Case Law Update: the "Qualified Immunity" Defense to 42 U.S.C. § 1983 Federal Constitutional Claims and the *Spackman v. Board of Education* Defense to Utah Constitutional Claims

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I. Background Regarding 42 U.S.C. § 1983

a. Statutory language

42 U.S.C. § 1983 provides:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

b. Who May Sue Under Section 1983

Any person whose federally protected constitutional or statutory rights are violated by person acting under color of state law may sue for money damages under 42 U.S.C. § 1983. A person must have standing to raise a Section 1983 claim. *Nova Health Systems v. Gandy*, 416 F. 3d 1149 (10th Cir. 2005). Federal courts lack jurisdiction over claims of persons without standing. *Summers v. Earth Island Inst.*, 129 U.S. 1142, 129 S.Ct. 1142, 1148-49, 173 L.Ed.2d 1 (2009).

Constitutional standing requires: (1) an injury in fact, (2) causation, and (3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

c. Who May Be Sued Under Section 1983 – Individual/Personal v. Official Capacity

Individuals employed by or acting on behalf of local governments are subject to suit under Section 1983. Those individuals may be sued in either their "personal" or their "official" capacities. A suit against an individual in his "official capacity" constitutes a suit against the government entity on whose behalf the individual acted, and thus requires the additional elements of proof for claims against a government entity. On the other hand, a suit against the individual in his or her "personal" capacity asserts claims against the individual. In *Hafer v. Melo*, 502 U.S. 21, 25-26 (1991), the United States Supreme Court explained the differences between personal and official capacity suits:

> … official-capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" Suits against state officials in their official capacity therefore should be treated as suits against the State. … Because the real party in interest in an official capacity suit is the governmental entity and not the named official, "the entity's 'policy or custom' must have played a part in the violation of federal law." For the same reason, the only immunities available to the defendant in an official capacity action are those that the governmental entity possesses.
>
> Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law. Thus, "[o]n the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." While the plaintiff in a personal-capacity suit need not establish a connection to governmental "policy or custom," officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law.

Id. at 25 (internal quotations and citations omitted).

Local governments, including counties and municipalities, are also subject to suit under Section 1983. Importantly, however, departments of local government entities, such as police departments, sheriff's offices, etc., are not "persons" under Section 1983, unless they have separate legal existence, and thus generally are not subject to suit. Instead, the properly named defendant is the municipality or county of which the department is a part. *See, e.g., Darby v. Pasadena Police Dept*., 939 F.2d 311, 313-4 (5th Cir.1991) (stating that the police department was not subject to suit under Section 1983 because it did not ""enjoy a separate legal existence."); *Revene v. Charles County Comm'rs*, 882 F.2d 870, 874 (4th Cir.1989) (finding that the Office of Sheriff is not a legal entity separate from the sheriff and the county government).

States are not subject to suit under Section 1983, due to the protections of the Eleventh Amendment. The Eleventh Amendment does not, however, bar suits against state *officials* acting in their personal capacities. *Hafer, supra* at 30. Again, because a suit against a government actor in his official capacity amounts to suit against the entity on whose behalf he acts, suits against state officials in their official capacity are barred by the Eleventh Amendment.

d. Remedy Provided

Section 1983 plaintiffs can recover monetary damages for actual injury inflicted as a result of the violation of their federally protected rights. Compensatory and punitive damages are available. *Dang v. Cross*, 422 F.3d 800 (9th Cir. 2005). Punitive damages may be awarded against an individual defendant sued in his or her personal capacity where the individual acts with evil intent or motive, or with reckless or callous indifference to the federal rights of others. *Smith v. Wade*, 461 U.S. 30 (1983). Punitive damages may not be awarded as against a municipal entity defendant. *Newport v. Fact Concerts, Inc*., 453 U.S. 247 (1981).

Prospective remedies, such as claims for injunctions and declaratory relief, are available under Section 1983. To obtain an injunction, the plaintiff must show the likelihood of substantial and irreparable injury, and the inadequacy of remedies at law. *O'Shea v. Littleton*, 414 U.S. 488 (1974). The conduct to be enjoined must result from official custom or practice. *Los Angeles County, Cal. v. Humphries*, 131 S. Ct. 447 (2010).

42 U.S.C. § 1988 authorizes an award of attorney fees to the prevailing party in Section 1983 litigation. The justification advanced for awarding fees to a prevailing party's attorney is to encourage prosecution of valid claims with damages "too small to justify the expense of litigation[.]" *Hudson v. Michigan*, 547 U.S. 586, 598 (2006). The award of attorney fees to the prevailing plaintiff is presumed, whereas an award of attorney fees to a prevailing defendant requires a showing "that 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).

e. Color of Law Requirement

Section 1983 does not apply to claims against purely private persons or federal actors. Thus, showing that the defendant acted under color of state law is a vital element of any Section 1983 claim. *See* Section III.c, *supra*.

II. History of Congress's Adoption of 42 U.S.C. § 1983

Congress enacted the Civil Rights Act in 1871. 42 U.S.C. § 1983 was codified as section 1 of the Civil Rights Act, and it still remains law today. The Civil Rights Act of 1871 was passed as a result of the Ku Klux Klan's campaign of violence and deception in the South, which resulted state actors denying citizens their civil and political rights. *See Briscoe v. LaHue*, 460 U. S. 325, 336-340 (1983). The congressional debates on the Civil Rights Act of 1971 note the alarming insecurity of life, liberty, and property in the Southern States:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishing have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of

> felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of public tribunals are searched in vain for any evidence of effective redress.

Cong. Globe, 42d Cong, 1st Sess., 374 (1871) (remarks of Rep. Lowe).

By providing a remedy for the violation of federal constitutional and statutory rights, Congress hoped to restore peace and justice to the region through the power of civil enforcement. Despite Congress's efforts in passing the Civil Rights Act of 1871, however, Section 1983 was not given substantive legal effect to protect a citizen's federal constitutional rights until much later. In 1961, the United States Supreme Court decided *Monroe v. Pape*, 365 U.S. 167 (1961), finally giving full effect to Section 1983 as a means to redress violations of federal rights.

In *Monroe*, the Supreme Court opened the door to the federal courthouse for those persons aggrieved by state officials acting under color of law. *Monroe* first determined that a state official acts under "color of law" even if his conduct violates state law. *Id.* at 186-187 ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'") (internal quotations omitted). Second, the *Monroe* Court recognized that a person still enjoys a federal remedy under Section 1983 even if the state actor's conduct also violates state law and thus creates a remedy under state law. *Id*. at 183 ("It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.").

It would be another 17 years before the Section 1983 remedy was extended to reach the deep pocket of municipalities in *Monell v. New York City Dept. of Social Servs*., 436 U. S. 658, 692 (1978). In that case, the Supreme Court held that a municipality or other local government may be liable under Section 1983 if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation.

Since *Monell*, the Supreme Court and the lower federal circuits have decided a plethora of issues relating to Section 1983. Needless to say, however, there is a large body of jurisprudence construing constitutional claims and applicable defenses under Section 1983. Because Section 1983 serves as the sole means for vindicating federally protected rights, recent times have seen no decrease in the number of new Section 1983 cases or the amount of judicial opinions interpreting the meaning of Section 1983 and the federal constitution.

III. Elements of a § 1983 Claim

a. Elements in General

The Supreme Court has established that the "two essential elements to a § 1983 action are []: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

In practice, however, there are actually four basic elements of a Section 1983 claim against an individual. The plaintiff must establish by a preponderance of the evidence:

1) that a person
2) acting under "color of state law"
3) caused
4) the deprivation of a federal right

There is an additional element when pursuing a Section 1983 claim against a municipality or county. In a claim against a municipality or county, the plaintiff must additionally prove that the violation of his constitutional right resulted from the implementation of the municipality or county's unconstitutional policy or custom. *Monell, supra.*

Generally speaking, Section 1983 does not impose an intent requirement. *Parratt, supra*. However, depending upon the source of the right alleged to have been violated, there may be additional intent requirements. As relevant to this seminar addressing police liability, the standards of proof for Fourth Amendment, Eighth Amendment, and Fourteenth Amendment substantive due process claims are included in these materials.

It is important to note that Section 1983 itself does not create any federal protected right. Rather, it acts as a procedural vehicle for asserting claims for such violations against state actors. The right itself must arise from the constitution, or some federal statute other than 42 U.S.C. § 1983. Generally, the violation of right arising under state law does not give rise to a Section 1983 claim. *Collins v. Harker Heights*, 503 U.S. 115, 119 (1992) ("Although the statute provides the citizen with an effective remedy against those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law[.]"

b. Person

For purposes of Section 1983 litigation, a claim may be asserted against a "person" who acts under color of state law.

A "person" includes individual government actors in their official and unofficial capacities, municipal entities (including counties), but not states. In *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), the Supreme Court definitively resolved the question of whether a state was subject to suit under Section 1983, and held "that a State is not a 'person' within the meaning of § 1983[.]"

c. Acting Under Color of State Law

"[U]nder 'color' of law means under 'pretense' of law" and [] 'acts of officers in the ambit of their personal pursuits are plainly excluded.'" *Screws v. United States*, 325 U.S. 91, 111, 65 S.Ct. 1031, 1040, 89 L.Ed. 1495 (1945).

Persons can act under color of state law and nonetheless abuse their power. The question is whether there is a nexus between the actor's use or misuse of state granted authority and the violation of the federally protected right. A person acts under color of state law whenever he is empowered to act on the part of the government and violates another's rights, irrespective of whether he acts in compliance with state law, violates state law, or exercises professional discretion (such as prison physicians).

In most cases against police officers, this element is not in controversy. See, e.g., *Scott v. Harris*, 127 S. Ct. 1769 (2007)(excessive force claim arising from high speed pursuit of fleeing suspect; action under color of state law not challenged). In cases involving off-duty police officers or private police contractors, however, this element is sometimes in question.

i. Off-duty police

While it is clear that "personal pursuits" of police officers do not give rise to section 1983 liability, there is no bright line test for distinguishing "personal pursuits" from activities taken under color of law.

Liability may be found for actions of an off-duty police officer, where he or she invokes the real or apparent power of the police department. See *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir.1991); *Traver v. Meshriy*, 627 F.2d 934, 937-38 (9th Cir.1980). Liability also may exist where off-duty police officers perform duties prescribed generally for police officers. *See Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir. 1975). Courts will look to the nature of the officer's act, not simply his duty status, to determine whether he was acting under color of state law. *See Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir.1989).

ii. Private police contractors

Purely private actors may be found to be acting under color of state law where the facts warrant such a conclusion. A private actor acts under color of state law when the private actor "is a willful participant in joint activity with the State or its agents." *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 152, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Other factors weighed by the United States Supreme Court are whether there exists a symbiotic relationship[1], whether the private entity is carrying out an "exclusively" governmental service[2], whether there is a "sufficiently close nexus,"[3] joint participation,[4] or pervasive entwinement.[5]

In the police liability context, there definitely are occasions to assert claims may against private actors acting under color of state law. For example, law enforcement agencies frequently employ private contractors to provide services at jails, such as medical and mental health

[1] *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).
[2] *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157-64 (1978).
[3] *Blum v. Yaretsky*, 457 U.S. 991 (1982).
[4] *Rendell-Baker, supra*.
[5] *Brentwood Academy v. Tennessee Secondary School Athletic Assn*., 531 U.S. 288 (2001)

services. The Supreme Court has extended section 1983 liability to such individuals, concluding that they act under color of state law. *West v. Atkins*, 487 U.S. 42 (1988)(prison physician acted under color of state law in providing medical care to inmates).

d. Caused

All Section 1983 claimants must prove that the state actor's conduct proximately caused the deprivation of his or her federally protected right. This is the same causation concept utilized in the common law of torts. *See, e.g., McKinley v. City of Mansfield*, 404 F. 3d 418, 438 (6th Cir. 2005)("Causation in the constitutional sense is no different from causation in the common law sense.")

A defendant who causes the deprivation of federally protected rights is generally liable for foreseeable harm, including intervening acts of third persons, where the intervening act is itself foreseeable. *Warner v. Orange County Dept. of Probation*, 115 F. 3d 1068 (2nd Cir. 1996)("… an actor may be held liable for 'those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties.'") (internal quotations omitted).

In the context of police liability claims against a municipal entity for failure to train, a significant question of causation arises on the issue of whether the entity's alleged failure to train caused the deprivation of the federal right at issue. For municipal liability claims, the plaintiff must prove that the municipality's unconstitutional custom or policy was the "moving force," "closely related," "a direct causal link," or "affirmatively linked," in order to prove causation. It is insufficient proof to show merely that a particular officer was inadequately trained, or that the conduct at issue could have been avoided by better training. *See e.g. Canton v. Harris*, 489 U.S. 378 (1989).

e. Deprivation of a Federal Right

The due process clause of the Fourteenth Amendment makes the Bill of Rights i.e., Amendments I through X, applicable to the states and prevents the states from infringing upon those rights. Section 1983 claims arising under the federal constitution can involve violations of one of specifically enumerated rights in Amendments I through X, as well as due process under the Fourteenth Amendment. Due process claims under the Fourteenth Amendment can encompass both substantive due process violations resulting from arbitrary and wrongful government actions and procedural due process violations resulting from a state actor's failure to afford a plaintiff sufficient procedural protections in relation to the deprivation of a protected liberty or property interest.

IV. Defenses to Section 1983 Claims

a. Absolute Immunity

Absolute immunity bars Section 1983 suits against prosecutors and their functional equivalents when those individuals act as "officers of the court," or in activities intimately

associated with the judicial process, but not when they engage in investigative activities. The rationale behind the absolute immunity doctrine reflects "'a balance' of 'evils.'" *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 860 (2009)(quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949)(Hand, L., J.) " '[I]t has been thought in the end better …to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'" *Id.*

The Supreme Court has held that absolute immunity applies when a prosecutor prepares to initiate a judicial proceeding, *Burns v. Reed*, 500 U.S. 478, 492, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), or appears in court to present evidence in support of a search warrant application, *Kalina v. Fletcher*, 522 U.S. 118, 126, 130, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997). The Court has also held that absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation, *see Burns, supra*, at 496, 111 S.Ct. 1934, when the prosecutor makes statements to the press, *Buckley v. Fitzsimmons*, 509 U.S. 259, 277, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), or when a prosecutor acts as a complaining witness in support of a warrant application, *Kalina, supra*, at 132, 118 S.Ct. 502 (SCALIA, J., concurring).

b. Qualified Immunity

Individual government officials, such as police and sheriffs, are protected by qualified immunity from lawsuits under Section 1983, as long as their "'conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Gomes v. Wood*, 451 F.3d 1122, 1134 (10th Cir. 2006)(internal quotations omitted). The standard for overcoming an officer's claim of qualified immunity is quite high.

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 334, 341, 106 S.Ct. 1092, 89 L.E.2d 271 (1986). When a state or local government official asserts qualified immunity, he raises a rebuttable presumption that he is immune from the Section 1983 claims. *See Medina v. Cram*, 252 F.3d 1124, 1129 (10th Cir. 2001). Qualified immunity may be denied only if it is "obvious" under prior case law or based on the egregiousness of the facts that a reasonably competent officer would have realized that his actions were unconstitutional. *Gomes, supra*, at 1134.

In order to overcome the presumption of qualified immunity, the plaintiff must satisfy a two-part test. The plaintiff bears the first "heavy burden" of showing that the defendant's conduct violated one of the plaintiff's federal rights. *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.E.2d 583 (2004). The determinative question is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [government official]'s conduct violated a constitutional right?" *Kirkland v. St. Vrain Valley Sch. Dist.*, 464 F.3d 1182, 1188 (10th Cir. 2006). If the government actor's conduct did not violate one of the plaintiff's constitutional rights, qualified immunity is appropriate as a matter of law, and dismissal or summary judgment in favor of the officer will be granted. *See Saucier v. Katz*, 533 U.S. 194, 201-202 (2001).

On the other hand, if the plaintiff satisfies his initial burden of showing evidence of a constitutional violation, the plaintiff must then establish that the constitutional right allegedly

violated was clearly established, on a specific level, at the time of the conduct at issue. *Brosseau*, 543 U.S. at 199. This "clearly established" element can be proven with prior case law, or by sufficiently outrageous facts demonstrating the obviousness of the constitutional violation. Either way, "[t]he contours of the right [must be] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Brosseau*, 543 U.S. at 201. If the clearly established element is proven by prior case law, the prior case law must specifically address and "squarely govern[]" the factual situation the defendant confronted. *Brosseau*, supra at 200-201.

Courts have discretion as to the order in which to apply the qualified immunity test. *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009). In cases where the constitutional issues are complex, it is permissible to evaluate whether a right is clearly established prior to analyzing whether the facts show a violation of a constitutional right. *Id.*

c. *Procedural Defenses*

In addition to the substantive defenses of qualified and absolute immunity, there are procedural defenses that may be asserted against a Section 1983 claim.

i. Statute of Limitation

The statute of limitations applicable to Section 1983 claims is the general or residual statute of limitations codified in the state in which the claim arose. *Wallace v. Kato*, 127 S. Ct. 1091 (2007); *Owens v. Okure*, 488 U.S. 235, 249-250, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); *Wilson v. Garcia*, 471 U.S. 261, 279-280, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).

ii. Claim Preclusion and Issue Preclusion

The doctrines of claim and issue preclusion apply to Section 1983 suits. *See Allen v. McCurry*, 449 U.S. 90 (1980); *Migra v. Warren City School Dist. Bd. of Ed*., 465 U.S. 75 (1984)(claim preclusion); *Haring v. Prosise*, 462 U.S. 306 (1983)(issue preclusion).

28 U. S. C. § 1738 generally requires "federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen, supra*, at 96. In federal actions, including Section 1983 actions, a state-court judgment will *not* be given collateral-estoppel effect if "the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Id*. at 101.

V. Recent United States Supreme Court Case Law Interpreting Qualified Immunity Defense to Section 1983 Claims

Messerschmidt v. Millender, October Term 2011
Holding: The officers in the case are entitled to qualified immunity for executing a search warrant for firearms and evidence of gang activity in a home after a victim reported that the suspect had threatened her with a gun.

Filarsky v. Delia – October Term 2011
Holding: A private individual temporarily retained by the government to carry out its work is entitled to seek qualified immunity from suit under 42 U. S. C. § 1983.

Wood v. Moss – October Term 2013
Holding: Two Secret Service agents who ordered that individuals protesting the policies of President George W. Bush be moved away from the outdoor area at which the president was eating, placing them further away from the president than the president's supporters, are entitled to qualified immunity from the protesters' lawsuit alleging viewpoint discrimination in violation of the First Amendment when there was a legitimate security rationale for the removal of the protesters.

Plumhoff v. Rickard – October Term 2013
Holding: The use of deadly force by police officers in this case – firing multiple rounds into a car during a high-speed chase, contributing to the death of the driver and a passenger – was not unreasonable given the threat to public safety posed by the driver's reckless behavior. As such, the officers did not violate the Fourth Amendment. But in any event, the officers were entitled to qualified immunity because they did not violate any clearly established law.

Carroll v. Carman, October Term 2014
Holding: The U.S. Court of Appeals for the Third Circuit erred when it concluded that a police officer is not entitled to qualified immunity from a lawsuit under Section 1983 that alleged, among other things, that he entered their property in violation of the Fourth Amendment when he went into their backyard and onto their deck without a warrant. The police officer did not violate clearly established federal law when he went to a sliding glass door that he believed was a customary entryway that was open to visitors.

City and County of San Francisco v. Sheehan – October Term 2014 (Opinion not yet issued)
Issue(s): (1) Whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody; and (2) whether it was clearly established that even where an exception to the warrant requirement applied, an entry into a residence could be unreasonable under the Fourth Amendment by reason of the anticipated resistance of an armed and violent suspect within. (Breyer, J., recused.)

VI. Recent Tenth Circuit Case Law Interpreting Qualified Immunity Defense to Section 1983 Claims

Estate of Booker v. Gomez, 745 F.3d 405 (10th Cir. 2014)
Denver police arrested Marvin Booker on a warrant for failure to appear at a hearing regarding a drug charge. During booking, Mr. Booker died while in custody after officers restrained him in response to his alleged insubordination. Several officers pinned Mr. Booker face-down to the ground, one placed him in a chokehold, and another tased him.

After the officers sought medical help for Mr. Booker, he could not be revived. Defendant officers moved for summary judgment on qualified immunity grounds. The district court denied their motion because disputed facts precluded summary judgment.

The Tenth Circuit affirmed the denial of summary judgment. In evaluating qualified immunity the Court considered the relationship between the force used and the need presented. The evidence, when viewed in the light most favorable to the Plaintiffs, showed that the deputies used various types of force — including substantial pressure on his back, a taser, and a carotid neckhold — on Mr. Booker while he was not resisting. Because Mr. Booker was handcuffed and on his stomach, the Court concluded the force was not proportional to the need presented.

Eisenhour v. Weber County, 744 F.3d 1220 (10th Cir. 2014)

Marcia Eisenhour sued Weber County, three of its county commissioners, and a state judge. According to Ms. Eisenhour, the judge (Craig Storey) sexually harassed her and the County retaliated against her for reporting the harassment. She claimed violations of Utah's Whistleblower Act, the First Amendment, the Fourteenth Amendment's Due Process and Equal Protection Clauses, and Title VII. The district court granted summary judgment to the defendants on all claims.

Ms. Eisenhour worked for Weber County for 24 years, serving as the Court Administrator for the Weber County Justice Court under the direct supervision of Judge Storey. According to Ms. Eisenhour, she was subjected to offensive touching and unreasonable questions about her activities away from work.

Judge Storey began acting inappropriately toward Ms. Eisenhour in early 2008. He became "touchy" and would often stand so close to her that his groin rubbed against her. In addition to the touching, Judge Storey once called Ms. Eisenhour into his office and told her that he had a dream about her in which she was naked. Ms. Eisenhour also found a poem by Judge Storey, which revealed his romantic feelings for her.

The Tenth Circuit reversed the district court's grant of summary judgment to Judge Storey, concluding that he was not entitled to qualified immunity, that there was a fact-issue about whether Judge Storey inappropriately touched Ms. Eisenhour, and that Ms. Eisenhour had no requirement to show she was treated differently from a similarly situated individual.

Felders ex rel. Smedley v. Malcom, 755 F.3d 870 (10th Cir. 2014)

A Utah state trooper stopped Sherida Felders for speeding while on a trip from California to Colorado. Based on Felders's demeanor and several perceived inconsistences in the stories of Felders and her passengers as to why they were traveling to Colorado, the trooper, Brian Bairett, asked to search Felders's car for drugs. After Felders refused, Bairett called for assistance from K-9 Unit officer Jeff Malcom to conduct a dog sniff on Felders's Jeep. The ensuing two-hour search yielded no drugs.

Felders and her passengers, Elijah Madyun and Delarryon Hansend, subsequently filed suit against Bairett and Malcom under 42 U.S.C. § 1983. They alleged, among other claims, that both Bairett and Malcom unlawfully searched Felders's car in violation of the Fourth Amendment.

Malcom moved for summary judgment on the Fourth Amendment unlawful search claim based on qualified immunity.

The district court denied Malcom's motion for summary judgment. The district court found as a matter of law that Malcom could not establish probable cause to search the car prior to conducting the dog sniff and that material facts were in dispute regarding (1) whether Malcom's canine, Duke, alerted prior to jumping into the vehicle; and (2) whether Malcom facilitated Duke's entry into the vehicle prior to establishing probable cause.

Malcom filed this interlocutory appeal from the district court's denial of qualified immunity. He argues that the district court erred in denying his motion for summary judgment because he had probable cause to search the car prior to conducting the dog sniff and, alternatively, that the law did not clearly establish that his actions during the sniff violated the Fourth Amendment.

The Tenth Circuit agreed with the district court that Malcom did not have probable cause to search the vehicle prior to conducting the sniff. The information Bairett provided Malcom at most established a reasonable suspicion justifying the detention, and Malcom did not independently develop additional facts prior to conducting the sniff that could support a search. As to the permissibility of Malcom's actions during the dog sniff, genuine issues of material fact regarding Duke's alert and Malcom's facilitation of Duke's entry into the vehicle precluded the Court from finding that Malcom was entitled to qualified immunity as a matter of law.

Accordingly, exercising jurisdiction under 28 U.S.C. § 1291, the Tenth Circuit affirmed the district court's summary judgment decision denying Malcom qualified immunity.

ALDABA v. Pickens, No. 13-7034 (10th Cir. Feb. 4, 2015)

Johnny Leija went to a hospital in Oklahoma and was diagnosed with dehydration and severe pneumonia in both lungs, causing hypoxia (low oxygen levels, known to cause altered mental status). He was pleasant when he was admitted at 11 a.m., but by 6 p.m. his behavior had changed. Hospital personell called law enforcement "for help with a disturbed patient." In the process of attempting to restrain Leija, officers tased him and physically restrained him. The officers handcuffed Leija while the doctor administered calming medications, but at that point Leija became limp and the doctors began CPR. Leija died that evening. The medical examiner testified that the cause of death was pneumonia, but the taser shots "certainly could have increased Leija's need for oxygen," and the treating physician testified that the position Leija was forced into by the officers made it difficult for him to breathe.

Erma Aldaba, Leija's mother and next of kin, brought a 42 U.S.C. § 1983 action against the officers. The district court granted summary judgment to the officers, deciding that Leija was lawfully seized, since probable cause existed for taking him into protective custody due to his altered mental status. However, the district court denied qualified immunity on the excessive force claim, holding that several material disputes existed about the reasonableness of the force used against Mr. Leija. The officers filed an interlocutory appeal.

The Tenth Circuit first analyzed the constitutional violation regarding the officers' use of excessive force against Leija. The Tenth Circuit found that where, as here, the person has

committed no crime and poses a threat only to himself, it is especially egregious to use force to take the person into protective custody. The Tenth Circuit also admonished against the use of force or positional restraints when a person has special characteristics making him especially susceptible to harm, such as known medical conditions. Weighing the factors, the Tenth Circuit found the first factor weighed for the use of some force in restraining Mr. Leija, since he was clearly mentally disturbed and could die if he left the hospital. However, the rest of the factors weighed against the use of force, and particularly against the use of a taser. The Tenth Circuit affirmed the district court's denial of summary judgment to the officers.

VII. Utah Constitutional Claims Under *Spackman v. Board of Education*

a. *Background Regarding Utah Constitutional Liability Under Spackman v. Board of Education*

In *Spackman ex rel. Spackman v. Bd. of Education*, 16 P.3d 533 (Utah 2000), the Utah Supreme Court held that a plaintiff may only recover money damages for violations of the Utah Constitution when the allegedly violated provision is self-executing. "A constitutional provision is self-executing if it articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers. In other words, courts may give effect to a provision without implementing legislation if the framers intended the provision to have immediate effect and if "no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed...." *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996) (citations omitted). "Conversely, constitutional provisions are not self-executing if they merely indicate a general principle or line of policy without supplying the means for putting them into effect." *Id.*

If the provision is self-executing, the plaintiff must next satisfy the following three elements to recover on a claim for an alleged violation of the Utah Constitution: (1) she suffered a "flagrant" violation of her constitutional rights, (2) existing remedies do not redress the plaintiff's claimed injuries, and (3) equitable relief was and is wholly inadequate to protect the rights or redress the plaintiff's injuries. *Spackman* at 538-39. It is the plaintiff's burden to prove all three elements. *Id.*

b. *Test for a "Flagrant Violation" of the Utah Constitution*

To overcome a motion for summary judgment, the plaintiff must show evidence that she suffered a "flagrant" violation of her rights guaranteed by the constitutional provision at issue. The *Spackman* court defined the term "flagrant" in identical terms as the qualified immunity test articulated by the U.S. Supreme Court in *Harlow v. Fitzgerald*: "In essence, this means that a defendant must have violated 'clearly established' constitutional rights 'of which a reasonable person would have known.'" *Spackman* at ¶ 23 (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

Accordingly, the *Spackman* court's definition of "flagrant" matches the requirements for qualified immunity from federal Section 1983 claims, i.e., a plaintiff must show both a constitutional violation and that the right was clearly established at the time of the violation. *See Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶¶ 65-66, 250 P. 3d 465.

c. What Utah Constitutional Provisions are Self-Executing?

Held **NOT** self-executing:

- Former version of article XIII, section 4, dealing with the taxation of mine proceeds, *see Mercur Gold Mining*, 16 Utah at 227-28, 52 P. at 384;
- Former version of article X, section 3 (renumbered by amendment in 1986 as article X, section 5), dealing with the State School Fund, *see In re Montello Salt Co*., 88 Utah 283, 288-89, 53 P.2d 727, 729 (1936);
- Article XI, section 5, dealing with the source and scope of municipal powers, see *Utah Rapid Transit Co. v. Ogden City*, 89 Utah 546, 549-50, 58 P.2d 1, 2-3 (1936), overruled on other grounds by *Rich v. Salt Lake City Corp*. 20 Utah 2d 339, 437 P.2d 690 (1968);
- Article I, section 17, dealing with freedom of election, see *Anderson v. Cook*, 102 Utah 265, 281, 130 P.2d 278, 285 (1942) (per curiam); and
- Former article X, section 8 (renumbered by amendment in 1986 as article X, section 3), dealing with membership of the State Board of Education, see *State Bd. of Educ. v. Commission of Fin*., 122 Utah 164, 175, 247 P.2d 435, 440 (1952).
- Article XIII, Section 11, see *Alpine School Dist. v. State Tax Com'n*, 14 P.3d 125, 2000 U.T. App 319

Held **YES** self-executing:

- Article I, section 7 due process clause, see *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996)
- Article I, section 24, uniform operation of the laws, see *Intermountain Sports, Inc. v. Department of Transportation and Murray City*, 2004 U.T. App 405, 103 P.3d 716
- Article I, section 9, unnecessary rigor, see *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996), *Dexter v. Bosko*, 2008 UT 29, 184 P.3d 592
- Article I, section 1, inherent and inalienable rights, see *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, 250 P. 3d 465
- Article I, section 14, unnecessary search and seizure, see *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, 250 P. 3d 465
- Article I, section 22, takings clause, see *Land v. Holladay City*, 2005 U.T. App 202, 113 P.3d 1024

d. Relevant Utah cases construing Spackman standard

Patterson v. American Fork City, 2003 U.T. 7, 67 P.3d 466
Plaintiff must exhaust available administrative remedies before pursuing Utah constitutional claims.

Intermountain Sports, Inc. v. Department of Transportation and Murray City, 2004 UT App 405, 103 P.3d 716

Although the uniform operation of laws clause of the Utah Constitution is self-executing, money damages not available where plaintiff failed to demonstrate that existing remedies were not available to redress its injuries.

Dexter v. Bosko, 2008 UT 29, 184 P.3d 592

Article I, Section 9 is self-executing. The Court addressed the standard for demonstrating a violation of Article I, Section 9 and articulated the law that would govern Dexter's claims against the officers. "If an official knowingly and unjustifiably subjects an inmate to circumstances previously identified as being unnecessarily rigorous, that is obviously a flagrant violation." *Id*. at ¶ 25. However, "[w]here a clear prohibition has not been previously known to the official, more may be required to establish a flagrant violation." *Id*. As such, where there is no prior case law establishing a clear prohibition against the conduct at issue, a plaintiff can establish "a flagrant violation of the unnecessary rigor clause … whenever the following two elements are established: First, the nature of the act presents an obvious and known serious risk of harm to the arrested or imprisoned person; and second, knowing of that risk, the official acts without other reasonable justification." *Id.*

Jensen ex rel. Jensen v. Cunningham, 2011 UT 17, 250 P. 3d 465

Article I, sections 1 nad 14 are self-executing. State constitutional claims are not subject to the notice of claim requirements of Governmental Immunity Act of Utah. Applying *Spackman* to conclude that plaintiffs had not sufficiently demonstrated a flagrant violation of their rights

Friedman v. Salt Lake County, 2013 U.T. App 137, 305 P.3d 162

Affirming grant of motion to dismiss where plaintiff failed to plead allegations to support each component of the 3-part *Spackman* test. Rejecting pro se litigant's free exercise of religion claim, and refusing to address whether the provision was self-executing, where plaintiff failed to show that "that equitable relief, such as an injunction [or declaratory judgment], was and is wholly inadequate to protect [his] rights or redress his... injuries."