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Typical Section 1983 Claims

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A. PRISON LITIGATION

In the prison or jail setting, inmates' claims run the gamut of everything from complaints about food that is cold to claims about lack of proper medical attention to claims about inadequate access to the law library. With respect to claims about the conditions of confinement, including those for overcrowding and cold food, and claims about allegedly improper medical attention, the standard that is utilized is "deliberate indifference." This is true whether the claim is asserted under the Eighth Amendment (which applies to claims by convicted prisoners) or the Fourteenth Amendment (which applies to claims by pretrial detainees). [Cottrell v. Caldwell](#), 85 F.3d 1480, 1490 (11th Cir. 1996). Please note the distinction between the claims of pretrial and convicted inmates so that you do not erroneously proceed under the incorrect and inapplicable Amendment. See [Ingraham v. Wright](#), 430 U.S. 651, 97 S.Ct. 1401 (1977).

In addition to making certain that suit is brought pursuant to the correct constitutional provision, it is critical that a plaintiff allege and establish that the actions of the individuals and/or entity were deliberately indifferent, as opposed to merely negligent. Both the Supreme Court and the Eleventh Circuit have made clear that even "gross negligence" is insufficient to support either an Eighth Amendment or a Fourteenth Amendment claim. [Farmer v. Brennan](#), 511 U.S. 825, 114 S.Ct. 1970 (1974); [Cottrell v. Caldwell](#), supra, at 1490 ("In any event, the Supreme Court's recent decision in [Farmer v. Brennan](#), ___ U.S. ___, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), which was released after this case left the district court, makes it clear that 'gross negligence' is not part of the standard for judging custody mistreatment cases under the Due Process Clause.").

Instead, the standard to be applied in both jail and prison conditions cases is the standard of "deliberate indifference." [Farmer v. Brennan](#), supra; [Wilson v. Seiter](#), 501 U.S. 294, 111 S.Ct. 2321 (1991); [Cottrell v.](#)

Caldwell, supra. A very good discussion by the Eleventh Circuit of what conduct is and is not deliberately indifferent can be found in *Hill v. DeKalb Youth Detention Center*, 40 F.3d 1176 (11th Cir. 1994). In *Farmer*, the Supreme Court undertook to define and explain the term "deliberate indifference." In that case, a transsexual inmate with feminine characteristics who was incarcerated with other males claimed to have been beaten and raped by another inmate. In his lawsuit, the inmate alleged that Wisconsin prison officials had acted with deliberate indifference to his safety in violation of the Eighth Amendment because they knew that the penitentiary had a violent environment and a history of inmate assaults and that he would be particularly vulnerable to sexual attack. The district court granted summary judgment in favor of the prison officials, and the Seventh Circuit affirmed.

On review of the case by the Supreme Court, the Court was called upon to define the term "deliberate indifference." In so doing, the Court made reference to the subjective component of the inquiry:

We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. . . . [A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

Farmer, 114 S.Ct. at 1979 (emphasis supplied). Thus, in the case of inmate-on-inmate violence, as in other jail-related claims, the plaintiff must demonstrate that jail officials knew of a substantial risk of serious harm. "Deliberate indifference" requires that a deliberate choice be made to do or not to do something. Failing to take action when the risk is not perceived is not deliberate and is not unconstitutional.

An illustrative situation of mere negligence was presented in *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986). There, an inmate (Daniels) who slipped on a pillow left on the jail stairs by a deputy sheriff (Williams) brought suit under the Due Process Clause of the Fourteenth Amendment, claiming that Williams' actions deprived him of his "liberty" interest in freedom from bodily injury without due process of law. Finding that Williams' acts were, at most, negligent, the Eastern District of Virginia granted Williams' motion for summary judgment, and the Fourth Circuit affirmed. The Supreme Court granted Daniels' petition for writ of certiorari to address "the inconsistent approaches taken by the lower courts in determining when tortious conduct by state officials rises to the level of a constitutional tort" and "the apparent lack of adequate guidance by [the Supreme Court]." *Daniels*, 474 U.S. at 329, 106 S.Ct. at 664. In affirming the lower courts' decisions in favor of Williams, the Court made clear that the Fourteenth Amendment is not "a font of tort law:"

. . . Historically, the guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty or property. . . . No decision of this Court before *Parratt* supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta . . . was "intended to secure the individual from the arbitrary exercise of the powers of government." . . . By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, . . . , it serves to prevent governmental power from being used "for the purposes of oppression." . . .

We think that the actions of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate's property, are quite remote from the concerns just discussed. Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.

. . . Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for

injuries that attend living together in society. We have previously rejected reasoning that "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States"

Daniels, 474 U.S. at 331-32, 106 S.Ct. at 665 (citations omitted).

The deliberate indifference standard also is applied in cases involving jail or prison suicides. The plaintiff, a representative of the deceased inmate's estate, must show that the jail official displayed "deliberate indifference" to the prisoner's taking of his own life. *Tittle v. Jefferson County Commission*, 10 F.3d 1535, 1539 (11th Cir. 1994); *Popham v. City of Talladega*, 908 F.2d 1561, 1563 (11th Cir. 1990); *Edwards v. Gilbert*, 867 F.2d 1271, 1274-75 (11th Cir. 1989).

A finding of deliberate indifference requires that officials have notice of the suicidal tendency of the individual whose rights are at issue in order to be held liable for the suicide of that individual. *Popham*, 908 F.2d at 1564 ("absent knowledge of a detainee's suicidal tendencies, the cases have consistently held that failure to prevent suicide has never been held to constitute deliberate indifference"). See also *Haney v. City of Cumming*, 69 F.3d 1098 (11th Cir. 1995), cert. denied, 517 U.S. 1209 (1996); *Schmelz v. Monroe County*, 954 F.2d 1540, 1545 (11th Cir. 1992) ("[defendants] cannot be liable under §1983 for the suicide of a prisoner 'who never had threatened or attempted suicide and who had never been considered a suicide risk'"). Furthermore, the deliberate indifference standard requires a strong likelihood rather than a mere possibility that self-infliction of harm will occur. *Popham*, 908 F.2d at 1563.

Turning briefly to the question of access to law libraries, "the fundamental constitutional right of access to the courts requires prison authorities to . . . provid[e] prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498 (1977). The Supreme Court has made clear, however, that a "constitutional prerequisite" for such a claim is a showing of actual injury resulting from the lack of access to or inadequacy of the law library. *Lewis v. Casey*, 518 U.S. 343, 351, 116 S.Ct. 2174, 2180 (1996). While *Bounds* guarantees the right of access to the courts under the Fourteenth Amendment, prisoners have no inherent or independent right of access to a law library or to legal assistance. *Lewis*, 518 U.S. at 349-51, 116 S.Ct. at 2179-80. "Instead, they must show actual injury in the pursuit of specific types of nonfrivolous cases: direct or collateral attacks on sentences and challenges to conditions of confinement." *Wilson v. Blankenship*, 163 F.3d 1284, 1290 (11th Cir. 1998). In *Lewis*, the Court provided as examples of "actual injury" regarding prospective or existing litigation the missing of filing deadlines or the prevention from presenting claims. *Lewis*, 518 U.S. at 348, 116 S.Ct. at 2178. "Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Id.* at 355, 116 S.Ct. at 2182.

B. POLICE MISCONDUCT

Since at least the infamous Rodney King case, the actions of law enforcement authorities have been the subject of much media coverage and "water cooler talk." Beginning well before that time, such actions have been the subject of lawsuits brought pursuant to Section 1983. Current "hot" topics include the use of excessive force (including the use of pepper spray), high speed pursuits, and the use of restraints. Claims for unconstitutional search and seizure continue to proliferate. The Fourth Amendment normally applies up until the time of arrest, with the Fourteenth Amendment coming into play once the individual has been arrested and taken into custody.

1. Excessive Force Claims

By its terms, the Fourth Amendment proscribes only unreasonable searches and seizures. Therefore, in order to sustain a claim for a violation of Fourth Amendment rights, including a claim that excessive force was used in connection with an arrest, a plaintiff must establish (1) that the officers on the scene "seized" him or her, and (2) that such seizure was unreasonable.

In *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547 (1991), the Supreme Court held that in order for there to be a seizure for Fourth Amendment purposes, there must either be (1) some application of physical force, even

if extremely slight, or (2) a show of authority to which the subject yields. "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *Id.*, 499 U.S. at 625-26, 111 S.Ct. at 1550. It is possible that an individual who yields neither to physical force nor a show of authority may not be deemed "seized" until he or she is fatally shot. *See Manuel v. City of Atlanta*, 25 F.3d 990, 994-95 (11th Cir. 1994) (intransigent suspect who yielded neither to physical force (none was applied until the series of shots which proved fatal) nor to a show of authority was not seized until fatal shooting); *Puglise v. Cobb County, Ga.*, 4 F. Supp. 2d 1172, 1179 (N.D. Ga. 1998) (Story, J.).

Once it has been shown that there was a seizure, the next question to be answered is whether that seizure / use of force was reasonable. In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court discussed the concept of "reasonableness" as it applies in an excessive force case, noting at the outset that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." However, what is "reasonable" varies from case to case and must be determined based on specific facts:

Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing governmental interests at stake. . . . Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," . . . however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 490 U.S. at 396 (citations omitted).

Furthermore, the evaluation of "reasonableness" must be judged from the perspective of a reasonable officer on the scene, instead of with the 20/20 vision of hindsight:

With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," . . . violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often faced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.

As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Graham, 490 U.S. at 396-97 (citations omitted). *See also Samples v. City of Atlanta*, 916 F.2d 1548 (11th Cir. 1990).

It is important to keep in mind that while the law allows an officer to use reasonable force to effect an arrest, only that force necessary to bring the individual under control may be used. That is to say, once the need for force has ended, the application of force must also end. An example of conduct which crosses the line from reasonable to unreasonable would be the officer who uses appropriate force to subdue a struggling arrestee (reasonable) but who continues striking the individual after he has been brought under control and is no longer resisting the officer (unreasonable).

In *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985), the Supreme Court dealt specifically with the issue of deadly force, and announced that deadly force can be used if the fleeing suspect, regardless of the crime involved, poses a threat to the safety of the officer or others. In *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985), the Eleventh Circuit summarized the relevant inquiry as follows:

The *Garner* standard contains three elements. First, an officer must have probable cause to believe that the suspect poses a threat of serious physical harm to the officer or to others. Probable cause of this sort exists where

the suspect actually threatens the officer with a weapon or where there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm. Second, deadly force must be necessary to prevent escape. Third, the officer must give some warning regarding the possible use of deadly force whenever feasible.

771 F.2d at 1482-83, quoting *Acoff v. Abston*, 762 F.2d 1543, 1547 (11th Cir. 1985).

Under Georgia law, a law enforcement officer may use deadly force "if he reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person or to prevent the commission of a forcible felony." O.C.G.A. §16-3-21(a).

Under both the Garner standard and Georgia law, it is clear that deadly force may not be used to stop a fleeing suspect merely because he or she is attempting to get away. Deadly force may be used only when it is reasonably believed that the suspect poses a threat of serious physical harm to the officer or others, be they on the scene or not. See, e.g., *Montoute v. Carr*, 114 F.3d 181 (11th Cir. 1997). A suspect brandishing a gun or wielding a knife may well pose such a threat, as may one who uses an automobile as a deadly weapon by trying to run down the officer. See, e.g., *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992); *Smith v. Freland*, 954 F.2d 343 (6th Cir.), cert. denied, 112 S. Ct. 1954 (1992); *Puglise*, supra. The use of deadly force in response to such individuals may well be deemed reasonable.

Where the force employed by the officer is deemed unreasonable, the officer, his or her supervising officers and the city or county by which the officer is employed face civil liability.

2. The Use of Restraints

Another "hot" topic of discussion in the excessive force arena involves the use of restraining devices by law enforcement officers and, particularly, restraint-related in-custody deaths. These deaths reportedly occur as a result of positional or restraint asphyxia, when the position of the body (for example, prone and/or subjected to the body weight of officers) interferes with respiration, allegedly resulting in asphyxia. Sometimes, the individual is also suffering from some type of drug-induced psychosis or "excited delirium" syndrome.

The Eleventh Circuit grappled with a positional asphyxia case in *Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996). In that case, Leroy Bush Wilson was being transported in the back of a police car after his arrest. Wilson was placed in handcuffs and leg restraints, and placed in the back seat with his feet on the rear seat and his head in the space between the front and rear seats. In this position, he could not adequately inhale oxygen, and because of the handcuffs and leg restraints he could not reposition himself. He died on the way to the police station.

The district court denied qualified immunity to the officers. On appeal, the officers were found to be entitled to qualified immunity under the Fourteenth Amendment. The officers could not be deliberately indifferent, the court reasoned, because there was no evidence sufficient to support a finding that the defendants were consciously aware of and disregarded the risk that Wilson would suffocate. *Cottrell*, 85 F.3d at 1491-92.

3. Police Pursuits

The United States Supreme Court has more directly addressed the issue of a Fourth Amendment seizure in the context of a police pursuit, in *Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378 (1989). In *Brower*, the suspect stole a car and then attempted to elude police by driving at high speeds for approximately 20 miles, eventually crashing into a road block, and suffering fatal injuries. His estate brought a claim under the Fourth Amendment, claiming that the use of the road block was an unreasonable and excessive use of force by the police officers. The court below had dismissed the constitutional claim, finding that there had been no "seizure" because the decedent had a number of opportunities to stop his vehicle, such that his freedom of movement was never restrained.

The Supreme Court disagreed with the lower court, and sent the case back for further consideration. In so ruling, the court acknowledged that a violation of the Fourth Amendment requires "an intentional acquisition of physical control." Therefore, if a police officer pursues a fleeing suspect, and the suspect loses control of his car and crashes, there is no seizure: the suspect was stopped by his own loss of control, as opposed to the officer's show of authority. In contrast to that situation, however, the decedent in *Brower* was stopped by the road block erected by the officers. Therefore, the decedent was "seized" within the meaning of the Fourth Amendment:

We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough here, therefore, that . . . *Brower* was meant to be stopped by the physical obstacle of the road block -- in that he was so stopped. 489 U.S. at 599.

Consistent with the Supreme Court's reasoning in *Brower* is the decision in *United States v. Holloway*, 962 F.2d 451 (5th Cir. 1992). In that case, the police officers had a vehicle under surveillance, when it attempted to drive away. The officers boxed in the vehicle with their vehicles, and drew their guns. The suspect put his car in reverse, backing it into a police car parked behind him. Under these facts, the Fifth Circuit found that there was no seizure since the suspect had failed to submit to the officers' assertion of authority. The court noted that simply blocking the path of the suspect's car and pointing guns at him did not constitute a seizure.

As discussed above, even where the Fourth Amendment has been triggered in the sense that a "seizure" has occurred, the legal inquiry is not then at an end, as the court must still determine whether the officer's seizure was "reasonable."

In the police pursuit context, even deadly force can be reasonable, and indeed warranted, under certain circumstances. In *Smith v. Freland*, 954 F.2d 343 (6th Cir.) cert. denied, 112 S.Ct. 954 (1992), for example, the police officer initiated a high speed chase after observing a vehicle run a stop sign. The officer was able to box the suspect in with his vehicle, but the suspect, undaunted, rammed the officer's vehicle, backed up, and began to speed off. At that point, the officer fired one shot into the car, striking and killing the driver. The court found deadly force reasonable under the circumstances. See also *Smith v. Freland*, 954 F.2d at 347 (citations omitted); *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir.) cert. denied, 113 S.Ct. 462 (1992) and *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993). At the same time, in most instances, the reasonableness of an officer's use of force when there has been a seizure will need to be determined by a jury.

In addition to Fourth Amendment liability as discussed above, another potential avenue of liability in the police pursuit context is the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment provides that the states will not deprive citizens of "life, liberty or property without due process of law." Unlike the Fourth Amendment, there is no requirement that the police activity result in a "seizure."

In *Graham v. Conner*, discussed above, the Supreme Court not only set forth the Fourth Amendment's reasonableness standard, but also concluded that the Fourth Amendment provides the exclusive basis under the federal Constitution for claims of excessive force by police officers. In so deciding, the Court expressly rejected application of the Fourteenth Amendment's more general due process clause, in light of the specific textual reference to unreasonable seizures in the Fourth Amendment. *Graham*, however, involves situations where a seizure has occurred. Because a pursuit does not necessarily result in a seizure, the Fourteenth Amendment can come into play.

The standard for liability under the due process clause is, however, quite high. Unlike the Fourth Amendment, where liability is governed in part by a "reasonableness" standard, a due process violation requires intentional conduct. Mere negligence, even gross negligence, will not suffice to violate the Fourteenth Amendment. See [Daniels v. Williams](#), 474 U.S. 327, 106 S. Ct. 662 (1986).

On May 26, 1998, the Supreme Court issued its decision in [County of Sacramento v. Lewis](#), ___ U. S. ___, 118 S.Ct. 1798 (1998). There, the issue was whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. The facts of *Lewis* are as follows:

On May 22, 1990 at about 8:30 p.m., James Everett Smith ("Smith"), a Sacramento County sheriff's deputy, and Murray Stapp ("Stapp"), a City of Sacramento police officer, responded to a call to break up a fight. After resolving that situation, each officer returned to his patrol car. As they were preparing to leave, Smith saw Stapp's overhead lights come on and heard him yell something at two boys riding a motorcycle, neither of whom had been involved in the earlier fight. (Brian Willard was the driver and Teri Lewis was the passenger. Both were minors and neither wore a helmet.) Smith could not hear what Stapp had yelled.

Stapp pulled his vehicle closer to Smith's to prevent the motorcycle from leaving, but Willard managed to drive between the two cars and speed off. Smith, still not knowing the basis for Stapp's actions, gave chase and initiated a high-speed pursuit.

During the 75 seconds or so that the pursuit lasted, the motorcycle and Smith traveled approximately 1.3 miles. Posted limits for that stretch of roadway were as low as 30 m.p.h., but the average speed of the vehicles was 60 m.p.h., with speeds as high as 100 m.p.h. The pursuit went through four stop lights and three 90 degree left turns. Smith followed the motorcycle at a distance of as little as 100 to 150 feet, even though he would have required 650 feet to stop his car. Additionally, Smith's stopping distance was beyond the range of his headlights.

The chase ended when Smith skidded into the motorcycle, which was stopped in the road after having skidded to a stop. The impact propelled Lewis some 70 feet down the road. He suffered massive internal injuries and a fractured skull and was pronounced dead at the scene. Willard, the motorcycle driver, suffered no major injuries.

Lewis' parents sued the county, its sheriff's department, and deputy Smith under the Fourteenth Amendment. The district court granted summary judgment in favor of all defendants. As to Smith, it assumed, without deciding, that Smith had violated Lewis' Fourteenth Amendment rights. Even so, it found that Smith was entitled to qualified immunity, because the law regarding Lewis' Fourteenth Amendment right to life and personal security was not clearly established.

The Ninth Circuit affirmed the grant of summary judgment to the county and its sheriff's department. However, it reversed the district court's decision as to Smith. Relying upon decisions from the Fifth, Sixth and Eighth Circuits, the Ninth Circuit Court of Appeals held that the law regarding police liability for death or injury caused by an officer during the course of a high-speed chase was clearly established and that a reasonable officer in Smith's circumstances would have been aware that if his conduct were sufficiently egregious, resulting in either death or injury, he could be held liable. Thus, it found Smith was not entitled to qualified immunity and remanded the case back to the district court for trial on the issue of whether Smith's actions violated Lewis' rights.

The Supreme Court granted certiorari to resolve a conflict among the circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case. The Ninth Circuit had applied a "deliberate indifference" standard. Others, such as the First, Third, Fourth, Fifth and Tenth Circuits, had applied a "shocks the conscious" standard.

The Court rejected the use of the "deliberate indifference" standard in a high speed pursuit case. "As the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical." The conduct of Smith, the Court held, did not "shock the conscience:"

[W]hen unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates "the large concerns of the governors and the governed." *Daniels v. Williams*, 474 U.S., at 332. Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for Due Process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under §1983.

Lewis, 118 S.Ct. at 1720.

C. PUBLIC EMPLOYEES

Prior to the amendment of the Civil Rights Act to allow for jury trials, it seemed that virtually every public employment Title VII claim was cast as some sort of constitutional claim. Even now that jury trials are available for Title VII claims, certain causes of action continue to be brought under Section 1983. Among others, these include First Amendment retaliation claims, Fourteenth Amendment Due Process claims and Fourteenth Amendment Equal Protection claims.

1. First Amendment Claims

The Eleventh Circuit has developed a four-prong analysis to determine whether an individual's First Amendment (speech) rights are violated. See *Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir. 1989). The court in *Bryson* stated:

(1) the court must examine the content, form and context of the employee's speech, to determine whether it addresses a matter of public concern; (2) if the speech addresses a matter of public concern, the court then applies the second prong of *Pickering*, the balancing test, weighing the employee's first amendment interest against 'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.'; (3) if the public employee prevails on the balancing test, [then] the fact finder determines whether the employee's speech played a 'substantial part' in the government's decision to demote or discharge the employee; and (4) if the employee prevails by showing that the speech was a substantial motivating factor in the state's employment decision, [then] the state must prove by a preponderance of the evidence that 'it would have reached the same decision . . . even in the absence of the protected conduct.'

Bryson, 888 F.2d at 1565-66 (quoting *Pickering*, 391 U.S. at 568) (emphasis added). See also [Mt. Healthy City Bd. of Educ. v. Doyle](#), 429 U.S. 274 (1977); [Gattis v. Brice](#), 136 F.3d 724, 726 (11th Cir. 1998).

In order for a plaintiff's speech to be constitutionally protected, it must have related to "matters of public concern." [Connick v. Myers](#), 461 U.S. 138, 146-47 (1983). However, because of the obvious implications of considering virtually any complaint about the management of a government office to be a matter of public concern, *Connick* directs that the employee's speech be analyzed to determine whether the employee spoke primarily in the role of citizen or primarily in the role of employee:

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior . . . Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record.

Connick, 461 U.S. at 147-48.

Whether a plaintiff's speech is on a matter of public concern is a question of law for the court to determine. *Connick*, 461 U.S. at 148 n.7; *Bryson*, 888 F.2d at 1567. If the employee's speech cannot fairly be characterized as constituting speech on a matter of public concern, then the court's inquiry is at an end. *Connick*, 461 U.S. at 147-48. If it can be so characterized, the inquiry proceeds as outlined in *Bryson*.

The Supreme Court clarified that the *Connick* test, whether an employee's speech was on a matter of public concern, must be reviewed by the courts by looking "to the facts [of the employee's speech] as the employer reasonably found them to be," rather than as determined by a judicial factfinder. [Waters v. Churchill](#), 511 U.S. 661, 677, 114 S.Ct. 1878, 1889 (1994) (emphasis in original). In *Waters*, the Supreme Court discussed the significant interest of the government when it acts as an employer, rather than as the sovereign, in attempting to achieve its goals as effectively and efficiently as possible. *Waters*, 114 S.Ct. at 1887-88.

"To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark -- and certainly every criticism directed at a public official -- would plant the seed of a constitutional case." *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir. 1988), citing *Connick*, 461 U.S. at 149. "As this court explained in *Ferrara v. Mills*, 781 F.2d 1508, 1516 (11th Cir. 1986), 'a public employee may not

transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run." *Id.*

2. Procedural Due Process Claims

To establish that procedural due process was denied in connection with some employment action such as termination or demotion, the plaintiff must first show that he or she had a protected property interest in the employment. [Board of Regents of State Colleges v. Roth](#), 408 U.S. 564, 571, 92 S.Ct. 2701, 2706 (1972). State law determines whether a public employee has a property interest in his or her job. *Warren v. Crawford*, 927 F.2d 559, 562 (11th Cir. 1991). Under Georgia law, a public employee generally has no protected property interest unless he or she is employed under a civil service system which allows termination only for cause. *Id.* See also [Brett v. Jefferson County, Ga.](#), 123 F.3d 1429, 1433-34 (11th Cir. 1997).

With respect to the employee having a protected property interest, the Due Process Clause encompasses a guarantee of fair procedure. [Zinermon v. Burch](#), 494 U.S. 113, 110 S.Ct. 975, 983 (1990). In procedural due process claims brought under Â§ 1983, the alleged deprivation by state action of a constitutionally protected property interest is not in itself unconstitutional. What is alleged to be unconstitutional is the deprivation of such an interest without due process of law. *Id.*; [Parratt v. Taylor](#), 451 U.S. 527, 537, 101 S.Ct. 1908, 1913 (1981); [Carey v. Piphus](#), 435 U.S. 247, 259, 98 S.Ct. 1042 (1978).

The constitutional violation actionable under §1983 is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Zinermon, 494 U.S. 113, 110 S.Ct. at 983.

In 1985, the Supreme Court decided the seminal case of [Cleveland Board of Education v. Loudermill](#), 470 U.S. 532 (1985). The Court in *Loudermill* held that a public employee with a constitutionally-protected right in continued public employment (i.e., he has a property interest and is no longer terminable at-will) may not be terminated without a hearing prior to his or her separation from employment. The Eleventh Circuit emphasized in *Kelly v. Smith*, 764 F.2d 1412 (11th Cir. 1985), that it was sufficient to provide something less than a full evidentiary hearing prior to any adverse administrative action. "Affording an employee the opportunity to respond after being confronted with the charges is all that pretermination due process requires of the employer." [Harrison v. Wille](#), 132 F.3d 679, 684 (11th Cir. 1998).

The *Kelly* court noted that with respect to the pre-termination protection given a public employee, essential requirements of due process are simply: (1) notice, and (2) an opportunity to respond. The court in *Kelly* stated that "the pre-termination hearing, though necessary, need not be elaborate." *Id.*, quoting *Loudermill*, 470 U.S. at 546. The *Kelly* court further noted that the Supreme Court in *Loudermill* stated as follows:

The pre-termination hearing need not definitively resolve the propriety of the discharge. Instead, it should be an initial check against mistaken decisions Essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

Id., quoting *Loudermill*, 470 U.S. at 546 (citation omitted).

In the *Kelly* case, the plaintiff, Kelly, was advised orally by his supervisor that he was being terminated for failing to work on a standby shift. Subsequently, the plaintiff went to see the city manager, who told him he would have to confer with the plaintiff's supervisor before he could make a final decision. The plaintiff then received written notice of his termination a few days later. The written notice stated that Kelly had been terminated for insubordination and failing to work a standby shift. The Eleventh Circuit affirmed the local court's decision and held that the pre-termination procedures afforded the plaintiff satisfied the requirements of procedural due process.

The *Kelly* court ruled that it was clear under *Loudermill* that oral notice and an opportunity to respond orally were sufficient in the pre-termination context and that the plaintiff had received both. The court reasoned that the plaintiff's oral notice from his supervisor, together with his meeting with the city manager, under the circumstances, constituted adequate pre-termination decisions to serve as "an initial check against mistaken decisions." *Id.* at 1414-15.

The *Kelly* decision makes clear that what is commonly referred to as a "pre-termination hearing" does not require what one would normally think of as a "hearing." Instead, the employee must only be given notice and an opportunity to respond to the proposed disciplinary action. In this regard, it is important to note that any disciplinary action that arguably affects a property interest triggers the requirement for a pre-termination hearing. Thus, a disciplinary action such as a demotion or a transfer from one job position to another that results in less pay, less authority or less chance for promotion also may require that the employee be provided with notice and an opportunity to be heard prior to the actual disciplinary action. As long as the employee is told why the proposed disciplinary action is being taken, and is given the chance to respond to the charges before the action takes effect, pre-termination due process requirements have been satisfied. The employee's pay, however, must be continued until such time as the pre-termination hearing is held, even if only oral notice is given. A suspension without pay pending investigation of the charges by the employer has been held to violate *Loudermill's* requirements. *Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987).

Where there is a property right to employment, procedural due process not only requires a pre-termination hearing, but also a "post-termination" procedure. The post-termination hearing as it is commonly called is a far different procedure than the pre-termination hearing. The post-termination hearing must include opportunity to present and cross examine witnesses. In addition, the post-termination proceeding must be held before an impartial tribunal. The Eleventh Circuit also has suggested that failure to provide the employee with subpoena power may affect the validity of the post-termination proceeding.

3. Equal Protection Claims

As is the case with respect to claims by inmates of deliberate indifference, so too can there be no negligent violation of equal protection. Purpose or intent to discriminate must be present before there is a violation of equal protection. [Personnel Adm'r of Massachusetts v. Feeney](#), 442 U.S. 256, 99 S.Ct. 2282 (1979).

"Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Feeney, 442 U.S. at 279. Although the "identifiable group" of which the Court spoke in *Feeney* was gender-based (women), the Equal Protection Clause originally was intended to be used to fight discrimination based on race. Over the years, groups other than those based on gender or race have been held entitled to equal protection. For example, in [Romer v. Evans](#), 517 U.S. 620, 116 S.Ct. 1620 (1996), the Court held that a Colorado law violated the equal protection clause because its purpose was not the furthering of a legitimate governmental purpose but rather hostility toward homosexuals and bisexuals. Thus, after *Romer*, homosexuals and bisexuals cannot be discriminated against solely on the basis of their status.

If the plaintiff proves a prima facie case of discrimination (i.e., she was fired because she is a female), the defendant employer must then produce a legitimate, non-discriminatory reason to explain the challenged action. Should the employer carry this burden, the plaintiff must show that the defendant's proffered explanation was a pretext for the discrimination. This analytical framework for the establishment of a prima facie case of employment discrimination applies equally to claims brought under Title VII and under the Equal Protection Clause. [Arrington v. Cobb County](#), 139 F.3d 865, 873 (11th Cir. 1998); *Burns v. Gadsden State Community College*, 908 F.2d 1512, 1518 (11th Cir. 1990).

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