

# Federal Civil Practice

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## Has the Seventh Circuit finally (albeit indirectly) found that district courts should instruct juries that the preponderance of the evidence standard applies to claims under Section 1983 seeking punitive damages? Probably.

BY IAIN D. JOHNSTON, U.S. MAGISTRATE JUDGE

**There is no doubt that punitive damages are available** for claims against individual defendants under 42 U.S.C. Section 1983. *Smith v. Wade*, 461 U.S. 30, 56 (1983); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (punitive damages cannot be imposed on a municipality under Section 1983). There is likewise no doubt as to the requisite standard of conduct a plaintiff must establish for punitive damages to be imposed. The Supreme Court has held that punitive damages can be imposed on an individual defendant for a claim brought under Section 1983 “when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.” *Smith*, 461 U.S. 56. But there is doubt as to the standard of proof needed to recover punitive damages under Section 1983

claims: the preponderance of the evidence standard or the clear and convincing evidence standard.

The difference in those two standards is substantial. Obviously, the clear and convincing standard is higher. *United Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 563 F.3d 257, 271 (7th Cir. 2009). Under the clear and convincing standard of proof, the party must establish facts are highly probable. *Von Gonten v. Research Systems Corp.*, 739 F.2d 1264, 1268 (7th Cir. 1984). In contrast, under the preponderance of the evidence standard, the party need only establish that a fact is more probable than not. *Central States, Southeast & Southwest Areas Health & Welfare & Pension Funds v. Transcon Lines*, No. 90 C 1853, 1995 U.S. Dist. LEXIS 11372, \*23-24 (N.D. Ill. Aug. 4, 1995). The difference in these standards is exemplified by the Federal Civil Jury Instructions of the

Seventh Circuit (“Pattern Instructions”). Instruction 1.27 states that when a party must prove something by a preponderance of evidence, a juror must be persuaded that “it is more probably true than not true.” 7th Cir. Pattern Jury Instr. Civil 1.27 (rev. ed. 2017). However, Instruction 1.28 states that when a party must prove something by clear and convincing evidence, a juror must be convinced that it is “highly probable that it is true. . . [t]his is a higher burden of proof than ‘more probably true than not true.’ Clear and convincing evidence must persuade [the juror] that it is ‘highly probably true.’” 7th Cir. Pattern Jury Instr. Civil 1.28 (rev. ed. 2017). And the difference in these two standards can be critical in determining whether punitive damages will be imposed. *Gardner v. Wilkinson*, 643 F.2d 1135, 1137 (5th Cir. 1981) (noting important distinction between two standards). Often, in close

cases, judges and juries fall back onto the burden and standard of proof in ultimately making a decision. *See, e.g., United States v. Thevis*, 665 F.2d 616, 633 n. 17 (5th Cir. 1982) (“In addition, the ‘clear and convincing’ standard of proof dictates that close cases must be resolved in favor of the defendant.”) (abrogated on other grounds); *see Cortez-Acosta v. INS*, 234 F.3d 476, 481 (9th Cir. 2000); *see also United States ex rel. Bilyew v. Franzen*, 686 F.2d 1238, 1248 (7th Cir. 1982) (“If the evidence is closely balanced, then common sense indicates there is a reasonable possibility that who bears the burden of proof will determine the outcome.”).

The standard of proof jurisdictions use for imposing punitive damages is not uniform, in part, because the United States Constitution does not require a heightened standard of proof. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n. 11 (1991). For example, some states require clear and convincing evidence. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994) (cataloging states by burden). In contrast, some states only require a preponderance of the evidence. *Id.* In the federal courts, if Congress provides for the standard of proof for a particular claim, then the issue is resolved, unless constitutional principles require a different standard. *Microsoft Corp. v. i4i Partnership*, 564 U.S. 91, 100 (2011); *see, e.g., Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (termination of parental custody required to be proven by clear and convincing evidence); *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964) (actual malice required to be proven by clear and convincing evidence in defamation case by public official). But if Congress does not provide a standard of proof, then common law must make that determination. *Microsoft*, 564 U.S. 100.

Which standard of proof applies for punitive damages for Section 1983 claims is unclear because neither Congress nor the United States Supreme Court definitively provided the standard. The Seventh Circuit has also not specifically stated which standard applies. *Coulter v. Vitale*, 882 F.2d 1286, 1289 (7th Cir. 1989).

The absence of clear direction on this issue comes to the forefront at the

jury instruction conference. The Pattern Instruction 7.28 specifically uses the preponderance of the evidence standard. 7th Cir. Pattern Jury Instr. Civil 7.28 (rev. ed. 2017). But the Committee Comments to Pattern Instruction 7.28 recognizes that the standard of proof issue remains unresolved. Committee Comments to 7th Cir. Pattern Jury Instr. Civil 7.28 (rev. ed. 2017). And because the pattern instructions are not necessarily binding on the district courts, Section 1983 defendants are free to argue that the clear and convincing burden of proof applies. *United States v. Edwards*, 869 F.3d 490, 496-97 (7th Cir. 2017) (pattern instructions not binding). (Indeed, the author of this article made this argument to numerous federal judges, most of whom valiantly attempted not to roll their eyes.)

For decades, district courts in the Seventh Circuit struggled with the absence of clear direction. *See, e.g., Boyd v. Ambrose*, No. 91 C 4738, 1994 U.S. Dist. LEXIS 715, \*6-7 (N.D. Ill. Jan. 27, 1994); *Pakk v. Stasch*, No. 88 C 2894, 1991 U.S. Dist. LEXIS 5607, \*1 (N.D. Ill. Apr. 29, 1991); *Bryant v. Whalen*, No. 88 C 4834, 1991 U.S. Dist. LEXIS 4061, \*7 (N.D. Ill. Apr. 2, 1991) (“Similarly, we see no reason to require a greater burden of proof when it is the nature of the tortfeasor’s conduct which does or does not warrant the imposition of punitive damages.”). In fact, in *Fogarty v. Greenwood*, 724 F. Supp. 545 (N.D. Ill. 1989), Judge Shadur crafted a clever solution to this vexing issue in an attempt to alleviate the possible problems that might arise if the Seventh Circuit were to hold that the clear and convincing standard applied when he had instructed a jury that the preponderance of the evidence standard applied. Specifically, Judge Shadur would provide the following instructions and special interrogatories:

1. In addition to the general verdict form, the jury would be provided with interrogatories requiring that it answer separately whether the substantive conduct that would be a prerequisite to any possible award of punitive damages be proved as to each defendant (a) by a preponderance of the evidence or (b) by clear and convincing evidence.

2. The jury would also be instructed that it should not go on to consider the award of punitive damages unless it answered “yes” to one or both of those interrogatories.
3. The jury would be given instructions for both burdens of proof: preponderance of the evidence and clear and convincing evidence.
4. The jury was further informed in the instructions that the law was unsettled on the standard of proof for awarding punitive damages.

By using this procedure, if the jury found that the defendant’s conduct was proved by a preponderance of the evidence but not by clear and convincing evidence, and if the Seventh Circuit were to address the issue and find the clear and convincing standard applied, there would be no need for a remand to retry the punitive damages issue. Other judges in the Seventh Circuit adopted the procedure outlined in *Fogarty*. *See, e.g., Garland v. Schulz*, No. 88 C 6862, 1995 U.S. Dist. LEXIS 1400, \*4-5 (N.D. Ill. Feb. 4, 1995); *Vera v. Roldan*, No. 91 C 6711, 1993 U.S. Dist. LEXIS 11778, \*7-10 (N.D. Ill. Aug. 17, 1993).

But the issue of which standard applies may have been inadvertently resolved by the Seventh Circuit in *Ramirez v. T&H Lemon, Inc.*, 845 F.3d 772 (7th Cir. 2016). In that case, as a sanction under Federal Rule of Civil Procedure 37, the district court dismissed the plaintiff’s case for witness tampering. Specifically, the district court found that the plaintiff paid witnesses to lie during their depositions. On appeal, the plaintiff argued, among other things, that the dismissal sanction was erroneous because the evidence showing his mental state did not meet the clear and convincing standard of proof. *Ramirez*, 845 F.3d at 776. The Seventh Circuit noted that it had previously “held that clear and convincing evidence is required in order to dismiss a case as a sanction for discovery-related misconduct.” *Id.* But the Seventh Circuit found that previous precedent “failed to consider ‘the presumption that the burden of proof in federal civil cases is proof by a preponderance of the evidence.’” *Id.* at 777. As a result, the Seventh Circuit overruled

it prior decisions requiring the clear and convincing standard. According to the Seventh Circuit, “unless the governing statute (or in this case, the rule) specifies a higher burden, or the Constitution demands a higher burden because of the nature of the individual interests at stake, proof by a preponderance of the evidence will suffice.” *Id.* at 778. Because a party’s interest in continuing to pursue civil litigation is not sufficiently important to require a higher standard of proof, the district court was affirmed. *Id.* at 781-82.

So *Ramirez* stands for the proposition that unless Congress provides otherwise or a constitutional principle requires a contrary result, the preponderance of the evidence standard is the default. The rationale of *Ramirez* means that the

preponderance of evidence standard should apply to claims under Section 1983 seeking punitive damages. And if outright dismissal as a sanction does not require the clear and convincing standard of proof, then the imposition of punitive damages likewise would not require that heightened proof.

In fact, in *Currie v. Cundriff*, 870 F. Supp. 2d 581(S.D. Ill. 2012), Judge Reagan foreshadowed this result. In that case, the defendants argued that clear and convincing standard of proof should apply for claims brought under Section 1983. Judge Reagan disagreed, noting that the Seventh Circuit’s trend – even back in 2012 – was to presume that “the less onerous standard of preponderance of the evidence in federal civil cases” applied. *Currie*, 870 F. Supp. 2d at 586-87. Although there are

uncommon but recognized exceptions to this presumption, those exceptions occurred only when a court was taking an unusual coercive action. Judge Reagan found that an award of punitive damages did not fall into that category, but rather was a conventional form of monetary relief. *Id.* at 587.

Accordingly, district courts in the Seventh Circuit are much more likely to use Pattern Instruction 7.28’s preponderance of evidence standard and not even use the *Fogarty* procedure. Although the Seventh Circuit has still not specifically held that the preponderance of the evidence standard applies to punitive damages for claims brought under Section 1983, *Ramirez* strongly signals that district courts should use this standard when instructing juries. ■

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