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**37TH ANNUAL SECTION 1983
CIVIL RIGHTS LITIGATION CONFERENCE**

**PRACTICAL CONSIDERATIONS IN
SECTION 1983 LITIGATION**

I. INTRODUCTION

“Everyone has a plan until they get punched in the mouth.”

– Mike Tyson.

“A reasonable officer need not await the glint of steel before taking self-protective action.”

– *Estate of Bleck v. City of Alamosa, Colorado*, 643 Fed. Appx. 754 (2016) (Opinion of Judge Neil M. Gorsuch) [Internal Citations Omitted].

Mr. Tyson’s wisdom is particularly applicable to Section 1983 litigation. Unlike most areas of the law where the doctrinal underpinnings have been fixed for decades, case law and statutory changes make civil rights litigation a perpetually cutting-edge area of the law. Since last year’s Conference, the Supreme Court has twice issued a very strong admonition to lower courts and practitioners that in order to overcome the qualified immunity defense, a plaintiff must show the “clearly-established” element with particularity. *Kisela v. Hughes*, 2018 WL 1568126 (decided April 2, 2018); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).



On the other hand, during the course of the last year, significant efforts are being made to limit or eliminate entirely the qualified immunity defense. As of the writing of this outline, Colorado and New York City have done so. Illinois is considering similar legislation. It won't be long before police officer body cams are the rule, rather than the exception.

This ever-evolving legal landscape, combined with changes in technology and society's views of their local governments, require practitioners representing both plaintiffs and defendants to develop and evolve informed litigation game plans . . . while still being prepared to absorb a few punches in the mouth.

What follows are a series of hypotheticals drawn from actual case experiences. These hypotheticals will serve as a jumping-off point for a discussion of practical considerations at each stage of the litigation.

The Appendix consists of pleadings, opinions, jury instructions, and a sample closing argument.



A. THE USES AND LIMITATIONS OF VIDEO EVIDENCE IN SECTION 1983 LITIGATION

B. PLEADING STAGE: DEADLY SHOOTING – DO YOU HAVE A FEDERAL CASE?

Police officers are called to a house in response to a father-son domestic dispute. The officers are well aware of the house and the family. The son, while only 16 years old, is imposing physically, is autistic, and has had a number of physical confrontations with other officers called to the house.

When the officers arrive, the father said things have cooled off, the son is in his room in the basement and doesn't need any more stress. The officers insist their domestic violence protocols require that they physically examine the son. The father leads the officers down the narrow staircase and tells the son that the police just need to see him. As the father gets to the bottom of the stairs with the officers behind him single file, the son suddenly appears, armed with a knife, and lunges at the officers. The officers shoot him at close range, killing him.

- Is this a federal case?
- What are the dangers and pitfalls of bringing both Section 1983 excessive force and common law willful and wanton claims in federal court?
- What is plaintiff's best theory of liability?



Source: *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015); *Cole v. Carson*, 802 F.3d 752 (5th Cir. 2015). *Watts v. City of Calumet City* (No. 1-15-1973, [Rule 23 Order] Appendix, pgs. 1-17).

C. RECOGNIZING AND PURSUING UNUSUAL CLAIMS IN A SECTION 1983 ACTION.

The police are called to a fight during a backyard barbeque. One thing leads to another and Mr. Plaintiff is arrested and charged with a minor violation of obstructing a police officer.

A few weeks later, Mr. Plaintiff files a complaint against the arresting officer with the City's Internal Affairs Department. Three weeks after that, the charges against Mr. Plaintiff are upgraded to aggravated battery against a police officer.

The case goes to trial and Mr. Plaintiff is convicted based largely on the testimony of the officer. Mr. Plaintiff appeals his conviction. The Appellate Court said that there was sufficient evidence to convict, but there were other errors during the course of trial, calling for reversal and retrial. The State's Attorney ultimately decides not to retry Mr. Plaintiff.

- What claims does Mr. Plaintiff have?
- Are they federal or state?
- What is the statute of limitations?

Source: *Fultz v. Horton*, 2017 WL 449161 (N.D. Ill. 2017).



D. SUMMARY JUDGMENT PRACTICE IN EMPLOYMENT DISCRIMINATION CASES IN THE WAKE OF *ORTIZ* v. *WERNER ENTERPRISES, INC.*, 834 F.3d 760 (7th Cir. 2016).

In *Ortiz*, the Seventh Circuit Court of Appeals has eliminated what had become the common practice of analyzing summary judgment motions in employment discrimination cases strictly from the “indirect standard,” and the “direct standard.” Instead, employment discrimination cases are to be handled like any other summary judgment practice. See *David v. Board of Trustees*, 846 F.3d 216, 224 (7th Cir. 2017) (“In adjudicating a summary judgment motion, the question remains: Has the non-moving party produced sufficient evidence to support a jury verdict of intentional discrimination?”).

E. SUMMARY JUDGMENT PRACTICE IN EXCESSIVE FORCE CASES – CAN VIDEO EVIDENCE OVERCOME WHAT MIGHT OTHERWISE BE QUESTIONS OF FACT?

Order of District Court, *Pryor v. Corrigan* (Appendix, pgs. 18-73).

F. DISCOVERY STAGE: EMPLOYMENT DISCRIMINATION – CAN A SINGLE ADMISSION DEFEAT SUMMARY JUDGMENT?

Plaintiff is a part-time college instructor. He requires heart by-pass surgery and misses half of the spring semester. The Dean, who covers some of the absent instructor’s classes, discovers that the students have a world of complaints about him.

The instructor comes back for the fall semester. The Dean advises him that because of concerns regarding performance, the instructor’s load would be reduced in half while he remediates his deficiencies. At the end of the fall semester, the Dean concludes there has been



insufficient progress and terminates the plaintiff's employment. The teacher brings an ADA/ADEA/Retaliation lawsuit.

During the course of her deposition, the Assistant Dean testifies that "we" (she and the Dean) were concerned as to whether plaintiff could handle a full teaching load even though plaintiff had received a full release from his doctor.

The defense files a motion for summary judgment:

- What is the standard of causation in ADA and ADEA cases?
- Does the employer have to show that plaintiff's performance was substandard?
- Will the remark from the Assistant Dean prevent summary judgment?

Source: *Silk v. Moraine Valley Community College*, 795 F.3d 698 (7th Cir. 2015).

G. FACT DISCOVERY CLOSES: DO WE NEED AN EXPERT?

1. Plaintiff is arrested for DUI. He claims that while being processed and handcuffed in the booking area, officers repeatedly pushed him against the wall and punched him in the face, all without provocation. The officers claim he was drunk, stumbling around, and falling off the stool. Plaintiff has a photograph showing a number of facial injuries; the picture was taken by a family member after he was released. The mug shot shows no injuries.

The breathalyzer, taken about an hour and a half after the arrest, shows a blood alcohol content of .19. Plaintiff pleads guilty to driving under the influence.

- Does the defense need a medical expert on blood alcohol content?



- What will be the scope of his expert testimony?
- Is such proposed testimony inherently speculative or otherwise objectionable?

Source: *Gallegos v. City of Aurora*; Motion *in Limine* regarding medical testimony and response attached (**Appendix, pgs. 74-102**).

2. Excessive Force Death Case. Plaintiff discloses an expert. Both the expert disclosure and the expert's deposition set forth the expert's opinion that the officer's use of force was unreasonable. Should defense counsel obtain a counter-expert? Is reasonableness of use of force a proper subject for expert opinion?

Source: *Easterwood v. Village of Dolton*, Motion *in Limine* barring the use of Plaintiff's expert; Order of Court barring the use of this expert. (**Appendix, pgs. 103-111**).

H. OFFER OF JUDGMENT: MUST THE OFFER OF JUDGMENT BE MADE AT THE COMMENCEMENT OF THE CASE IN ORDER TO HAVE EFFECT?

See sample Offer of Judgment (identifiers redacted). (**Appendix, pgs. 112-113**).

I. SETTLEMENT CONFERENCE STAGE: WHEN IS A SHOOTOUT NOT THE USE OF FORCE?

Plaintiff is driving a car. He is pulled over by two plainclothes officers. When the officers get out of the car, plaintiff flees the scene. The officers pursue.

The pursuit enters an expressway. While on the expressway, one of the officers leans out of the car and shoots out the tires of plaintiff's car. The tires are blown, but plaintiff is able to



ditch the car and escape on foot. The officers catch up with him and arrest him. Force is used to effectuate the arrest. There are minimal injuries.

In his deposition, plaintiff denied having drugs in his possession. But he previously pled guilty to drug possession and there is photographic evidence of the recovered drugs.

The officers each took a 30-day suspension for their reckless conduct in pursuing plaintiff at high speed, and for shooting at plaintiff's car on the crowded expressway.

Plaintiff's theory in part is that the reckless conduct in shooting at plaintiff's car constituted excessive force. The defense claims that plaintiff's credibility will be destroyed by the combination of his guilty plea and his steadfast denial of drug possession in his deposition.

Issues for settlement conference:

- Will the suspensions be admissible?
- Will the drugs in the vehicle be admissible?
- Was the shooting out of plaintiff's tires a seizure?
- Will the defense be entitled to a *Gilbert* instruction?

Source: *Gilbert* Instruction (**Appendix, pg. 114**).

J. TRIAL EVIDENCE: YOUR OFFICER IS OUTNUMBERED BY OPPOSING WITNESSES. CAN YOU GET HIS POST-OCCURRENCE STATEMENTS INTO EVIDENCE?

An officer is summoned to the scene of a party late at night. There has been a good deal of drinking. The officer is looking for somebody who was making noise and then fled the party.



As he walks down a driveway, he has a confrontation with the individual. The officer punches the individual, shattering his jaw.

The criminal defendant is found not guilty of aggravated assault and becomes a civil plaintiff. At trial, he and his girlfriend testify that the officer was the aggressor. The officer claims otherwise.

The first person on the scene after the confrontation is a fellow police officer, who arrives just a minute or so after the event. The arresting officer blurts out: "He was charging right at me . . . I had no choice . . . so I punched the guy." The supporting officer documents this statement in his police report.

Questions:

- Can the officer's statement come in as a present sense impression under Federal Rule 803(1)?
- Can the statement to the fellow officer come into evidence under 803(2) as an excited utterance?

K. CLOSING ARGUMENT IN AN EXCESSIVE FORCE CASE

Questions:

- How best to weave in the jury instructions with the facts of the case.
- How much should be an appeal to emotion and how much should be a logical progression?

Sample: *Easterwood v. Village of Dolton*, Jury instructions and closing argument (**Appendix, pgs. 115-174**)

L. JURY INSTRUCTIONS IN AN EMPLOYMENT DISCRIMINATION CASE – WHAT HAPPENS WHEN THERE IS NO PATTERN INSTRUCTION?

M. CLOSING ARGUMENT IN AN EMPLOYMENT DISCRIMINATION CASE?

Questions:

- How best to weave in the jury instructions with the facts of the case.
- Unlike a police liability case where much of the inquiry is objective (the “reasonable police officer”), employment discrimination cases are inherently subjective.

Sample: *Remus v. Village of Dolton Bd of Fire & Police Commissioners*, Jury instructions and closing argument in an employment discrimination case (**Appendix, pgs. 175-258**).