Illinois Local Government Lawyers Association
25th Annual Conference
Naperville Campus, Northern Illinois University
February 19, 2018

FEDERAL CIVIL RIGHTS AND ILLINOIS TORT IMMUNITY CASE LAW UPDATE 2017-2018

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First Amendment – Retaliation – Employment

***Forgue v. City of Chi.*, 873 F.3d 962 (7th Cir. 2017)**

Plaintiff, an officer with the Chicago Police Department (CPD), filed a §1983 suit against the City of Chicago and over forty individual officers. Plaintiff alleged First Amendment retaliation, equal protection, civil conspiracy, and procedural due process claims. Plaintiff claimed he was being harassed and retaliated against for following CPD policy and procedure and for filing several internal complaints about officer misconduct and treatment of his sons.

In order to state a claim for retaliation in violation of the First Amendment, a public employee must prove that his speech is constitutionally protected. ñA public employeeôs speech is constitutionally protected only if it: (1) was made as a private citizen; and (2) addressed a matter of public concern.ò *Kubiak v. City of Chi.*, 810 F.3d 476, 481 (7th Cir. 2016). Both elements must be satisfied in order for there to be a cause of action. The court held that plaintiff spoke as a public employee, not a private citizen because plaintiffôs internal complaints of police misconduct were ñintimately connectedò to his job. Courts have long held that ña police officerôs duty to report official police misconduct is a basic part of the job.ò *Kubiak,* 810 F.3d at 482. Therefore, plaintiffôs speech is not entitled to First Amendment protection.

In order to state an equal protection claim, plaintiff must claim that he has been ñintentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.ò *Engquist v. Or. Dep't of Agric.*, 533 U.S. 591, 601-02, 128 S. Ct. 2146, 2153 (2008). Here, plaintiff alleges that defendants violated his equal protection rights by discriminating against him in the conditions of his employment, filing false complaints, and targeting his sons for no reason other than to harass him. However, plaintiffôs theory is barred by *Enquist* because a public employee may not bring class-of-one claims against their public employers and co-workers.

Plaintiff also alleged that defendants violated his right to due process in denying him a Retirement Card. To state a claim for a procedural due process violation, plaintiff must show ñ(1) a cognizable property interest; (2) a deprivation of that property interest; and (3) a denial of due process.ò *Manistee Apts., LLC v. City of* Chi., 844 F.3d 630, 633 (7th Cir. 2016). Plaintiff argues he has a property interest in receiving a Retirement Card and that right to that benefit was deprived without due process. The court found that plaintiff sufficiently alleged a due process claim.

First Amendment – Political Patronage

***Houlihan v. City of Chi.*, 871 F.3d 540 (7th Cir. 2017)**

Chicago police officers, who served on former Mayor Daleyôs protective services unit and were demoted after Mayor Emmanuel took office, sued under 42 U.S.C. § 1983 for political retaliation. Plaintiffs claimed that the new mayor impermissibly considered political loyalties when appointing officers to his detail in violation of the First Amendment and the *Shakman* decrees. Specifically, the plaintiffs alleged that the department demoted them because

they remained politically neutral and appointed different officers to the detail solely because those officers had volunteered to work on Emanuelôs campaign.

The Seventh Circuit affirmed summary judgment for the police chief and a commander on qualified immunity grounds. The court began by reaffirming that two classes of employees do not have First Amendment protection from political or patronage employment decisions: policymaking employees and confidential employees. The defendants utilized the latter in arguing that the law was not clearly established that, at the time of the reassignment, security specialists were non-confidential employees deserving of First Amendment protection. The Seventh Circuit agreed, noting that there was uncertainty in patronage law at the time of the reassignment and that given the ñhighly fact-specific inquiryò required to determine whether a particular job qualifies for First Amendment protection, the plaintiffs needed to come up with a nearly identical caseï which they failed to do. The Court also rejected the *Shakman* decrees as a basis for clearly established law. The Court held that *Shakman* is a general prohibition against patronage decisions but does not encapsulate the contours of the constitutional rule but instead is the result of settlement of litigation.

First Amendment – Exercise of Religion

***Affordable Recovery Hous. v. City of Blue Island*, 860 F.3d 580 (7th Cir. 2017)**

A Catholic order of nuns called the Mantellate Sisters of Mary have owned a group of five buildings in Blue Island since the 1950s. In 2010 the Mantellate Sisters allowed the founders of Affordable Recovery Housing (ñAffordableò) to use two of the buildings as a faith-based recovery home. Affordable sought to provide support services, lodging, meals, job training, religious outreach, and other services to adult men battling drug and/or alcohol addiction. The mayor approved the project in early 2011. However, the following year, the Blue Island fire chief required Affordable to install a sprinkler system before the buildings were used as residential facilities. Affordable could not afford to comply, so instead of installing a sprinkler system or expelling its 73 residents, Affordable filed suit against Blue Island and the townôs fire chief. Affordable sought to enjoin the eviction order and to obtain a judgment that the safety code did not require a sprinkler system. The district court refused to issue a preliminary injunction and Affordableôs residents had to leave. Sometime later, Affordable obtained a license from the Illinois Department of Human Services that designated its buildings a recovery house. Affordable was subsequently governed by the stateôs safety regulations for recovery houses, which didnôt require sprinkler systems. Though Affordable can now operate without installing a sprinkler system, Affordable appeals the district courtôs determination that it failed to prevail on claims based on the Illinois Religious Freedom Restoration Act (ñActò).

The Act provides, in relevant part, that the ñgovernment may not substantially burden a personôs exercise of religion é unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling government interest.ò 775 ILCS 35/15. Affordable considers helping men recover from addiction to be a paradigm of Christian charity and argues that being forced to expel its residents infringed its exercise of religion. However, there is no evidence that the

temporary expulsion of its residents was attributable to anything other than an honest concern with possible fire hazards to the residents.

First Amendment – Free Speech Clause

***Packingham v. North Carolina*, 137 S. Ct. 1730 (2017)**

This case considered whether North Carolinaôs statute, making it a felony for registered sex offenders to gain access to commercial social networking websites, is permissible under the First Amendmentôs Free Speech Clause. This is one of the first cases to address the relationship between the First Amendment and the modern Internet.

In 2002 plaintiff, a then 21-year-old college student, pleaded guilty to having sex with a 13-year-old girl and registered as a sex offender. As a registered sex offender, plaintiff was prohibited from gaining access to commercial social networking sites. In 2010 a state court dismissed a traffic ticket against plaintiff, and in response plaintiff posted on his personal Facebook profile. Plaintiff was subsequently indicted for violating the statute. The trial court denied plaintiffôs motion to dismiss on the grounds that the charge against him violated the First Amendment. However, the Court of Appeals of North Carolina struck the statute down on First Amendment grounds, concluding the law is not narrowly tailored. The Supreme Court of the United States granted certiorari.

The Supreme Court found North Carolinaôs statute unconstitutional. Today, social media is a portal used to gain access to information and to communicate with others. Prohibiting registered sex offenders from using those websites would be prohibiting access to current events, ads for employment, and communicating in the modern public square. To bar access to social media altogether prevents registered sex offenders from engaging in their legitimate exercise of First Amendment rights. North Carolinaôs statute impermissibly restricts lawful speech in violation of the First Amendmentôs Free Speech Clause.

First Amendment – Regulating Speech

***Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017)**

A New York statute provides that ñ[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.ò Five New York businesses and their owners who want to impose surcharges for credit card use filed suit against state officials, arguing that the law violates the First Amendment by regulating how they communicate their prices and that it is unconstitutionally vague. The District Court ruled in favor of the business owners, but the Court of Appeals vacated the judgment, concluding the statute did not violate the First Amendment. The Court of Appeals relied on precedent holding that price regulation alone regulates conduct, not speech. The Supreme Court found that the statute regulates speech. The statute does not tell sellers anything about the amount they are allowed to collect from a cash or credit card paying customer. Rather, the statute regulates how the merchant may communicate their prices. In regulating the communication of prices instead of the price, the statute regulates speech.

First Amendment – Freedom of Speech

***Higher Soc'y of Ind. v. Tippecanoe County*, 858 F.3d 1113 (7th Cir. 2017)**

Higher Society of Indiana (ñHigher Societyò) is a non-profit agency advocating for the legalization of marijuana. Higher Society sought to hold a rally on the steps of the Tippecanoe County Courthouse. However, in response to controversy over a nativity scene on the courthouse grounds in 1999, the Tippecanoe County Board (ñBoardò) voted to declare the grounds a ñclosed forum.ò The Board approved a policy that requires groups looking to hold an event on the courthouse grounds to seek the Boardôs sponsorship. The County only sponsors events that align with the Countyôs views. Because of a misunderstanding involving a County official, Higher Society held an event on the steps of the courthouse under the belief it was a sponsored event. After its first rally (that never received Board approval), Higher Society sought permission from the Board to hold a second event on the courthouse grounds. The Board declined to sponsor the event, citing the closed forum policy. Higher Society sought a preliminary injunction. The district court granted the preliminary injunction and the County appealed.

In order to be entitled to preliminary relief, Higher Society ñmust establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in [its] favor, and that an injunction is in the public interest.ò *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374 (2008). The two ways the County could reasonably defend its policy to bar Higher Societyôs event are to argue that the courthouse grounds are a nonpublic forum and its speech regulations are viewpoint-neutral, or that its sponsored events are government speech (to which the First Amendment is inapplicable). The County admitted that its policy was not viewpoint-neutral. Thus, the three factors to consider in determining whether an event is considered government speech are: ñ(1) whether governments have traditionally spoken to the public in the manner at issue; (2) whether observers of the speech at issue would reasonably interpret it to be that of the government; and (3) whether the government maintained editorial control over the speech.ò *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2247 (2015). After considering the factors, the Court held that the Countyôs policy violates the First Amendment because it restricts private speech and is not viewpoint-neutral. Therefore, Higher Society was entitled to a preliminary injunction.

First/Fourteenth Amendment – Freedom of Speech – Equal Protection

***Tagami v. City of Chi.*, 875 F.3d 375 (7th Cir. 2017)**

Plaintiff celebrated ñGo Topless Day 2014ò by walking around the streets of Chicago naked from the waist up, wearing only opaque body paint on her bare breasts. She was cited for violating a Chicago ordinance prohibiting public nudity. She filed suit, alleging ñthat banning women from exposing their breasts in public violates the First Amendmentôs guarantee of freedom of speech and amounts to an impermissible sex-based classification in violation of the Fourteenth Amendmentôs Equal Protection Clause.ò

The court concluded Chicagoôs public nudity ordinance regulates conduct, not speech. While some forms of expressive conduct are protected under the First Amendment, this principle extends only to conduct that is ñinherently expressive.ò *Rumsfield v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66, 126 S. Ct. 1297, 1310 (2006). In order to be ñinherently expressive,ò the conduct must convey its own message that can be readily understood by those who view it. *Id.* Courts have established that nudity is not an inherently expressive condition. Alternatively, even if plaintiffôs nudity was found to be communicative enough to warrant some degree of First Amendment protection, the district court was still correct in dismissing the claim because ñwhen óspeechô and ónonspeechô elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.ò *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678-79 (1968).

The Supreme Court upheld a similar public nudity ban in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456 (1991), where the statuteôs purpose of promoting traditional moral norms and maintaining public order is clear from its text and history. Similarly, Chicagoôs essential purpose of its ordinance is to promote traditional moral norms and public order.
The Cityôs ordinance also withstands plaintiffôs equal protection claim because the ordinance treats men and women alike by equally prohibiting the public exposure of the male and female body parts. ñAlthough the list of intimate body parts is longer for women than men, thatôs entirely attributable to the basic physiological differences between the sexes.ò

Fourth Amendment – Use of Force – Qualified Immunity

***Estate of Hill v. Miracle*, 853 F.3d 306 (6th Cir. 2017)**

This case involves a 42 U.S.C. § 1983 excessive force claim against a deputy county sheriff who drive tased a combative and disoriented and combative diabetic during a non-criminal medical assist. The officer was attempting to assist the paramedics who were treating the diabetic during a hypoglycemic episode. The District Court granted the deputyôs motion for summary judgment as to an emotional distress claim but denied the motion as to the remaining claims. The deputy appealed this ruling. The 6th Circuit held that the use of force was objectively reasonable, the deputy did not violate a clearly established right, and the deputy is entitled to governmental immunity.

The court created a new test in situations of medical emergencies where police officers need to use force to control an individual: who has not committed a crime, resisting an arrest, or directly threatening an officer. The new test asks three questions: (1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others? 2) Was some degree of force reasonably necessary to ameliorate the immediate threat? (3) Was the force used more than reasonably necessary under the circumstances? While these factors are non-exhaustive, and one should look to the totality of the circumstances, ñif the answer to the first two questions are yes and the third is no, the officer is entitled to qualified immunity.

Fourth Amendment – Searches and Seizures

Manuel v. City of Joliet, 137 S. Ct. 911 (2017)

During a traffic stop, a Joliet police officer searched plaintiff and found a vitamin bottle containing pills. The officers suspected the pills to be illegal drugs and conducted a field test, which came back negative for any controlled substance. Despite the negative result, the officers arrested plaintiff and took him to the police station. There, an evidence technician tested the same pills and got the same negative result but wrote in his report that one of the pills tested ñpositive for the probable presence of ecstasy.ò An arresting officer also reported that based on his ñtraining and experience, he knew the pills to be ecstasy.ò Based on those false statements, another officer filed a complaint charging plaintiff with unlawful possession of a controlled substance. Relying entirely on that complaint, a county court judge found probable cause to detain plaintiff pending trial. About two weeks later, a grand jury indicted plaintiff based on similar false evidence.

Plaintiff filed a § 1983 lawsuit against the City of Joliet and several police officers alleging his arrest and detention violated the Fourth Amendment. The District Court dismissed plaintiffôs suit, holding the statute of limitations barred his unlawful arrest claim and that pretrial detention following the start of legal process (here, the judgeôs probable-cause detention) could not give rise to a Fourth Amendment claim. The Seventh Circuit Court of Appeals affirmed and reiterated that once an individual is detained pursuant a legal process, the individualôs claim that the detention is improper becomes one of due process, not the Fourth Amendment.

The Supreme Court granted certiorari to decide whether plaintiff may bring a Fourth Amendment claim to contest the legality of his pretrial confinement. The Fourth Amendment protects the right of the people to be secure in their persons against unreasonable seizures. Plaintiffôs complaint seeks just that protection. The Fourth Amendment remains the applicable constitutional provision to evaluate ñdeprivations of liberty.ò Pretrial detention can violate the Fourth Amendment when it precedes or follows the start of legal process in a criminal case. This can occur when a judgeôs probable cause determination is based solely on fabricated evidence or false statements. Here, probable cause is lacking, and the subsequent pretrial detention violates the plaintiffôs Fourth Amendment rights.

United States v. Paxton, 848 F.3d 803 (7th Cir. 2017)

Five defendants were arrested as they were preparing to commit a robbery. The defendants were placed into a police transport van that was clearly marked as a Chicago Police Department vehicle. During the drive, the defendants conversed. Unknown to them, there were two hidden recording devices in the rear compartment of the van. Defendant Berry stated the van was ñprobably bugged,ò but the defendants, nonetheless, continued to converse and make incriminating statements.

The defendants moved to suppress any recorded statements they made within the van. The district court granted that motion in part, holding it was ñobvious that defendants took steps to conceal their conversation . . . by lowering their voices and were under the impression, at least

initially, that their discussion was private.ò *United States v. Paxton*, No. 1:13-cr-00103, 2014 U.S. Dist. LEXIS 104444, 2014 WL 3807965, at Å1 (N.D. Ill. July 31, 2014). However, any subjective expectation of privacy ended once defendant Berry placed his co-defendants on notice of the probability that the van was bugged. *Id*. Thus the court suppressed any statements that the defendants made prior to Berryôs warningï as those statements were made with an expectation of privacyï but not after. The government appeals. The issue in this case is whether there is an expectation of privacy in police vans and squadrols.

A person has no objectively reasonable expectation of privacy while seated in a marked patrol car. The government has legitimate reasons for monitoring individuals it has taken into its custody and placed into a police transport van. Here, the recording of the defendantsô conversations did not constitute a search for purposes of the Fourth Amendment.

***Beal v. Beller*, 847 F.3d 897 (7th Cir. 2017)**

Detective Strelow received an anonymous tip that an African-American man in a yellow shirt was selling heroin on the corner of a street. Without taking any steps to corroborate the tip, Strelow and his partner, Detective Beller, drove an unmarked car to the intersection. There they saw plaintiff, who matched the tipsterôs description. The detectives parked the car and approached plaintiff. They told plaintiff they received an anonymous tip that he was selling drugs and asked him to identify himself. Plaintiff did so without objection. At that point Detective Beller grabbed plaintiffôs wrist and Detective Strelow frisked him. During the frisk, Detective Strelow felt keys in plaintiffôs pockets and emptied his pockets. Attached to plaintiffôs keys was a flashlight that had been hollowed out and contained four small baggies with a substance the detective believed to be heroin. Based on the result of the search, Detective Strelow arrested and charged plaintiff with possession of heroin.

Plaintiff filed a §1983 suit against the detectives. The most important issue on appeal is whether the undisputed facts showed that the tip on which the detectives acted came from a known source or if there is a genuine dispute of fact over the question whether the source was anonymous. If the tip was anonymous, then *Florida v. J.L.*, 529 U.S. 266, 268, 120 S. Ct. 1375 (2000), applies, which holds that an anonymous tip alone does not justify a stop-and-frisk. An anonymous tip must be corroborated. The court found there is a genuine issue of fact on whether the tip was anonymous. Taking the facts in the light most favorable to plaintiff, the court must assume that the tip was anonymous and uncorroborated.

***Cty. of L.A. v. Mendez*, 137 S. Ct. 1539 (2017)**

A confidential informant told the Los Angeles County Sheriffôs Department that a potentially armed and dangerous parolee-at-large, Ronnie Oôdell, had been seen at the home of Paula Hughes in Lancaster, California. It was announced during the briefing, that a man named Angel Mendez lived in the backyard of the Hughes home with a woman named Jennifer Garcia.

While other officers searched the main house, Deputies Conley and Pederson searched the back of the property, including the shack. The shack had a single doorway covered by a blue blanket. Mendez kept a BB rifle in the shack that ñclosely resembled a small caliber rifle.ò The deputies

did not have a search warrant and did not knock and announce their presence. When the deputies opened the wooden door and pulled back the blanket, Mendez thought it was Ms. Hughes and went to place the BB gun on the floor. As a result, when the deputies entered, Mendez was holding the BB gun. Deputy Conley immediately yelled, ñGun!ò and the deputies opened fire, discharging a total of 15 rounds. Mendez and Garcia were both shot multiple times and suffered severe injuries. OôDell was not in the shack or anywhere on the property.

Mendez and Garcia brought three Fourth Amendment Claims. The District Court held the deputies liable for excessive force. The Court of Appeals held that the officers were entitled to qualified immunity on the knock-and-announce claim but concluded that the warrantless entry of the shack violated clearly established law and was attributable to both deputies. Like the District Court, the Court of Appeals applied the provocation rule and found the deputies liable for the use of force on the theory that they had intentionally and recklessly brought about the shooting by entering the shack without a warrant in violation of clearly established law. It held that ñbased notions of proximate causeò would support liability even without the provocation rule because ñit was órеasonably foreseeableô that the officers would meet an armed homeowner when they órbarged into the shack unannounced.ô The Supreme Court granted certiorari.

The provocation rule is fundamentally flawed in that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist. The basic problem with the provocation rule is that it instructs courts to look back in time to see if there was a *different* Fourth Amendment violation that is somehow tied to the eventual use of force. That distinct violation, rather than the forceful seizure itself, may then serve as the foundation of the plaintiffôs excessive force claim. By combining excessive force claims with other Fourth Amendment claims, the provocation rule permits excessive force claims that cannot succeed on their own terms.

***Milwaukee Police Ass'n v. City of Milwaukee*, 856 F.3d 480 (7th Cir. 2017)**

The district court did not err in granting defendantôs motion for judgment on the pleadings in plaintiffsô § 1983 action, alleging that defendants violated their due process rights by enacting an ordinance requiring law enforcement, fire, and emergency personnel to reside within 15 miles of city limits. Plaintiffs had no substantive due process claim, since the right to be free from residency requirement is not a fundamental right. Moreover, plaintiffs had no procedural due process right, even though plaintiffs alleged that the ordinance retroactively deprived them of a vested right to live wherever they wanted, since (1) the prior statute that allowed plaintiffs to live anywhere did not create a vested right; and (2) the current statute applied only prospectively.

***Ewell v. Toney*, 853 F.3d 911 (7th Cir. 2017)**

The district court did not err in granting defendantsô motion to dismiss plaintiffôs § 1983 action alleging that defendantsô decision to incarcerate her for a period of twelve days violated her constitutional rights. Plaintiff argued the police lacked probable cause to arrest her, and the purpose of her continued incarceration was for the improper purpose of building a criminal case against her. Records show that plaintiff had been convicted of charges relating to hiding the murder victimôs body and had received a two-year sentence that gave her credit for an instant

twelve-day period at issue in her complaint. As such, receipt of her instant sentencing credit on a lawful sentence precluded plaintiff from obtaining any damages on her unlawful detention claim for claims that defendants had failed to provide her with a prompt probable cause hearing. Also, defendants were entitled to qualified immunity on plaintiffôs false arrest claim, since defendants could have reasonably believed that plaintiff helped hide the murder victimôs body, where defendants knew at the time of plaintiffôs arrest that: (1) the video tape indicated that plaintiff and another person had purchased a shower curtain and hooks on the day the victim went missing; (2) witnesses have indicated that shower curtain in victimôs bathroom had been replaced after victim went missing; (3) defendant had access to victimôs home, and defendant admitted to being in victimôs home; and (4) the police had discovered projectile from victimôs bathtub plumbing pipe.

Howell v. Smith, 853 F.3d 892 (7th Cir. 2017)

The district court erred in denying defendantôs motion for summary judgment in plaintiffôs § 1983 action, alleging that defendant used excessive force when handcuffing plaintiff during a thirty-minute period of time that defendant and other officers were investigating reports from a third-party that plaintiff had fired a gun during a road rage incident. After defendants received the third-partyôs report, defendant encountered plaintiffôs car that matched the description given by the third-party and conducted a ñhigh risk traffic stopò that required defendant to handcuff plaintiff during the investigation until other officers brought the third-party to the scene to make an identification. As such, defendant was entitled to qualified immunity. The third-party raised serious allegations that involved the use of deadly force (which supported defendantôs decision to place plaintiff in handcuffs), and the record showed that third-party positively identified the plaintiff as the perpetrator. Moreover, plaintiff never told defendant during his detention that he was in pain or was actually suffering because of use of handcuffs.

***Colbert v. City of Chi.*, 851 F.3d 649 (7th Cir. 2017)**

The District Court did not err in granting defendantsô motion for summary judgment in plaintiffôs § 1983 action alleging either that they were subjected to malicious prosecution on gun possession charges, that they were victims of false arrest, or that defendants had violated their Fourth Amendment rights arising out of search of their home. Plaintiff could not prevail on a malicious prosecution claim against defendants since (1) the criminal indictment on the instant gun charges severed any causal connection between the prosecutionôs and defendantôs conduct; and (2) the record failed to link any of defendantôs actions to the indictment process. Moreover, plaintiff could not prevail on his Fourth Amendment claim alleging that certain defendants conducted a search of his home that caused unreasonable property damage, because plaintiff was unable to identify which defendants had actually caused said damage. The court rejected plaintiffôs suggestion that all defendants should have been required to show that they did not cause any damage to this property.

***Haze v. Kubicek*, No. 17-1037 (7th Cir. 2018)**

Darrell Haze was ticketed for disorderly conduct after he tussled with Milwaukee Police Officer Mark Kubicek outside the Bradley Center on the night of a Bucks game. He contested the ticket

and won. He then sued Kubicek for damages alleging that the officer unlawfully stopped him, falsely arrested him, used excessive force, and targeted him based on his race. After a two-day trial, a jury exonerated Kubicek on all but the unlawful-stop claim. On that claim the jury found that the stop was unlawful (because it was not supported by adequate suspicion) but was not the proximate cause of any compensable injury.

Haze filed two post-trial motions, arguing that the juryôs split verdict was fatally inconsistent. He also asked the judge for nominal damages and a declaratory judgment as remedies for the unlawful stop. The judge denied most of these requests, but she did award $1 in nominal damages for the unlawful stop.

On appeal Haze argued that the trial court erred in denying his summary judgment motion on his claim for false arrest. The Seventh Circuit held that this argument is procedurally foreclosed. The false-arrest claim was tried, the jury rejected it, and neither of Hazeôs post-trial motions challenged this aspect of the juryôs verdict. The Seventh Circuit also held that the lawfulness of the stop and the lawfulness of the officerôs use of force were distinct inquiries subject to different legal tests; an unlawful stop does not make an officerôs later use of force per se unreasonable. Finally, the judge denied Hazeôs request for a declaratory judgment, reasoning that the juryôs verdict was a ñdeclarationò of sorts, and an award of nominal damages for the unlawful stop would suffice to vindicate Hazeôs rights.

Fourteenth Amendment – Due Process Clause

***Stinson v. Gauger*, 868 F.3d 516 (7th Cir. 2017)**

Plaintiff spent over 23 years in jail for a murder he didnôt commit. There was no eyewitness testimony or fingerprints connecting him to the murder. Two dentists testified that plaintiffôs dentition matched the teeth marks on the victimôs body. After Stinsonôs conviction a panel of forensic odonatologists reanalyzed the bite mark evidence and concluded that Plaintiff could not have made the bite marks on the victim. After his exoneration plaintiff filed a § 1983 complaint against defendants, alleging defendants violated his due process right to a fair trial by fabricating evidence (the opinions that his dentition matched the bite marks on victim) and for failing to disclose their agreement to fabricate this evidence.

Defendants argued they were entitled to absolute immunity because they were testifying witnesses. In a § 1983 trial, witnesses have absolute immunity from liability based on their testimony at trial. *Briscoe v. Lahue*, 460 U.S. 325, 345-46 (1983). However, the Supreme Court has long held that ñabsolute immunity protects a prosecutor for trial preparation and trial testimony, but not for investigating the case.ò *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). Plaintiffôs claims focused on the defendantsô actions during their investigation, not their trial preparations or trial testimony. If a prosecutor does not have absolute immunity while investigating a case, neither does an expert witness.

***Beaman v. Freesmeyer*, 2017 IL App (4th) 160527, 415 Ill. Dec. 296**

In 2008 plaintiffôs conviction for the murder of his ex-girlfriend was overturned after concluding the State had violated plaintiffôs right to due process when it failed to disclose material and exculpatory information about an alternative suspect. Subsequently, plaintiff filed a § 1983 complaint against defendants. Plaintiff argued three federal claims (which were all dismissed) and state law claims for malicious prosecution, conspiracy, and intentional infliction of emotional distress.

The trial court granted summary judgment on plaintiffôs malicious prosecution claim because defendants did not sign the criminal complaint or initiate the criminal proceedings against plaintiff. Furthermore, plaintiff failed to identify evidence from which a reasonable jury could infer that defendants pressured or exerted influence on the stateôs attorneys, who made the decision to prosecute plaintiff or provided knowingly false statements leading to plaintiff's prosecution. Next, plaintiff's conspiracy claim also failed because the tortious act alleged was defendantsô alleged malicious prosecution of plaintiff. The trial court properly granted summary judgment on the *respondeat superior* and indemnification claims, as they were dependent on the claims against the individual defendants.

***Simpson v. Brown Cnty.*, 860 F.3d 1001 (7th Cir. 2017)**

This case arises from Brown County, Indiana, a rural town where most families and businesses depend on septic systems to dispose of wastewater. Plaintiffôs job was to install and repair septic systems, until his license was revoked by the Brown County Board of Health (ñBoardò). The letter plaintiff received from the Board did not inform him of any law or regulation that had been violated, and it did not identify any opportunities for administrative or judicial review. Plaintiff filed a § 1983 complaint claiming he was deprived of property without due process of law. The district court rejected plaintiffôs arguments and dismissed the action. Plaintiff appealed.

It is well established that government-issued licenses are a form of government-created property. Furthermore, government-issued licenses have long been considered property protected by the Fifth and Fourteenth Amendments. Thus, plaintiff was deprived of a protected property interest. Therefore, the issue on appeal is to determine what process was due to plaintiff and when.

The general test for determining what process is due and when was established in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976). *Mathews* identified three balancing factors: (1) the private interest; (2) the risk of erroneous deprivation and the value, if any, of additional procedural safeguards; and (3) the state interest. *Id.* at 335. Under the *Mathews* balancing test, plaintiff has sufficiently alleged that he was denied the pre-deprivation process he was due before his license could be revoked.

Fourteenth Amendment – Equal Protection

Alston v. City of Madison, 853 F.3d 901 (7th Cir. 2017)

Plaintiff, an African American, filed a § 1983 suit against defendants, alleging defendantsô placement of him in a repeat violent offender program that required increased surveillance while he was on probation violated his equal protection rights and that his inclusion in the program deprived him of liberty without due process. The district court granted summary judgment for defendants because plaintiff failed to provide evidence that the program had a discriminatory effect or purpose. Plaintiff appealed.

To prove an equal protection claim, plaintiff must show that the repeat violent offender program had a discriminatory effect and that defendants were motivated by a discriminatory purpose. *Chavez v. Ill. State Police*, 251 F.3d 612, 635-36 (7th Cir. 2001). Statistics show that African Americans represented only 4.5% of the Cityôs population, while African Americans represented 86% of participants in the program. These statistics did not establish that the program had a discriminatory effect or purpose. The statistics did not address whether African American repeat violent offenders were treated differently from white repeat violent offenders. While the instant statistics showed the existence of disparate impact on African American participants, statistics alone rarely establish proof of discriminatory purpose. Moreover, the plaintiff failed to present evidence indicating either number of African American repeat violent offenders to qualify for the program, but were not chosen, or number of white repeat violent offenders chosen for the program compared to the number of white repeat violent offenders who could have been chosen.

Plaintiff also cannot establish any due process claim, since the programôs requirement that he attend one notification meeting did not deprive him of his liberty as probationer without due process. Also, the surveillance conducted under the program was authorized under the terms of plaintiffôs probation.

L.P. v. Marian Catholic High Sch., 852 F.3d 690 (7th Cir. 2017)

Plaintiff filed a § 1983 action alleging defendantsô drug testing program produced false positive results for plaintiffsô six African American students. Plaintiffs claimed the drug testing program was being administered in a way that discriminated against plaintiffs on account of their race. The district court granted defendantsô motion to dismiss because plaintiffsô complaint failed to state an actionable claim. Plaintiffs did not allege that the hair testing procedure had a racially discriminatory impact, or that defendantsô tester was aware of the race of the person whose hair it had tested.

Also, plaintiffs cannot bring a § 1983 action against defendant-school guidance counselor, because plaintiffsô complaint failed to allege that said defendant was a state actor. Moreover, defendant-schoolôs funding came from federal funds, such that plaintiff cannot bring an action under § 1983, but could potentially bring an action under a different legal theory.

Fourteenth /Eighth Amendment – Due Process – Cruel and Unusual Punishment

***Isby v. Brown*, 856 F.3d 508 (7th Cir. 2017)**

Plaintiff brought suit under 42 U.S.C. § 1983 against various prison employees, alleging his continued solitary confinement ï for the past ten years and counting ï violated his Eighth Amendment right to be free from cruel and unusual punishment, as well as his Fourteenth Amendment rights under the Due Process Clause. Furthermore, plaintiff sought leave to proceed *in forma pauperis*, despite having already accumulated three ñstrikesò for filing frivolous lawsuits or appeals. Under the PLRA, inmates who have accrued three ñstrikesò are restricted from bringing another action in federal court without prepayment of fees. Unaware of plaintiffôs strikes, the court granted plaintiffôs request.

In order to establish a violation of the Eighth Amendmentôs prohibition against cruel and unusual punishment, there must be an objective showing that the conditions are sufficiently serious, and a subjective showing of a defendantôs culpable state of mind. In this case, there is no evidence of serious physical, mental, or psychological harm to plaintiff caused by the conditions or the duration of plaintiffôs segregation. While the length of plaintiffôs confinement is greatly disturbing, plaintiff failed to make out an Eighth Amendment violation.

In determining what process is due and when, the court considered the three *Mathews* factors: (1) the private interest (plaintiffôs interest) affected by a governmental decision; (2) ñthe risk of an erroneous deprivation of [the private] interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards;ò and (3) the governmental interests at stake. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976). With respect to the first factor, plaintiffôs private interest is substantially diminished because of his status as an inmate. However, the court found that the extended, indefinite length of plaintiffôs placement in solitary confinement tips the scale in plaintiffôs favor on this prong of the analysis. With regard to the second factor, the court found the vague, boilerplate language (without any updates or explanations of why continued placement in confinement is necessary) coupled with the length of plaintiffôs confinement, could cause a reasonable trier of fact to conclude that plaintiff has been deprived of his liberty interest without due process. Next, the governmentôs interests are significant. ñMaintaining institutional security and safety are crucial considerations in the management of a prison, and, to the extent that an inmate continues to pose a threat to him or others, ongoing segregation may well be justified.ò *Isby*, 856 F.3d at 526. However, plaintiffôs due process claim should have survived summary judgment given the long periods of time during which plaintiff had no serious disciplinary problems. Additionally, plaintiff raised triable issues of material fact regarding whether reviews of his ongoing segregation were meaningful.

Fourteenth/Eighth Amendment – Due Process – Excessive Fines Clause

***Simic v. City of Chi.*, 851 F.3d 734 (7th Cir. 2017)**

Plaintiff was texting while driving in Chicago. A police officer issued plaintiff a ticket because texting while driving violates a Chicago ordinance. Plaintiff failed to pay the ticket and the City of Chicago took steps to collect the fine. Instead of paying the fine, Plaintiff sued the City,

alleging the ordinance is unconstitutional. Plaintiff claims the ordinance violates the Fourteenth Amendmentôs Due Process Clause and the Eighth Amendmentôs Excessive Fines Clause. Plaintiff moved for a preliminary injunction to stop enforcement of the ordinance throughout Chicago. The district court denied plaintiffôs motion for an injunction because her likelihood of success on the merits was ñdoubtfulò and she failed to show a threat of irreparable injury. Plaintiff appealed. The district court correctly found that plaintiff failed to show any threat of irreparable harm. Plaintiff lacked standing to assert her federal claims. She did not have standing to seek injunctive relief, and was unable to show any injury to support her claim for damages.

Illinois Tort Immunity Act – Application to Non-Tort Actions

***Rozsavolgyi v. City of Aurora*, 2017 IL 121048, 2017 Ill. LEXIS 1077 (October 19, 2017)**

Plaintiff claimed that she was fired from city employment on account of her disability in violation of the Illinois Human Rights Act. The circuit court certified several questions for appellate review, including whether the Illinois Tort Immunity Act applies to a civil action under the Illinois Human Rights Act where the plaintiff seeks damages, reasonable attorneys' fees and costs. The Appellate Court for the Second District, 2016 IL App (2d) 150493, answered the question in the affirmative, noting while there were Appellate Court decisions holding that Act only applies to tort actions, the Illinois Supreme Court had impliedly rejected those decisions in *Raintree Homes, Inc. v. Village of Long Grove,* 209 Ill.2d 248, 261 (2004) ("we do not adopt or approve of the appellate court's reasoning that the Tort Immunity Act categorically excludes actions that do not sound in tort").

However, the Illinois Supreme Court in *Rozsavolgyi* vacated the Appellate Courtôs decision on multiple procedural grounds and refused to address the certified question. The Court found that the certified question was improperly overbroad, should not have been answered, and did not warrant review at this time. Specifically, the Court held that the certified question referred generally to the Illinois Human Rights Act and not to any specific cause of action involved in this case. The Court also disagreed with the Appellate Courtôs reading of *Raintree Homes* as rejecting prior Appellate Court decisions on the certified question. Therefore, it was questionable at best whether there was a substantial difference of opinion on the certified question. Justice Burke wrote a vigorous dissent arguing that the Court should have addressed the issue.

Illinois Tort Immunity Act – Maintenance of Bike Trails

***Corbett v. Cty. of Lake*, 2017 IL 121536, 2017 Ill. LEXIS 1295**

The Illinois Supreme Court clarified what a ñriding trailò is for the purposes of the Tort Immunity Act (ñActò). Plaintiff was riding her bicycle on the Skokie Valley Bike Path when she was thrown off her bicycle after riding over a defective portion of the bike path, causing her to suffer severe injuries. Weeds and other vegetation were growing on this section of the path, which caused portions of the path to be broken, bumpy, and elevated. Plaintiff filed suit against the County of Lake and the City of Highland Park claiming the willful and wanton acts or omissions of the defendants proximately caused her injuries. In her complaint, Plaintiff alleged

defendants had been told about the dangerous condition of the section of the path she was riding her bike on prior to that date. The City argued it was immune under section 3-107(b) of the Act. Plaintiff argued the path is not a ñriding trailò under the Act because it is paved and runs through a busy and developed area.

The Illinois Supreme Court held that the legislature intended to apply blanket immunity only to ñprimitive or rustic trails.ò This includes trials that are ñnot improved with asphalt or concrete and are not intended for ócon-roadôtype transportation.ò The Skokie Valley Bike Path is a 10-mile long, paved path designed for bicycles, pedestrians and skaters. Therefore, it is not a ñtrailò within the meaning of the Act and section 3-107(b) is inapplicable in this case.

***Cohen v. Chi. Park Dist.*, 2017 IL 121800, 2017 Ill. LEXIS 1303**

Similar to the case above, Plaintiff was riding his bike along the Lakefront Trial in Chicago when he fell off his bike after his front wheel hit a crack in the pavement. Plaintiff brought suit against the Chicago Park District, alleging it was responsible for his injuries because it had acted willfully and wantonly in failing to reasonably maintain the path. The Chicago Park District argued it was absolutely immune under section 3-107(a) of the Tort Immunity Act (ñActò), which grants immunity to ñlocal public entities for injuries caused by a condition of a road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas.ò 745 ILCS 3-107(a) (West 2012). In the alternative, even if section 3-107(a) did not apply to the Lakefront Trial, defendant was immune under section 3-106 of the Act which ñimmunizes local public entities for injuries occurring on recreational property, except when the local public entity engages in willful and wanton conduct proximately causing the injuries.ò 745 *ILCS* 3-106 (West 2012).

The court found that section 3-107(a) of the Act was inapplicable because the Lakefront Trail is not a ñroadò within the meaning of the Act. The court defined a ñroadò as ña public way that permits travel by motorized vehicles such as motorcycles, cars, and trucks.ò The Lakefront Trail is not open to motorized traffic and therefore, is clearly not a ñroadò within the meaning of the Act. However, the park district was immune from suit under section 3-106. The court held the park districtôs conduct in repairing the crack could not be deemed willful and wanton, especially since there were no prior injuries involving the crack, which would have alerted the park district.

***Colella v. Lombard Park Dist*., 2017 IL App (2d) 160847, 2017 Ill. App. LEXIS 618**

Plaintiff was walking along the Lombard Park District path when she fell and her leg was impaled by a large nail protruding from a piece of lumber that was dumped on the path. Plaintiffs filed suit against the Lombard Park District and the Village of Lombard. Defendants argued they were immune from liability under section 3-106 and section 3-107(b) of the Tort Immunity Act. Immunity is unavailable under section 3-106 if a plaintiffôs theory of liability is based on conduct that is ñunrelated to the existence of a condition of the property in question.ò Unlike section 3-106, section 3-107 applies if an injury is simply ñcaused by a condition ofò a trail.

The court granted the park districtôs motion to dismiss because plaintiff was injured on a ñhiking trailò and the spiked timber constituted a ñconditionò of the trail within the meaning of section 3-

107(b). Since plaintiffôs injury was caused by a condition of the hiking trial, the park district is entitled to absolute immunity from liability for the plaintiffôs injury.

Illinois Tort Immunity Act – Maintenance of Streets

***Lewis v. City of Chi.*, 2017 IL App (1st) 161888-U**

Plaintiff fell and injured his ankle after stepping into a pothole in the street when exiting a Chicago Transit Authority (ñCTAò) bus. The plaintiff filed a complaint against the City of Chicago and the CTA. The plaintiff argued that the City had negligently maintained the street and that the CTA bus driver had negligently operated the bus.

The court granted summary judgment in favor of defendants under section 3-102 of the Tort Immunity Act (ñActò). The court held the City owed no duty of care to the plaintiff. Pursuant to the Act, the City owed a duty to maintain its street only for users that are *both* permitted and intended. 745 ILCS 10/3-102(a) (West 2014). The City argued that the plaintiff was not an intended user because he was not on a crosswalk when he fell into the pothole and injured himself. The court agreed. Case law has clearly established that streets are intended to be used for vehicular traffic, not by pedestrians. Consequently, a municipality does not owe a duty of care to pedestrians who attempt to cross a street outside of a crosswalk because pedestrians are not intended users of the street. This contention is further supported by a long line of cases holding a City has no duty to reasonably maintain its streets for pedestrians who were injured while walking in the street outside the crosswalk. The Court did note an important exception to this general rule that involves pedestrians entering or exiting a legally parked vehicle. However, the court held that exception does not extend to pedestrians exiting buses into the street.

Illinois Tort Immunity Act – Maintenance of Property – Ice/Snow

***Knuth v. Vill. of Antioch*, 2017 IL App (2d) 160961-U**

Plaintiff slipped and fell on ice while on the premises of the Raymond Kia dealership located in the Village of Antioch. Next to the dealership was a water tower owned and operated by the Village of Antioch. The accumulation of ice on the dealershipôs property was attributable ultimately to the water tower. After sustaining injuries, plaintiff filed a complaint against the Village of Antioch alleging the Village was negligent. The Village argued that it had no duty to ñmonitor and remediate accumulations of snow and ice on neighboring properties merely because such snow and ice may have transited [the Villageôs] property while borne on the wind.ò Alternatively, the Village argued they were immune under sections 2-109 and 2-201 of the Tort Immunity Act (ñActò).

ñUnder the ónatural accumulation rule,ô a landowner in Illinois is generally not liable for injuries when the slip and fall occurred on a surface where the snow and ice accumulation was natural and aggravated by the landowner. " *Whittaker v. Honegger*, 284 Ill. App. 3d 739, 743, 674 N.E.2d 1274, 221 Ill. Dec. 169 (1996). The owner may, however, be liable if ñthe owner either aggravated a natural condition or engaged in conduct which created a new, unnatural or artificial condition.ò *Id.* An unnatural accumulation may result from design deficiencies that promote an

unnatural accumulation of ice and snow. Under plaintiffôs theories, the accumulation on which he slipped was caused by the design deficiencies of the water tower and not by snow removal efforts. However, the plaintiff failed to show an ñidentifiable causeò of the ice on which he slipped.

Illinois Tort Immunity Act – Inspection of Property

***Nourse v. City of Chi.*, 2017 IL App (1st) 160664, 412 Ill. Dec. 417, 75 N.E.3d** 397

Plaintiff, an apprentice elevator service man and his spouse, filed a personal injury action against the City of Chicago and the elevator inspector employed by the Cityôs Bureau of Elevators, alleging that plaintiff was injured as a result of the inspectorôs wrongful acts or failures to act in his role as inspector. The court properly dismissed the suit with prejudice on the grounds that it was barred by the Tort Immunity Act. Plaintiff presented no evidentiary support to refute that the inspection was done to determine whether elevators posed a safety hazard. Moreover, the inspector died fourteen months after the suit was filed, but plaintiff did not move to substitute an estate as a defendant or appoint a special administrator. The court made clear in its ruling that the Tort Immunity Act also barred any possible claims against the inspector.

Illinois Tort Immunity Act – Maintenance of Parkways

***Hollenbeck v. City of Tuscola*, 2017 IL App (4th) 160266, 411 Ill. Dec. 192, 72 N.E.3d 880**

Plaintiff filed a second amended complaint against the City and her neighbor, to recover for injuries plaintiff sustained after falling on city property. The court properly granted summary judgment in favor of the City and plaintiffôs neighbor. The city owned the parkway located adjacent to her neighborôs house, and plaintiff stepped in a large crevice that covered a storm drain or catch basin cover, and she fell and sustained injuries. Evidence shows the catch basin in the parkway was a customary condition, did not amount to a pitfall, and did not give rise to a duty on part of the city. No evidence showed the neighbor assumed any portion of the parkway for his own purposes as means of ingress or egress, or that he prevented the public from using the parkway. His act of mowing it, or allowing others to mow it for him, did not establish a duty on his part.

Illinois Tort Immunity Act – Maintenance of Sidewalks

***Monson v. City of Danville*, 2017 IL App (4th) 160593**

Plaintiff sued over injuries sustained when she tripped and fell on public sidewalk. She alleged that the City failed to repair an uneven seam between two slabs of the sidewalk. The deviation was less than two inches. City employees testified that a year earlier they had walked the downtown district and spray painted places that required repair, replacement, or removal and determined what recommendations, if any, to make. The work later performed on the downtown sidewalks included portions near where the Plaintiff had fallen. Further testimony revealed that the City made decisions to repair, replace, or remove a slab of concrete on a case-by-case based a variety of factors including severity of the defect, availability of personnel, and costs.

The circuit court granted summary judgment based discretionary immunity pursuant to 745 ILCS 10/2-201 and 2-109. The Appellate Court affirmed. Although the City owed a duty of care to maintain its sidewalks with reasonable care, and regardless of whether the City had notice of the defect prior to the accident, sections 2-201 and 2-109 worked together to provide absolute immunity from liability. The City took discretionary acts and made policy determinations relating to the repair, replacement, or removal of sidewalks on a case-by-case basis using numerous factors developed over multiple years in consultation and collaboration with City departments and personnel; and, the City engineer used his discretion in implementing those policy considerations as he began a project to enhance the City's downtown area as to which portions of the sidewalks were in need of repair.

Illinois Tort Immunity Act – Actual or Constructive Notice

***Krivokuca v. City of Chi.*, 2017 IL App (1st) 152397, 411 Ill. Dec. 441, 73 N.E.3d 525**

Plaintiff filed a negligence/*res ipsa loquitur* action against the City, for injuries sustained after his vehicle struck a pothole, and then a sinkhole opened up in the road, causing his entire car to fall into the sinkhole. The court properly granted summary judgment for the City. The notice provision in § 3-102(a) of the Tort Immunity Act imposes additional elements of proof not contemplated by common law *res ipsa loquitur* doctrine, and thus plaintiff did not and could not, under the known facts, satisfy the notice requirement.

Illinois Tort Immunity Act – Supervisory Immunity – Willful and Wanton Conduct

***Barr v. Cunningham*, 2017 IL 120751, 2017 Ill. LEXIS 231 (March 11, 2017)**

A student injured in school floor hockey game sued school and teacher for failing to require use of protective safety goggles. The circuit court granted directed verdict for defendants under section 3-108 of Tort Immunity Act (no liability for supervision of activities on or the use of public property unless willful and wanton). The Appellate Court reversed, but the Illinois Supreme Court disagreed and affirmed the decision of the trial court. Based on the evidence introduced at trial, the students were using plastic hockey sticks instead of wooden sticks and "squishy" safety balls instead of hard pucks. Based on the teacherôs experience and expertise, she determined that the goggles were not necessary because she did not believe a serious eye injury could occur using this equipment. She also imposed and enforced various safety rules. Thus, plaintiff did not show that the teacher was willful and wanton, i.e., a conscious disregard for the students' safety. To the contrary, the evidence showed that she consciously considered student safety when she determined that the floor hockey equipment together with the safety rules was sufficient to prevent injuries. There was also no evidence of prior injuries to students playing floor hockey that would have put the teacher on notice of a specific danger of an eye injury. Nor was there any evidence that playing floor hockey was a obviously dangerous activity.

Employment Discrimination/Harassment

***Reed v. Freedom Mortg. Corp.*, 869 F.3d 543 (7th Cir. 2017)**

Plaintiff was an employee of defendant, Freedom Mortgage Company. Plaintiff is African American and plaintiffôs two supervisors are white. Plaintiff had a poor attendance and disciplinary history. Plaintiff had received multiple written and oral warnings regarding his repeated violation of the Attendance policy. When Freedom Mortgage Corporationôs Downers Grove office downsized, plaintiff and two other employees (one African American and one white) were let go. Plaintiff alleges he was fired because of his race and sued Freedom Mortgage Company for race-based discrimination.

The district court found plaintiff lacked evidence of racial bias and granted summary judgment in favor of defendants. The district court evaluated the case under the burden-shifting framework of *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). Under the *McDonnell Douglas* analysis, Plaintiff has the initial burden of establishing that (1) he is a member of a protected class; (2) he was meeting his employerôs legitimate performance expectations; (3) he was subjected to an adverse employment action; and (4) similarly situated employees outside of his protected class were treated more favorably by the employer. *Id.* It is uncontested that plaintiff is a member of a protected class or that his termination was an adverse employment action.

The issue on appeal is whether plaintiff produced any evidence that similarly situated employees outside his class were treated more favorably. Plaintiffôs lawyer did not present any evidence that any employees had a similar attendance and disciplinary record. Rather, plaintiffôs counsel relied on his clientôs personal observations of other employeesô arrival times and absences, without gathering evidence regarding the timing or context. Therefore, plaintiff presented no evidence that employees had similar attendance and disciplinary issues and were treated more favorably.

***Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017)**

Plaintiff is an openly lesbian teacher. She began teaching as an adjunct professor at Ivy Tech Community College and applied for at least six full-time positions between 2009 and 2014. In July of 2014, her part-time contract was not renewed. Believing Ivy Tech was rejecting her because of her sexual orientation, she filed a charge with the Equal Employment Opportunity Commission. After receiving a right-to-sue letter, plaintiff filed a Title VII action. The district court dismissed plaintiffôs complaint for failure to state a cause of action.

While the district courtôs dismissal aligned with Seventh Circuit case law at the time it was entered, the Court of Appeals, in overruling *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.,* 224 F.3d 701 (7th Cit. 2000), and other cases, found that sexual orientation discrimination is a form of sex discrimination under Title VII. This involves either prohibited gender stereotyping or discrimination on basis of sex with whom person associates. Therefore, the district courtôs dismissal is reversed because plaintiffôs claim that she was discrimination against because of her sexual orientation put forth a case of sex discrimination under Title VII.

***Catinella v. Cook County,* No. 16-2278 (7th Cir. 2018)**

The Seventh Circuit affirmed dismissal of complaint alleging that county highway employee was wrongfully terminated under false pretenses in violation of his due process and equal protection rights. The complaint alleged an array of events, including improprieties in a public-bidding process and cover up investigation, false reports about plaintiffôs workplace violence threats, and his arrest for disorderly conduct. The plaintiff failed to identify any state law, local ordinance, or contract provision that substantively limited countyôs ability to fire him therefore he had no due process property right in his job. Nor did the allegations ñshock the conscienceò sufficient to state a substantive due process claim. Lastly, the court held that there were no allegations to support a race based retaliation claim. While the allegations in the complaint were intriguing, the Seventh Circuit held that none of the alleged unfair treatment violated any federal constitutional or statutory provision and therefore the district judge correctly ruled that plaintiff did not plead a plausible claim for relief. The Seventh Circuit held that the complaint spun an elaborate story, but it did not ñcohere around any plausible constitutional or statutory violation.ò

The Comity Doctrine and State Taxpayers

***Cosgriff v. Cnty. of Winnebago*, 876 F.3d 912 (7th Cir. 2017)**

When two township employees came to the Cosgriffsô home in April 2014 to reassess its property value after the addition of a pool, one of the Cosgriffsô dogs bit one of the employees. That employee and Roscoe Township sued the Cosgriffs. Subsequently, the Cosgriffs posted a ñNo Trespassò sign on their property and started an online petition that encouraged other Roscoe Township taxpayers to notify the Roscoe Township Assessor and its employees not to trespass on their own property. The Cosgriffs brought §1983 claims against defendants, alleging defendants acted unconstitutionally when they increased the Cosgriffsô property assessment because the Cosgriffs spoke out against township employees. The new assessment reflected a valuation that was 47.14% higher than the previous year (an increase in fair market value from $357,000 to $525,000) even though the Cosgriffs only added a $50,000 pool.

Claims under § 1983 prohibit unconstitutional actions by persons acting under the color of state law. § 1983 appears by its terms to give a federal cause of action to state taxpayers, however, the comity doctrine has limited its scope. Cases dealing with state tax systems fall within the comity doctrineôs purview. So, the principles of comity bar a state taxpayer from bringing a § 1983 suit in federal court. Taxpayers alleging that their federal rights have been violated by state or local tax practices must seek relief through available state remedies if those remedies are ñplain, adequate, and complete.ò The principles of comity bar the Cosgriffsô claims from being heard in federal court. Furthermore, before filing this federal suit, the Cosgriffs utilized their Illinois state remedies by appealing their property tax assessment. If they were still dissatisfied after their property tax assessment was reduced, they could have continued through the state process to obtain further review and raise any and all constitutional objections.

Transgender Rights

***Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017)**

Here, the Seventh Circuit Appellate Court affirmed a grant of preliminary injunctive relief that allowed a transgender boy to use the boysô restroom while at school. Ashton Whitaker is a transgender high school senior. He exclusively used the boysô restrooms at school until a teacher saw him washing his hands in the boysô bathroom and reported it to the schoolôs administration. The School District informed Whitaker that he was permitted to only use the girlsô restrooms or the gender-neutral bathroom in the schoolôs main office.

Whitaker alleged that the denial of access to the boysô bathroom was causing him educational, physical, and emotional harm, including suicidal thoughts. Accordingly, Whitaker brought suit, alleging that the School Districtôs unwritten bathroom policy violates Title IX of the Education Amendments Act of 1972 and the Fourteenth Amendmentôs Equal Protection Clause. In addition to filing suit, Whitaker moved for preliminary injunctive relief, seeking an order granting him access to the boysô restroom. The district court granted Whitakerôs motion and the School District appealed.

The court held a policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School Districtôs policy treats transgender students like Whitaker, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. These students are disciplined under the School Districtôs bathroom policy if they choose to use a bathroom that conforms to their gender identity. Subsequently, Whitaker has met the low threshold of demonstrating a probability of success on his Equal Protection Claim.

Moreover, the School District failed to provide any evidence of how the preliminary injunction harmed it, or any of its students or parents. The harms identified by the School District are all speculative and based upon conjecture, whereas the harms to Whitaker are well-documented and supported by the record. The court concluded that Whitaker would suffer irreparable harm absent preliminary injunctive relief and, therefore, affirmed the district courtôs decision.

Whistleblower Act

***Corah v. Bruss Co.*, 2017 IL App (1st) 161030, 413 Ill. Dec. 231, 77 N.E.3d 1038**

Plaintiff alleges he was terminated by defendant after refusing to file a false accident investigation report. Plaintiff filed suit alleging his termination violated the Whistleblower Act. The trial court granted summary judgment on plaintiffôs Whistleblower claim because the report that plaintiff was instructed to complete gave an explanation of the root cause of injury, and was not a fraudulent report. Plaintiff failed to show that the defendant instructed him to engage in unlawful behavior or interfere with his co-workerôs rights under the Workersô Compensation Act.

***Sweeney v. City of Decatur*, 2017 IL App (4th) 160492, 413 Ill. Dec. 835, 79 N.E.3d 184**

The plaintiff filed a Whistleblower complaint against the City, his former employer, asserting retaliatory discharge and a violation of the Whistleblower Act. The court properly dismissed plaintiffôs complaint with prejudice under § 2-615 of Code of Civil Procedure. Plaintiffôs allegations that he told the alleged a government violator that his acts were improper does not constitute ñdisclosing informationò under Section 15(b) of the Whistleblower Act. Plaintiff failed to state a cause of action for retaliatory discharge; as he failed to plead facts supporting an instance of whistleblowing, failed to plead a violation of a clear mandate of public policy based on whistleblowing, or based on his exercise of his first amendment rights by speaking at a department meeting.

Attorney's Fees

***Koehn v. Tobias*, 866 F.3d 750 (7th Cir. 2017)**

Plaintiff filed a § 1983 complaint against his former employers, alleging they unlawfully retaliated against him for exercising his First Amendment rights. After many failed settlement attempts, the district court held a status hearing, during which it inquired about the status of any settlement negotiations. Defense counsel stated he believed that defendantsô insurer had proposed a settlement in the range of $150,000. Based off that information, plaintiffôs counsel said a settlement conference might be productive, and the court scheduled a second settlement conference between the parties. At the settlement conference, however, defendants did not make an offer in the range of $150,000. Instead, they offered less than half the amount ï the same amount they had offered in a previous settlement conference. The plaintiff, again, rejected the offer and the case did not settle. The court entered an order that allowed plaintiff to submit a request for attorneyôs fees and costs associated with ñthe unnecessary settlement conference held based upon defense counselôs representation.ò

The district court granted plaintiff's motion, holding that Federal Rule of Civil Procedure 16 allows the imposition of sanctions where a party's failure to timely and candidly communicate a change in position of settlement results in the holding of an unnecessary settlement conference. The court found that, while defendants were certainly free to change their settlement position between the status hearing and the settlement conference, their failure to notify the court or plaintiff of that change made the settlement conference pointless. The court ordered defendants to pay the requested fees and costs. The defendants appealed.

Defendants first argue that the court did not apply the appropriate legal standard to impose sanctions under Rule 16(f), and second, that the facts in this case simply do not support the imposition of sanctions under any of Rule 16(f)ôs standards. The court held it is clear that both plaintiff and the court interpreted defense counselôs representations at the status hearing as an indication of defendantsô current settlement position. It cannot be said that the district court abused its discretion in finding that, by changing their position so drastically without any indication that they intended to do so, defendants did not participate in the settlement conference in good faith. The order awarding attorneyôs fees and costs is affirmed.

***Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017)**

The Haegers filed suit against Goodyear Tire Company (ñGoodyearò), alleging that the failure of Goodyearôs tire caused their motorhome to swerve off the road and flip over. The parties eventually settled the case. Months after the fact, the Haegersô attorney discovered that in another lawsuit involving the same tire, Goodyear disclosed test results indicating that the tire got unusually hot at highway speeds. Goodyear admitted withholding the information from the Haegers, even though they had requested all testing data. Consequently, the Haegers sought sanctions for discovery fraud, arguing Goodyearôs misconduct entitled them to attorneyôs fees and costs expended in the litigation.

The district court awarded the Haegers $2.7 million in attorneyôs fees and the Ninth Circuit Court of Appeals affirmed. While the district court had inherent authority to order a party that engaged in misconduct to pay the other sideôs legal fees, it erred when it awarded the Haegers fees they incurred that did not result from Goodyearôs misconduct. When a federal court exercises its inherent authority to sanction bad-faith conduct by ordering a litigant to pay the other sideôs legal fees, the award is limited to the fees the innocent party incurred solely because of the misconduct.

Plaintiff's Acceptance of Offer of Judgment

***Wright v. Calumet City*, 848 F.3d 814 (7th Cir. 2017)**

Plaintiff filed a § 1983 complaint against the city alleging it violated his Fourth and Fourteenth Amendment rights by failing to provide him with a judicial determination of probable cause within 48 hours of his arrest. Plaintiff had been in custody for nearly 55 hours. Plaintiff alleged that the City had a policy or practice authorizing its officers to detain arrestees without a warrant for up to 72 hours before permitting the arrestee to appear before a judge. Plaintiff sought to pursue both an individual claim and class claims. The court denied certification because plaintiff failed to show the classes were sufficiently numerous to satisfy the requirements of Federal Rule of Civil Procedure 23(a)(1). After the court denied plaintiffôs petition to appeal the certification issue, the City made a Rule 68 offer of judgment to resolve ñall claims brought under this lawsuit.ò Plaintiff accepted the offer. Despite his acceptance, plaintiff appeals the courtôs denial of the class certification.

Article III of the Constitution provides federal court justification is limited to cases or controversies. Federal courts are, therefore, restricted to resolving only ñthe legal right of litigants in actual controversies.ò *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 71, 133 S. Ct. 1523, 1528 (2013). The 7th Circuit has held ña voluntary settlement by the prospective class representative often means that é the settling individual has elected to divorce himself from the litigation and no longer retains a community of interests with the prospective class.ò *Muro v. Target Corp.*, 580 F.3d 485, 491 (7th Cir. 2009). Therefore, a mere desire to appeal the denial of certification is insufficient. There must be a ñpersonal stakeò in the claim to assure that the case is in a form capable of judicial resolution. Plaintiffôs settlement resolved all of his claims. He did not retain an interest in his individual claim or an interest in pursuing a claim as a representative

of a class. Plaintiff accepted the offer as full compensation for all of his claims, and therefore cannot demonstrate any ongoing personal stake in the matter as is required under Article III.

Res Judicata

***Janus v. AFSCME, Council 31*, 851 F.3d 746 (7th Cir. 2017)**

The district court did not err in dismissing plaintiffsô § 1983 action alleging that the Illinois Public Relations Act, which allows union representing public employees to collect ñfair shareò fees from non-member employees, violated plaintiffsô First Amendment rights. Records indicated that one plaintiff had previously filed a suit challenging the retirement that he pay union fair share fee in claim that went before the Illinois Labor Relations Board and on appeal to the Illinois Appellate Court, which resulted in an order allowing plaintiff to pay same fair share fee to charity instead of the union. As such, the court found that res judicata applied to prevent said plaintiff from proceeding in this case, since said plaintiff could have raised instant First Amendment issue in his appeal to the Illinois Appellate Court in his prior case, but he had failed to do so. As to claim of other plaintiff, plaintiff failed to state a valid cause of action since: (1) instant claim would require the overruling of *Abood*, 431 U.S. 209, which held the requirement that non-union public employees pay fair share fees to union; and (2) only the Supreme Court could overrule *Abood.*

Statute of Limitations

***Artis v. Dist. of Columbia,* ___ U.S. ____No. 16–460, 199 L. Ed. 2d 473 (2018)**

Under 28 U. S. C. §1367, federal district courts may entertain claims not otherwise within their adjudicatory authority when those claims are related, i.e., part of same episode. When the court dismisses the federal claims, they often decline to exercise jurisdiction over supplemental state law claims and remand those to state court. This case concerns the time within which state claims may be re-filed in state court. Section 1367(d) states: ñThe period of limitations for any [state] claim [joined with a claim within federal-court competence] shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.ò Plaintiff argued that the word ñtolledò meant the state limitations period is suspended during the pendency of the federal suit. The defendant argued that ñtolledò meant that, although the state limitations period continues to run, a plaintiff is accorded a grace period of 30 days to re-file in state court after dismissal of the federal claims. The Supreme Court agreed with plaintiff and ruled that §1367(d)ôs instruction to ñtollò a state limitations period meant to hold it in abeyance, i.e., to stop the clock.