v. Michigan Department of State Police*,[63] neither a state, a state agency, nor a state official acting in an official capacity is a "person" within the meaning of section 1983 when a plaintiff seeks damages.[64] However, state officials still can be sued for injunctive relief under section 1983.[65] Thus, a plaintiff cannot avoid the restrictions of the eleventh amendment by bringing a section 1983 action against the state in state court. Further, the eleventh amendment prohibits federal courts from awarding monetary relief that would

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59. *Apostol*, 870 F.2d at 1339.

60. The inefficiency of two trials when there is only one factual transaction is apparent. The increased burden on the judicial system, as well as the increased cost to the parties and inconvenience to witnesses will generally discourage more than one trial. Two trials arising out of the same factual transaction can lead to complex preclusion issues. *See, e.g.*, Lytle v. Household Mfg., 110 S. Ct. 1331 (1990); McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990).

61. Prejudgment interest is an ordinary part of any award for back pay. Williamson v. Handy Button Mach. Co., 817 F.2d 1290, 1297 (7th Cir. 1987); Daniels v. Essex Group, Inc., 740 F. Supp. 553, 561-62 (N.D. Ind. 1990); DeLaCruz v. Pruitt, 590 F. Supp. 1296, 1308-09 (N.D. Ind. 1984).

62. The fact that a delay in the trial may lead to an increase in the amount of lost wages, which will generally be paid by the municipal entity, demonstrates the conflict when one law firm represents both the entity and the official claiming a qualified immunity. *See supra* note 22.

63. 109 S. Ct. 2304 (1989).

64. *Id.* at 2311-12.

65. *Id.* at 2311-12 n.10.

be paid from the state treasury.[66] Therefore, in our first case, the plaintiff could sue the police officer for damages in her individual capacity in federal court pursuant to section 1983, but would be faced with the qualified immunity issue. Further, the federal court could award damages against the individual officer based on the state claim, but not injunctive relief based on that claim.[67]

In short, states, state agencies, and state officials acting in their official capacities cannot be sued for damages under section 1983 in any court; federal courts can award damages to section 1983 plaintiffs against state officials in their individual capacities; federal courts can award damages against state officials in their individual capacities based on state claims; federal courts can award prospective injunctive relief against state officials based on claims under section 1983, but not based on state law claims.

Municipalities can be sued under section 1983 for compensatory damages, but generally not punitive damages. Municipalities do not enjoy the qualified immunity enjoyed by government officials.[68] However, municipalities are not automatically liable because they employ a wrongdoer. Respondeat superior liability was explicitly rejected by the Supreme Court in *Monell v. Department of Social Services*,[69] in which the Court stated:

> [I]t is when execution of government's 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 that the government as an entity is responsible under § 1983.[70]

This limitation on municipal liability has generated much litigation because its application requires a determination of whose conduct represents municipal "policy or custom." Here the Court has distinguished between those officials who are policymakers and those who are not.

Generally, policymakers are "those whose edicts or acts may fairly be said to represent official policy."[71] For example, a prosecutor's instruction to law enforcement officers to forcibly enter a medical clinic, in violation of the fourth amendment, constitutes municipal "policy" when the prosecutor has the authority under state law to make this decision.[72] However, a municipality is not automatically liable for all actions of one who is a policymaker because there must be evidence

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66. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 103 (1984).
67. *Id.* at 100.
68. *See supra* note 56.
69. 436 U.S. 658 (1978).
70. *Id.* at 694.
71. *Id.*
72. Pembaur v. Cincinnati, 475 U.S. 469, 485 (1986).

that this person has final authority "to establish policy with respect to the action ordered."[73] Further, it is not clear that the municipality is liable when one of its policymakers acts contrary to municipal policy.[74]

Following *Pembaur*, the Court further confused the issues in *St. Louis v. Praprotnik*[75] when it held that the city was not liable for a retaliatory employment decision made by a subordinate of a policymaker.[76] According to the four-Justice plurality decision, neither "[s]imply going along with discretionary decisions made by one's subordinates" nor "the mere failure to investigate the basis of a subordinate's discretionary decisions" constitutes a delegation of policymaking authority.[77] Three Justices concurred in the result in *Praprotnik* because the court below "identified only one unlawfully motivated municipal employee involved in [the challenged decision], and . . . that employee did not possess *final* policymaking authority with respect to the contested decision."[78] Because the official with the improper motive had only the authority to initiate transfers, subject to the approval of others, the concurring Justices agreed this official had no authority to establish city policy.[79] However, they did not agree with the reasoning of the plurality that the subordinate could not be a policymaker simply because his decisions were subject to review by others.[80]

There was a more important source of disagreement between the concurring Justices and those joining the plurality opinion in *Praprotnik*. The plurality contended that the determination of whether an official has final policymaking authority is determined by the court based on state law.[81] In contrast, the concurring Justices believed that it is a jury question.[82] The position taken in the plurality opinion makes the issue appropriate for summary judgment and thus subject to resolution early in the litigation.

Although the decision in *Praprotnik* does little to clarify the law in this area, there are a few general rules that can be stated with some confidence. In the second example, if the mayor has final authority to

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73. *Id.* at 481.

74. *See id.* at 486 (White, J., concurring). *See also* Johnson v. Hardin County, Ky., 908 F.2d 1280, 1286-87 (6th Cir. 1990); Redman v. County of San Diego, 896 F.2d 362, 364 (9th Cir.), *reh'g granted*, 906 F.2d 1384 (9th Cir. 1990).

75. 485 U.S. 112 (1988).

76. *Id.* at 130.

77. *Id.*

78. *Id.* at 142 (Brennan, J., concurring) (emphasis added).

79. *Id.* at 137-42 (Brennan, J., concurring).

80. *Id.* at 146-47 (Brennan, J., concurring).

81. *Id.* at 124. *See also* Crowder v. Sinyard, 884 F.2d 804, 830 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 2617 (1990); Wulf v. Wichita, 883 F.2d 842, 868 (10th Cir. 1989).

82. *Praprotnik*, 485 U.S. at 143-44 (Brennan, J., concurring).

make employment decisions for the municipality, and made the decision to discharge the plaintiff, the entity will be liable so long as the decision was not contrary to express municipal policy.[83] On the other hand, even though the mayor may have final policymaking authority on some matters, if state or municipal law gives a board or commission responsibility for employment decisions, the municipality will not be liable for damages based on the mayor's decision to discharge.[84] In contrast, if the mayor has authority to discharge and made the decision to discharge the plaintiff, subject to review or approval by a board or commission, then municipal liability may turn on the nature of the review; the more circumscribed and deferential the review, the more likely the entity will be held liable.[85]

In the case of nonpolicymakers, such as the officer involved in the first example, a municipality is liable if the challenged conduct was undertaken pursuant to express municipal policy or custom.[86] So, if the municipality had a policy authorizing the officer to fire a shotgun in the circumstances presented, the municipality could be held liable if it is determined that the plaintiff's fourth amendment rights were violated. However, absent an express policy or custom authorizing the challenged conduct, a section 1983 plaintiff must show a de facto policy or custom which caused the injury in order to hold the municipality liable.[87] Whether such a de facto policy or custom exists will turn on several factors, including the egregiousness of the challenged conduct, the nature and extent of the training provided to the wrongdoer, the frequency of similar misconduct, and the municipal response to such misconduct.[88]

Although a jury should not be allowed to infer a "policy" of inadequate police training based on a single egregious incident,[89] inadequate training can lead to municipal liability when it is sufficiently inadequate to constitute "deliberate indifference to the rights of persons with whom the police come into contact."[90] If the police officer in the first example received no training on apprehending suspects and on using deadly force, the municipality may be held liable. However, the plaintiff

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83. *See supra* notes 72-82 and accompanying text.

84. *See supra* notes 77 and 78.

85. *Praprotnik*, 485 U.S. at 145-47 (Brennan, J., concurring).

86. Monell v. Department of Social Servs., 436 U.S. 655, 690-91 (1978).

87. *See, e.g.*, Vukadinovich v. McCarthy, 901 F.2d 1439, 1443-44 (7th Cir. 1990) (inadequate training or a deficiency in investigating a complaint may represent "city policy" if it reflects a deliberate indifference to the rights of the victim and the plaintiff can show that the inadequacy or deficiency caused the constitutional deprivation). *See also* Sims v. Mulcahy, 902 F.2d 524, 541-45 (7th Cir.), *cert. denied*, 111 S. Ct. 249 (1990).

88. *Sims*, 902 F.2d at 541-44.

89. Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985).

90. City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989).

must also show that the deficiency in training was the "moving force" or cause of the violation of the plaintiff's rights.[91] The "deliberate indifference" standard, adopted for inadequate training cases, will probably govern cases in which the plaintiff seeks to establish a de facto policy or custom based on inadequate supervision or lack of official response to other misconduct of the nonpolicymakers.[92]

Thus, it becomes quite apparent that the section 1983 plaintiffs in the two examples might establish a violation of their constitutional rights, but would be left without a damage remedy under section 1983. If the police officer in the first case is able to establish a qualified immunity from damages and the plaintiff cannot show a municipal policy or custom that caused the injury, damages will not be awarded under section 1983. Similarly, in the second case, even if the court concludes that the plaintiff was not a policymaker and, therefore, her first amendment rights were violated, the individual official will be immune from damages unless it was "clearly established" that the plaintiff was not a policymaker. Further, the city might escape liability if the mayor had no authority to make the challenged decision or if the city had a policy against politically motivated discharges of nonpolicymakers. Again a prevailing section 1983 plaintiff is left without a damage remedy. This seems directly contrary to the purpose of section 1983.

Municipal liability becomes even more critical when section 1983 plaintiffs sue officials who enjoy an absolute immunity from damages. Judges and prosecutors have long enjoyed an absolute immunity from damages when performing judicial or prosecutorial acts.[93] However, not all acts of judges are judicial,[94] and one need not have the title of judge in order to take advantage of the absolute immunity.[95] If the challenged conduct was within the court's jurisdiction and involved a function normally performed by a judge, the absolute immunity from damages

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91. *Harris*, 489 U.S. at 391. *See also Sims*, 902 F.2d at 542; *Vukadinovich*, 901 F.2d at 1444; Patrick v. Jasper County, 901 F.2d 561, 565 (7th Cir. 1990); Pennington v. Hobson, 719 F. Supp. 760, 773 (S.D. Ind. 1989).

92. *See, e.g.*, *Vukadinovich*, 901 F.2d at 1443 (failure to investigate).

93. *See, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978) (judicial acts); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutorial acts).

94. *See, e.g.*, Forrester v. White, 484 U.S. 219, 228 (1988) (personnel decisions made by a state court judge are administrative rather than judicial acts).

95. *See, e.g.*, Butz v. Economou, 438 U.S. 478, 514 (1978) (absolute judicial immunity extended to administrative law judges performing adjudicatory functions). *Cf.* Cleavinger v. Saxner, 474 U.S. 193, 204-06 (1986) (absolute immunity does not extend to members of a prison disciplinary committee, primarily because of the absence of procedural safeguards and the fact that members of the committee are subordinates of the warden rather than independent decisionmakers).

applies.[96] For example, an Indiana trial judge and court of appeals judge who allegedly conspired to interfere with an appeal of a criminal conviction by requiring both defendants in a consolidated trial to purchase the transcript are immune from damages.[97] Similarly, an Indiana trial judge who allegedly falsified a transcript was found to be immune from damages.[98] In these cases, quasi-judicial immunity protected members of the court staff who followed orders given by the judges.[99]

Even if one accepts the policy reasons for absolute judicial immunity — that is, the need for independent judicial determinations without the constant fear of personal damage actions under section 1983 in situations where errors can be corrected through appeals[100] — there does not seem to be any justification for extending the immunity to judges who falsify transcripts or seek to make it more difficult for those convicted in criminal cases to perfect an appeal. Of course, the judges should not be held liable if the plaintiff cannot prove the allegations, but this concerns the merits of the case rather than the immunity issue. Judges do not enjoy an absolute immunity from injunctive relief and can be held liable for attorney fees under 42 U.S.C. § 1988[101] when a plaintiff prevails in seeking an injunction.[102]

When judges or those acting like judges are able to establish an absolute immunity, the question of municipal liability again becomes important. However, it is often difficult to determine the judge's "employer." For example, is a circuit, superior, or county court judge in Indiana an employee of the county or the state?[103] Regardless of who employs state judges, can a city or county be held liable for damages when its police department follows a "policy" set by one of these judges?[104] Assume that a police department follows a bond schedule for

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96. *See, e.g.*, *Stump*, 435 U.S. at 356, 359-60; Dellenbach v. Letsinger, 889 F.2d 755, 759 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1821 (1990).

97. *Dellenbach*, 889 F.2d at 760-62.

98. Scruggs v. Moellering, 870 F.2d 376, 377 (7th Cir.), *cert. denied*, 110 S. Ct. 371 (1989).

99. *Dellenbach*, 889 F.2d at 762-63; *Scruggs*, 870 F.2d at 377.

100. *See* Forrester v. White, 484 U.S. 219, 225 (1988); Stump v. Sparkman, 435 U.S. 349, 363-64 (1978).

101. This section was amended in 1976 to provide attorney fees to the prevailing party in cases brought under various civil rights provisions, including § 1983. *See* 42 U.S.C. § 1988 (1988).

102. Pulliam v. Allen, 466 U.S. 522, 542 (1984).

103. In Pruitt v. Kimbrough, 536 F. Supp. 764, 766 (N.D. Ind. 1982), the court concluded that the judges are not local county officials. *See also* Parsons v. Bourff, 739 F. Supp. 1266, 1267 (S.D. Ind. 1989) (clerk of circuit court for Howard County is a state official). *Cf.* Williams v. Butler, 863 F.2d 1398, 1402-03 (8th Cir. 1988) (conduct of municipal judge leads to municipal liability), *cert. denied*, 109 S. Ct. 3215 (1989).

104. *See* Woods v. Michigan City, Ind., 685 F. Supp. 1457, 1461-64 (N.D. Ind.

traffic offenders which was promulgated by a superior court.[105] The judge is not a city employee, but has the authority to set the amount of bail for individuals charged with a criminal offense in the superior court.[106] Because the judge enjoys absolute immunity from damages and because the arresting officer may enjoy a qualified immunity,[107] is the plaintiff who is illegally incarcerated for several days without a damage remedy? If the judge is not the city's policymaker, the city should still be liable if its police department voluntarily accepted the bond schedule. If the city had no choice but to follow the schedule, state law seems to have made the judge its policymaker, and liability should follow.[108]

A question concerning the extent of prosecutorial immunity is raised when a prosecutor advises the police. For example, in *Burns v. Reed*,[109] the Delaware county prosecutor was "afforded absolute immunity for giving legal advice to police officers about the legality of their prospective investigative conduct."[110] Judge Ripple, in a concurring opinion, stressed that the immunity would not extend to a situation in which "the prosecutor goes beyond rendering legal advice and assumes responsibility for the management of the investigation."[111] Given the purpose of an absolute immunity for prosecutors — that is, to avoid having prosecutors approach their law enforcement duties fearful of their potential liability[112] — why should a prosecutor who gives advice to police officers be treated differently than the police officers themselves?[113] Although the conduct of police in a criminal investigation is certainly relevant to the ultimate prosecution, there is no reason to extend absolute immunity when the prosecutor would be sufficiently protected by a qualified immunity. Unless the prosecutor's advice contravened clearly established law, the prosecutor, like the police, would be protected by a qualified immunity. Isn't that enough?

In summary, it is clear that section 1983 plaintiffs must do more than establish liability, that is, a violation of the United States Con-

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1988). *See also* Anela v. City of Wildwood, 790 F.2d 1063, 1065-67 (3d Cir.), *cert. denied*, 479 U.S. 949 (1986).

105. *See, e.g.*, *Woods*, 685 F. Supp. at 1459.

106. *Woods*, 685 F. Supp. at 1463.

107. *See supra* notes 2 and 3. *See also*, *Woods*, 685 F. Supp. at 1464-65 (police officers entitled to qualified immunity).

108. *See supra* note 72.

109. 894 F.2d 949 (7th Cir.), *cert. granted*, 110 S. Ct. 3269 (1990).

110. *Id.* at 956. *Cf.* Petry v. Lawler, 718 F. Supp. 1396, 1401 (S.D. Ind. 1989) (prosecutor engaged in police-like investigation entitled to no more than qualified immunity).

111. *Burns*, 894 F.2d at 957 (Ripple, J., concurring).

112. Imbler v. Pachtman, 424 U.S. 409, 424-25 (1976). *See also Burns*, 894 F.2d at 953.

113. The investigative conduct of police officers is protected by the qualified immunity defense. *See Petry*, 718 F. Supp. at 1401.

stitution or federal statutes, when seeking damages. The Court has provided individual officials with substantial protection without making municipalities liable whenever the officials enjoy this protection. Therefore, section 1983 plaintiffs whose rights were violated may be without a damage remedy.

## III. Racial and Sexual Harassment in the Workplace

The primary source of relief for victims of race or gender discrimination in private employment is Title VII of the Civil Rights Act of 1964.[114] Plaintiffs can bring such actions in either state or federal court,[115] but because Title VII provides only for equitable relief, there is no right to a jury trial.[116] Although equitable relief can include lost wages and benefits, it clearly does not include compensatory and punitive damages.[117] Therefore, victims of race or gender discrimination frequently look to another source of substantive rights. Except for federal employees,[118] Title VII is not the exclusive source of relief for employment discrimination.[119] In the past, plaintiffs alleging race discrimination often included a claim under 42 U.S.C. § 1981,[120] which makes available compensatory and punitive damages. Victims of gender discrimination in private employment, particularly sexual harassment, have included pendent state tort claims.[121] State or local government employees claiming gender

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114. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

115. Yellow Freight Sys. v. Donnelly, 110 S. Ct. 1566, 1570 (1990).

116. Although the Supreme Court has not ruled on the availability of a jury trial in Title VII litigation, Lytle v. Household Mfg., 110 S. Ct. 1331, 1335 n.1 (1990), the lower courts are nearly unanimous in holding that there is no right to trial by jury. *See, e.g.*, Brooms v. Regal Tube Co., 881 F.2d 412, 423 (7th Cir. 1989).

117. *See, e.g.*, King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990).

118. The Court has held that § 717 of Title VII, 42 U.S.C. § 2000e-16, provides the exclusive remedy for employment discrimination claims against the United States. Brown v. General Servs. Admin., 425 U.S. 820, 829 (1976).

119. *See, e.g.*, Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1974) (remedies available under Title VII and 42 U.S.C. § 1981 are "separate, distinct, and independent"). *See also* Lytle v. Household Mfg., 110 S. Ct. 1331, 1335-37 (1990) (judge's findings of fact on Title VII issue cannot be used to preclude a jury determination on § 1981 claims because it would interfere with the seventh amendment right to trial by jury).

120. *See supra* note 8.

121. *See, e.g.*, Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465-66 (7th Cir. 1990); Spencer v. General Elec. Co., 894 F.2d 651, 655-58 (4th Cir. 1990); Zabkowicz v. West Bend Co., 789 F.2d 540, 545-48 (7th Cir. 1986); Bell v. Crackin Good Bakers, Inc., 777 F.2d 1497, 1503-04 (11th Cir. 1985); Phillips v. Smalley Maintenance Serv., Inc., 711 F.2d 1524, 1531 (11th Cir. 1983); Frykberg v. State Farm Mut. Auto Ins. Co., 557 F. Supp. 517 (W.D.N.C. 1983); Guyette v. Stauffer Chemical Co., 518 F. Supp. 521, 523-25 (D.N.J. 1981). *See supra* text accompanying note 20.

discrimination frequently include a claim under section 1983, alleging a violation of the equal protection clause.[122] Recent decisions seriously restrict the use of section 1981 to remedy race discrimination and the use of state tort theories in challenging sexual harassment.

One of the Supreme Court decisions that would have been overturned by the Civil Rights Act of 1990 is *Patterson v. McLean Credit Union*.[123] In *Patterson*, the Court held that because section 1981 refers only to race discrimination in the making and enforcement of contracts, it generally does not reach discriminatory conduct that arises after formation of the employment contract.[124] Therefore, racial harassment and discharge claims are not actionable, while the denial of a promotion can be challenged only when the promotion "rises to the level of an opportunity for a new and distinct relation between the employee and the employer."[125] Retaliation, motivated by race, may still be actionable under section 1981.[126] The Seventh Circuit has held that *Patterson* should be given retroactive application unless plaintiffs can show that they detrimentally relied on the pre*Patterson* interpretation of section 1981.[127]

After *Patterson*, it is still clear that section 1981 can be used to challenge the initial hiring decision as racially discriminatory. Unless a plaintiff can show that a willingness to endure racial harassment was part of the original employment agreement, *Patterson* precludes the use of section 1981 to challenge racial harassment in the workplace.[128] A refusal to promote, when the promotion would have resulted in "a new and distinct relation between the employee and the employer," is actionable under section 1981.[129] However, it is not clear what constitutes a "new and distinct relation." A denial of a pay raise would not qualify

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122. *See, e.g.*, King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990); Andrews v. Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990); Carrero v. New York City Hous. Auth., 890 F.2d 569, 581 (2d Cir. 1989); Bohen v. East Chicago, Ind., 799 F.2d 1180, 1185 (7th Cir. 1986). *Cf.* Gray v. Lacke, 885 F.2d 399, 414 (7th Cir. 1989) (allegations of retaliation against the plaintiff because of her complaints of sexual harassment do not state a claim under the equal protection clause), *cert. denied*, 110 S. Ct. 1476 (1990).

123. 109 S. Ct. 2363 (1989).

124. *Id.* at 2372-73.

125. Malhotra v. Cotter & Co., 885 F.2d 1305, 1311 (7th Cir. 1989). *See also* Bailey v. Northern Ind. Pub. Serv. Co., 910 F.2d 406, 409-11 (7th Cir. 1990).

126. McKnight v. General Motors Corp., 908 F.2d 104, 111-12 (7th Cir. 1990) (retaliation that impairs an employee's ability to enforce established contract rights through legal process is actionable under § 1981, but not retaliation for complaints filed under anti-discrimination laws). *See also Malhotra*, 885 F.2d at 1313.

127. *McKnight*, 908 F.2d at 110-11.

128. *Patterson*, 109 S. Ct. at 2363. *See also Malhotra*, 885 F.2d at 1312.

129. *Bailey*, 910 F.2d at 410; *McKnight*, 908 F.2d at 109-10; *Malhotra*, 885 F.2d at 1311.

as a "new and distinct relation," whereas a denial of an opportunity to move from a bargaining unit position to a supervisory or management position should qualify. However, there are many situations in between that are less than clear. Relevant considerations should include whether there was a change in duties, whether there was a change in authority and responsibility, whether applications were accepted from both inside and outside the company, and whether the sought-after position is considered a stepping stone to higher level positions.[130] Even though *Patterson* did not involve a discharge, most courts have excluded discharge cases unless the plaintiff can show that a discriminatory discharge was, in effect, a term or condition of the original employment agreement.[131]

A claim of retaliation for filing anti-discrimination complaints may still be actionable under section 1981 because it punishes "efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, and enforcing the terms of a contract."[132] However, "[t]he right to enforce contracts does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights."[133] Therefore, section 1981 does not extend to retaliation resulting from efforts to enforce rights under anti-discrimination laws.[134] Rights conferred by anti-discrimination laws are not contractual rights, and the Seventh Circuit in *McKnight* refused to read such a contractual duty into every employment contract.[135]

After *Patterson*, plaintiffs seeking to include claims under section 1981 should be careful in formulating their complaint. Section 1981 claims that would survive *Patterson* if properly pleaded might be dismissed or adversely decided on a summary judgment motion if the plaintiff does not plead in anticipation of a *Patterson* defense. For example, in promotion cases it is important to allege the denial of an opportunity

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130. *Bailey*, 910 F.2d at 410; *McKnight*, 908 F.2d at 109-10; *Malhotra*, 885 F.2d at 1311.

131. *Bailey*, 910 F.2d at 409; *McKnight*, 908 F.2d at 108-09; Sims v. Mulcahy, 902 F.2d 524, 537 (7th Cir.), *cert. denied*, 111 S. Ct. 249 (1990). *Contra* Hicks v. Brown Group, Inc., 902 F.2d 630, 638-39 (8th Cir. 1990) (*Patterson* did not resolve the question of whether discharge claims are actionable under § 1981 and because protection from racially motivated deprivation of contracts is essential to the full enjoyment of the right to make contracts, discriminatory discharge is still cognizable under § 1981; this is supported by the legislative history of § 1981 as well as previous Supreme Court decisions). *See also* Taggart v. Jefferson County Child Support Unit, 915 F.2d 396 (8th Cir. 1990).

132. *Patterson*, 109 S. Ct. at 2373.

133. *Id.*

134. *McKnight*, 908 F.2d at 112.

135. *Id.*

for a new and distinct employment relation; if the employer's post-formation discrimination was implicit in the original hiring, it should be pleaded as such. Because section 1981 claims for damages trigger a right to jury trial, the relevant factual questions concerning issues such as the denial of a promotion should be determined by the jury.

Unless racial harassment in the workplace results in a constructive discharge,[136] such cases usually do not result in any lost wages. Therefore any monetary award under Title VII is precluded, and the *Patterson* limitations on section 1981 become devastating. The Court's suggestion to the contrary, referring to the availability of Title VII,[137] simply ignores the significance of damages in harassment cases. Racial harassment cases are analogous to sexual harassment claims under Title VII[138] when the plaintiff has not been discharged but has suffered substantial emotional and mental distress as a result of the harassment.[139] Sexual harassment plaintiffs frequently have looked to state tort law, but this has been seriously limited by the decision in *Fields v. Cummins Employees Federal Credit Union*[140] which held that such tort claims are within the exclusive jurisdiction of Indiana's worker's compensation law.[141] Although compensation may be available under the worker's compensation statute, it is generally considered less favorable than the damages available under tort law.

These deficiencies in Title VII would have been remedied by the Civil Rights Act of 1990 if it had not been vetoed by President Bush. By providing for compensatory and punitive damages,[142] the Act generally would have eliminated the need for Title VII plaintiffs to look for other provisions with better remedies. In the meantime, serious gaps remain in the relief available to the victims of race and gender discrimination in private employment.

## IV. Conclusion

A clear trend in the Supreme Court is to limit the availability of damages in civil rights actions. Section 1983 plaintiffs can be left without

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136. *See, e.g.*, Daniels v. Essex Group, Inc., 740 F. Supp. 553, 560-61 (N.D. Ind. 1990).

137. *Patterson*, 109 S. Ct. at 2374-75.

138. In Meritor Savings Bank v. Vinson, 477 U.S. 57, 63-68 (1986), the Court made it clear that the Title VII prohibition against sex discrimination includes sexual harassment.

139. Victims of racial harassment who are employed by state or local government can raise an equal protection claim under § 1983, like victims of sexual harassment. *See supra* note 122.

140. 540 N.E.2d 631 (Ind. Ct. App. 1989). *See also* Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465-66 (7th Cir. 1990).

141. *Fields*, 540 N.E.2d at 636.

142. *See* S. 2104, 101st Cong., 2d Sess. § 8 (1990).

a damage remedy because the Court has taken an "activist" approach in greatly expanding the immunity doctrines beyond the face of the statute. State and local governments and government officials have been given protection, at the expense of the victims of civil rights deprivations, far beyond what is necessary for the proper functioning of these governmental units and officials. Similarly, the Supreme Court has deprived many victims of race discrimination in private employment of their most effective remedy, section 1981. This was accomplished by a very narrow reading of the language of the statute, after two decades of numerous lower courts interpreting section 1981 as prohibiting a broad range of discriminatory practices in private employment. At this point, it appears that only congressional action will reverse this trend in the Supreme Court.