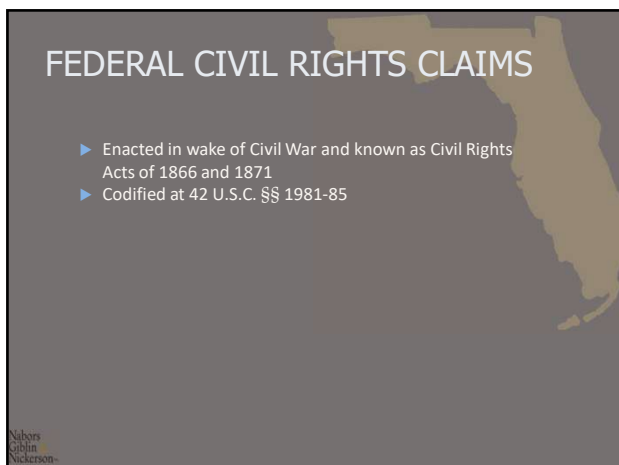




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§ 1981





Guarantees the “same equal rights under the law” to all persons “as is enjoyed by white citizens.”



Amended in 1991, adding new sections:

Define the right to “make and enforce contracts,” and
Protection against violation of rights by “governmental discrimination and impairment under color of state law.”

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§ 1981

- ▶ Contract language used in employment cases – both private and public employers.
- ▶ § 1981 applies ONLY to RACE as understood at the time of its enactment in 1866.
- ▶ Action against state actor must be brought via § 1983 – action cannot proceed if based solely on § 1981.
- ▶ Unlike Title VII, § 1981 claims require plaintiffs to establish “but-for” causation. Comcast Corp. v. National Association of African-American-Owned Media, 140 S.Ct. 1009 (2020).

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FEDERAL CIVIL RIGHTS CLAIMS

Differences	Title VII	Section 1981
Actionable Discrimination	Race, color, religion, sex, & national origin	Race, certain national origins, & religions
Number of Employees	Applies only to employers of 15 or more persons	No such restriction
Individual Liability	No	Yes

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§ 1983

Constitution is not self-executing.

When individuals seek to enforce Constitutional rights against a local gov't, the individual generally must bring suit under § 1983.

Procedural due process, equal protection, free speech, unreasonable search and seizure, etc.

§ 1983 allows an action for damages against any person who, under color of law, subjects any person to a deprivation of any rights, privileges or immunities secured by the Constitution or the law of the United States.

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§ 1983

 To state a claim, Plaintiff must show:

 He was deprived of a right, privilege or immunity secured by the Constitution or Federal law,

 The deprivation took place under color of law, and

 The act was in furtherance of a "custom or policy"

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§ 1983

"Custom or Policy"

- Counties and municipalities may only be held liable if the act taken constitutes a custom or policy of the county/municipality. The local gov't must be clearly at fault. Its actions must have been the CAUSE of the harm. There is no respondeat superior.
- Single instance of deprivation does not mean local government is safe.
- When action is taken by a gov't official in whom final policymaking authority has been vested, action constitutes official policy and gov't potentially can be held liable.

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§ 1985

- Prohibits various conspiracies to interfere with civil rights, including conspiracies to discriminate against someone based on race and sex.
- Extended to protect against conspiracies based on any protected characteristic.
- "Conspiracy" means 2 individuals act together.
- May be brought against anyone—not just state actors



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§ 1985

Elements of claim under § 1985(3):

- a conspiracy;
- for the purpose of depriving equal protection; and
- an act in furtherance of the conspiracy;
- whereby a person is either injured in his person or property or deprived of a right.

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FEDERAL CIVIL RIGHTS CLAIMS

WHOCAN BE LIABLE

- ▶ § 1981
 - ▶ any individual who violates the statute;
 - ▶ counties and municipalities; but,
 - ▶ generally **not** state gov't, unless waived 11th Amendment Immunity
- ▶ § 1983
 - ▶ counties and municipalities if violation was due to custom or policy
 - ▶ **not** private persons unless engaging in "state action" because of color of law requirement
- ▶ § 1985
 - ▶ private persons/business and governmental entities

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FEDERAL CIVIL RIGHTS CLAIMS

DEFENSES

- ▶ Absolute Immunity
 - ▶ Available to state and local legislators and judges when sued for damages and, in some instances, for injunctions
 - ▶ Prosecutors when sued for damages
- ▶ Qualified Immunity
 - ▶ Available to gov't officials in certain circumstances when sued in their individual capacities under sections 1981 and 1983.
 - ▶ In other words, not available in state tort lawsuit.

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FEDERAL CIVIL RIGHTS CLAIMS

When are gov't officials entitled to Qualified Immunity?

- ▶ When they act with discretionary authority within the scope of their job duties; AND
- ▶ Their conduct does not violate a clearly established right of which a **reasonable person** would have known.

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FEDERAL CIVIL RIGHTS CLAIMS

Qualified Immunity

Objective Reasonableness Standard

- ▶ Government agent gets benefit of the doubt UNLESS actions are so obviously illegal considering then-existing law that only an official who was **plainly incompetent** or who **knowingly** violated the law would have committed them.
- ▶ 11th Cir. has held that QI is the rule, not the exception. It provides immunity from SUIT not just from liability. Usually, immediately appealable.

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FEDERAL CIVIL RIGHTS CLAIMS

CLEARLY ESTABLISHED RIGHTS CAN BE PROVEN BY

1. "On point" SCOTUS, Court of Appeals, or state high court case with materially similar facts;
2. Broad, clearly established constitutional principle that could govern novel facts; or
3. Conduct where a broad, preexisting constitutional principle applies with obvious clarity.

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FEDERAL CIVIL RIGHTS CLAIMS

RELIEF

§ 1981

- Injunctive relief, reinstatement, back pay
- Punitive damages against a public official and compensatory damages against both the official and the municipality

§ 1983

- Injunctive relief, reinstatement, back pay
- Punitive damages against a public official and compensatory against municipality and official
- Attorneys' fees and costs

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FEDERAL CIVIL RIGHTS CLAIMS

STATUTE OF LIMITATIONS

- ▶ § 1983 (presumably § 1985)
 - ▶ Governed by same SOL as personal injury suits
 - ▶ In Florida, the 4-year* SOL for tort actions governs
- ▶ § 1981
 - ▶ 4-year SOL

*Recall that now tort SOLs in Florida is 2 years generally under §95.11(4)(a), Fla. Stat., and 4 for suits against local governments specifically §768.28(14), Fla. Stat.

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FEDERAL CIVIL RIGHTS CLAIMS

Excessive Use of Force Graham Factors

- ▶ Severity of the crime at issue;
- ▶ Whether the suspect poses an immediate threat to the safety of the officers or others;
- ▶ Whether the suspect was actively resisting arrest or attempting to evade arrest by flight;
- ▶ The relationship between the need and amount of force used; and
- ▶ The extent of the injury inflicted.

Graham v. Connor, 490 U.S. 386 (1989)

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Sebastian v. Ortiz, 918 F.3d 1301 (11th Cir. 2019)



Sebastian stopped for traffic infraction, complied with stop, refused search of his vehicle. Officer Ortiz forcibly removed Sebastian from vehicle and put handcuffs on in a painful manner.

Sebastian placed in a hot patrol car with only a cracked window and painfully handcuffed



Court determined that all the Graham factors weighed heavily in Sebastian's favor and that the case law bars Officer Ortiz's actions with sufficient clarity (Severity of the crime; whether suspect poses immediate threat; actively resisting or evading; Need for force; and extent of injury)

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Stephens v. DeGiovanni, 852 F.3d 1298 (11th Cir. 2017)



Eleventh Circuit vacated MSJ ruling in favor of deputy



Facts:

- The Deputy investigated Stephens working on parked car and charged him with operating a vehicle without a license
- Stephens complied with all the Deputy's questions and commands
- Unprovoked, the Deputy slugged Stephens with all his body weight causing cervical sprains



Court determined that "[i]n these obvious-clarity facts, 'no particularized preexisting case law was necessary for it to be clearly established what Deputy DeGiovanni did violated Stephen's constitutional right to be free from excessive use of force'"

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FLORIDA CON LAW

Provides additional rights beyond that provided in the U.S. Constitution:

- ▶ Right to privacy;
- ▶ Right to access to public meetings and records; and
- ▶ The right of access to the courts.

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FLORIDA CON LAW

PRIVACY

- ▶ Generally broader than the federal right
- ▶ But see Board of Cnty. Comm'rs of Palm Beach Cnty. v. D.B., 784 So. 2d 585 (Fla. 4th DCA 2001).

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FLORIDA CON LAW

ACCESS TO RECORDS AND PUBLIC MEETINGS

- ▶ See 119 and 286
- ▶ Government in the Sunshine Manual

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FLORIDA CON LAW

ACCESS TO COURTS

"We find the trial court complied with the requirements of [Florida vexatious litigant law], and reject Brown's claim that the statute violates his right to access to the courts as guaranteed by the Florida Constitution."

► Brown v. Miami-Dade Cnty., 319 So. 3d 81, 83 (Fla 3d. DCA 2021)

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REVIEW

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FLORIDA CIVIL RIGHTS ACT (FCRA, Chapter 760, Fla. Stat.)

COVERAGE

- Same as Title VII, ADA and ADEA
- Race, sex, national origin, religion, disability and age (except not limited to 40 or older)
 - EXCEPT also includes prohibition of discrimination based on marital status
 - Applies to ERs covered by Title VII, including local and state governments

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FCRA

TITLE VII AND THE FCRA

- ▶ Federal courts look to federal case law interpreting Title VII when analyzing FCRA claims.
- ▶ Any interpretive changes regarding Title VII may subsequently be applied to the FCRA.
 - ▶ Examples
 - ▶ Sex discrimination includes discrimination against a transgender person for gender nonconformity under both Title VII and FCRA.
 - ▶ Title VII retaliation claims must be proved according to traditional principles of but-for causation since 2013 Supreme Court decision.

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FCRA

REMEDIES

- ▶ Compensatory
- ▶ NO PUNITIVE FOR STATE AND LOCAL GOV'T
- ▶ Attorney's fees and costs
- ▶ Jury trial

STATUTE OF LIMITATIONS

- ▶ 365 days to file a charge of discrimination with FCHR; unlike Title VII which gives 300 days
- ▶ EE then has one year to file suit after the FCHR makes a final determination
- ▶ If FCHR fails to make a determination within 180 days employee can file suit. No early right to sue letter.

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CH. 2020-153, LAWS OF FLA.

- ▶ On June 30, 2020, Governor DeSantis signed into law CS/HB 255, which amends 760.11, Fla. Stat., and the limitations period for filing a lawsuit alleging a violation of the FCRA.
- ▶ Prior to the law, if FCHR fails to issue a determination within 180 days, the charging party may proceed as if the FCHR issued a reasonable cause determination and file a lawsuit.
- ▶ The amendment harmonizes the limitations periods, providing that the 1-year SOL that applies where FCHR issues a timely cause determination also applies where it fails to do so.
- ▶ The FCHR is required to "promptly notify" the charging party of its failure to issue a determination. The 1-year period begins on the date that notice was sent.

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PUBLIC EMPLOYEE LABOR RELATIONS ACT

Protects rights of public employees to take concerted action in furtherance of mutual aims and protects the right to form, join and assist employee organizations.

PERC oversees disputes concerning the representation of public employees by labor unions and allegations of unfair labor practices.

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FLORIDA WHISTLEBLOWER ACT

- ▶ Covers EEs who disclose or threaten to disclose to a governmental agency a violation or suspected violation of misfeasance, malfeasance, waste, or neglect of duties. (Fla. Stat. § 112.3187)
- ▶ The complaint must be in writing. Does not protect those who disclose information known to be false.

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FLORIDA WORKERS COMP

Prohibits discharge or retaliation of an employee for filing a workers' compensation claim. To establish a prima facie case of workers' compensation retaliation, the employee must show that

- ▶ (1) he engaged in a statutorily protected activity,
- ▶ (2) that he was subjected to an adverse employment action and
- ▶ (3) a causal connection exists between the two.

Atha v. Allen P. Van Overbeke, D.M.D. P.A., 213 So. 3d 1073, 1074 (Fla. 2d DCA 2017).

§ 440.205 does not require an employee to ultimately prove that his pursuit of workers' compensation was the employer's only basis for termination. See *Juback v. Michaels Stores, Inc.*, 696 F. Appx 959, 960-61 (11th Cir. 2017).

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FLORIDA JURY SERVICE § 40.271

Analogous to the Jury System Improvements Act, this state statute prohibits discharge of employees for jury service. This protection applies only to jury service within the state court system and does not apply to jury service in federal courts. See *Hill v. Winn-Dixie Stores, Inc.*, 699 F. Supp. 876, 877-78 (M.D. Fla. 1988); *Scott v. Estalella*, 563 So. 2d 701, 701 (Fla. 3d DA 1990).



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FLORIDA FIREFIGHTERS/POLICE & CORRECTIONAL OFFICERS BILL OF RIGHTS

§§112.80-112.84, 112.531-112.535 provide procedures for investigating alleged misconduct by firefighters, police officers, or correctional officers. Under the Police Officers' and Correctional Officers' Bill of Rights, an employee has the right to bring a civil suit for damages, "pecuniary or otherwise." FLA. STAT. § 112.532(3).



By contrast, a firefighter bringing a civil suit pursuant to the Firefighters' Bill of Rights is limited to injunctive relief. See FLA. STAT. § 112.83. See also *Curtis v. City of West Palm Beach*, 82 So. 2d 894, 896 (Fla. 4th DCA 2011) (holding damages were not an available remedy for violations of Firefighters' Bill of Rights).

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COMMON LAW TORTS

Ordinarily, when an employee commits a wrongful act, the plaintiff will attempt to hold the employer responsible for that act under the doctrine of respondeat superior. This doctrine makes an employer liable for the harm caused by an employee who acted within the course and scope of employment, i.e., to serve the employer's interests.

See, e.g., *Canto v. J.B. Ivey & Co.*, 595 So. 2d 1025 (Fla. 1st DCA 1992).

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COMMON LAW TORTS

Until 1973, sovereign immunity foreclosed most suits against state and local governments for the acts of their employees. Traditionally, sovereign immunity relieved governments from liability to ensure that the public treasury was not unduly burdened by the defense of lawsuits or the payment of claims. Like many other states, Florida gave up most of its sovereign immunity protection by adopting a statutory waiver of immunity:

No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

FLA. STAT. § 768.28(9)(a) (Emphasis added).

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COMMON LAW TORTS

Three categories of conduct will overcome a government employee's individual immunity:

- (1) bad faith,
- (2) malicious purpose, and
- (3) wanton and willful disregard of human rights, safety or property.

Johnson v. City of Daytona Beach, No. 6:16-cv-941-Orl-40TBS, 2017 WL 119744, at *6 (M. D. Fla. Jan. 12, 2017).

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COMMON LAW TORTS

NEGLIGENT HIRING AND RETENTION

A negligent hiring or retention suit is unlike most suits in that it is specifically designed to hold the employer responsible for acts of an employee outside the course and scope of employment. *Garcia v. Duffy*, 492 So. 2d 435, 438 (Fla. 2d DCA 1986). See also *City of Boynton Beach v. Weiss*, 120 So. 3d 606, 610 (Fla. 4th DCA 2013).

Government employers should assume that these torts will be applied to them. See *Slonin v. City of West Palm Beach*, 896 So. 2d 882, 884 (Fla. 4th DCA 2005) (finding no sovereign immunity for negligent retention or supervision).

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COMMON LAW TORTS

NEGLIGENT HIRING

To show negligent hiring, a plaintiff must prove that:

- the employer owed a duty to the plaintiff to exercise reasonable care in the selection of an employee to perform particular duties;
- the employer failed to make an appropriate investigation;
- appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general;
- the plaintiff was harmed by an independent wrongful act committed by the employee;
- the independent wrongful act was of a type foreseeable in light of the employee's particular unsuitability; and
- the employer's unreasonable failure to investigate was a legal cause of the Plaintiff's injury.

Garcia, 492 So. 2d at 440.

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COMMON LAW TORTS

NEGLIGENT RETENTION

To show negligent retention, a plaintiff must prove that:

- the employer owed a duty to the plaintiff to exercise **reasonable care** in the retention of an employee to perform particular duties;
- the employer received **actual or constructive notice** that the employee it retained was unfit to perform these duties;
- the employer **unreasonably failed to take corrective action** reasonably calculated to prevent harm to the plaintiff;
- the **plaintiff was harmed** by an independent wrongful act committed by the employee;
- the independent wrongful act was of a type **foreseeable** in light of the employee's particular unfitness for duty; and
- the employer's unreasonable failure to take corrective action was a **legal cause** of the Plaintiff's injury.

Garcia, 492 So. 2d at 441.

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COMMON LAW TORTS

DEFENSES

An employer can escape liability by proving the absence of notice to the employer that the employee who caused the harm was unfit for duty. See *M.V. By & Through W.W. v. Gulf Ridge Council Boy Scouts of Am., Inc.*, 529 So. 2d 1248, 1248 (Fla. 2d DCA 1988)

Other defenses include proof that the employer took reasonable steps to avoid harm and proof that the wrongful act committed by the employee was not foreseeable from the information available to the employer. See *Iglesia Cristiana La Casa Del Senor, Inc. v. L.M.*, 783 So. 2d 353, 358-59 (Fla. 3d DCA. 2001)

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COMMON LAW TORTS

ASSAULT AND BATTERY

Assault

- an intentional
- offer or threat of bodily injury to another
- under such circumstances as to create a fear of imminent peril
- where defendant possessed the apparent present ability to carry out the offer or threat

See *United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982), cert. denied, 460 U.S. 1016, 75 L. Ed. 2d 487.

Battery

- the intentional infliction of
- a harmful or offensive contact
- upon the person of the plaintiff

See *Chorak v. Naughton*, 409 So. 2d 35, 39 (Fla. 2d DCA 1981).

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CIVIL RIGHTS

3. In 2000, City implemented an ordinance which prohibited City residents from holding a business tax receipt for an eating establishment unless the applicant was Scandinavian, because the City Commission believed "only Scandinavians knew how to cook." In 2000, just after the ordinance was enacted, Resident Ricardo, of Italian decent, applied for and was denied a business tax receipt for a restaurant based on the ordinance. In 2005, Resident Ricardo filed suit against the City under Section 1981 and Section 1983, for the denial of the business tax receipt. Resident Ricardo's claims are barred:

- by the statute of limitations.
- as municipalities cannot be sued under Section 1983.
- by the doctrine of qualified immunity.
- by the United States Constitution.

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Answer: A

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SOVEREIGN IMMUNITY

2. The city of Miami Beach controls the beach area within the city limits pursuant to an agreement with the State of Florida, owner of the Beach. Under the terms of the agreement the city provides public restrooms, picnic tables and parking areas. The beach has not been designated by the city as a public swimming area and thus no lifeguards are provided although the city is aware that people use the area for swimming.

A guest in a local hotel ventured out onto the beach and while there rented a beach chair and umbrella from a concessioner licensed by the city. The guest decided to go for a swim and was dragged under by prevailing rip currents and drowned. Subsequently a wrongful death action was brought by the estate against the city, who after responding to the suit moved for summary judgment. At the hearing on the motion the trial court should:

- grant the summary judgment motion because the city does not have a duty of care to warn beachgoers of naturally occurring rip currents when it did not have control over the area and does not take express action to designate it a swimming area.
- grant the summary judgment motion because the city has the discretionary authority to operate or not operate swimming facilities and is immune from suit on that discretionary question.
- deny the summary judgment motion because the City controls the beach area and, therefore, had a duty of care to warn of dangers that were known or should have been known, and is not shielded from liability based on sovereign immunity.
- deny the summary judgment motion because it was reasonably foreseeable that people would use this area for swimming.

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SOVEREIGN IMMUNITY

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