South Carolina Law Review

Volume 53 | Issue 3 Article 12

Spring 2002

Citadel Cadets Dodge the State Action Bullet: A Critical Analysis of Mentavlos v. Anderson

John P. Fougerousse

CITADEL CADETS DODGE THE STATE ACTION BULLET: A CRITICAL ANALYSIS OF *MENTAVLOS V. ANDERSON*

I. INTRODUCTION

To say that The Citadel has had its share of gender integration problems would be like calling Tiger Woods a decent golfer. First, Shannon Faulkner was denied enrollment in 1993 after being admitted to the school because officials discovered that she was female.[1] After Faulkner instituted legal action, the school begrudgingly allowed her to enroll in the fall of 1995.[2] Second, the United States Supreme Court struck down another admissions policy at Virginia Military Institute (VMI) in June 1996.[3] Only after this court ruling did The Citadel abandon its male-only admissions policy, thus allowing women to enroll in the Corps of Cadets for the first time.[4] Four women subsequently enrolled at The Citadel in the fall of 1996.[5]

However, according to two of those women, The Citadel's fight against gender integration has simply become covert rather than overt. By December 1996, Jeanie Mentavlos and Kim Messer had withdrawn from the school, citing recurring sexual harassment and other abuses.[6] Mentavlos thereafter filed a lawsuit in federal court,[7] alleging that upper-class cadets had harassed her because she was a woman.[8] Specifically, Mentavlos claimed that the cadets' actions abridged her Fourteenth Amendment right to equal protection in violation of 42 U.S.C. § 1983 and deprived her of equal access to education in violation of Title IX of the Educational Amendments of 1972.[9]

Section 1983 subjects an individual to personal liability who, while acting "under color of [state law]," violates another person's constitutional rights.[10] This

---

1. Elizabeth Gleick, *Let the Hell Week Begin*, TIME, Aug. 26, 1996, at 39.

2. *See* AMERICAN CIVIL LIBERTIES UNION, LEGAL FEES FROM THE BATTLE TO ADMIT SHANNON FAULKNER WILL GO TO WOMEN'S RIGHTS PROJECT (Oct. 4, 2000), *at* http://www.aclu.org/news/2000/n100400a.html.

3. United States v. Virginia, 518 U.S. 515, 556-58 (1996) (holding that the adoption of substantially similar program at a women's college did not remedy VMI's unconstitutional male-only admissions policy); *see also* Chris Burritt, *The Citadel Faces Open-Ended 'Hell Week' in Court*, ATLANTA J. & CONST., Nov. 10, 1999, at A14 (discussing the VMI case).

4. United States v. Jones, 136 F.3d 342, 343-44 (4th Cir. 1998).

5. Burritt, *supra* note 3, at A14.

6. Bill Hewitt & Don Sider, *Conduct Unbecoming*, PEOPLE, Jan. 27, 1997, at 40, 42.

7. Burritt, *supra* note 3, at A14. Kim Messer also filed a similar suit against The Citadel. *Id.* The suit settled for a reported $37,750. *Id.*

8. Mentavlos v. Anderson, 85 F. Supp. 2d 609, 610, 612-14 (D.S.C. 2000).

9. *Id.* at 610-11; *see also* Mentavlos v. Anderson, 249 F.3d 301, 306 (4th Cir. 2001) (discussing Mentavlos' claims).

10. 42 U.S.C.A. § 1983 (West Supp. 2001). Section 1983 reads:

> Every person who, under color of any statute, ordinance, [or] regulation, . . . of any State . . ., subjects, or causes to be subjected, any citizen of the United States

Note discusses the Fourth Circuit's decision in *Mentavlos v. Anderson*,[11] in which the court considered whether students at publicly-funded schools could be "state actors" for purposes of § 1983.[12] This Note concludes that the Fourth Circuit correctly held that students are not state actors based on traditional state-action tests and on public-policy notions. However, this Note argues that upholding summary judgment for the cadets was incorrect in light of the "action in concert" and conspiracy state-action tests, and that the decision violated general principles of fairness. Part II contains the factual and procedural background of the *Mentavlos* case. Part III offers a critique of the Fourth Circuit's holding and reasoning in *Mentavlos*. Part III also analyzes the *Mentavlos* facts in light of other state-action tests not considered by the parties, the district court, or the Fourth Circuit. Part IV concludes by offering suggestions for future similar state-action cases brought to the Fourth Circuit.

II. BACKGROUND

A. Factual Background

The State of South Carolina established The Citadel in Charleston on December 20, 1842.[13] The school incorporates military discipline and training into its educational curriculum.[14] To implement its strict military-style education, The Citadel established what is known as the "Fourth Class System."[15] This system allows upperclassmen to ensure that freshmen cadets, also known as "knobs," learn the procedures and traditions of The Citadel by requiring "strict and unquestioning obedience, mental and physical toughness, and mature tolerance of confrontation."[16] Knobs are expected to respect upperclassmen and to comply with their orders without question or hesitation.[17] Therefore, the Fourth Class System's treatment of knobs reinforces The Citadel's overall military-style education.[18]

> or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

Id.

11. 249 F.3d 301 (4th Cir. 2001).

12. *Id.* at 305.

13. THE CITADEL, ORIGINS, *at* http://www.citadel.edu/history/origins.html (last visited Mar. 16, 2002) [hereinafter ORIGINS]. The Citadel is also known as the South Carolina Military Academy. *Id.*

14. *See id.*

15. *See* THE CITADEL, THE FOURTH CLASS SYSTEM MANUAL OF THE CORPS OF CADETS 5 (2000) [hereinafter THE FOURTH CLASS SYSTEM MANUAL].

16. *Id.*

17. *See id.* at 7-8.

18. *See id.* at 5.

Although The Citadel historically performed distinctly military functions,[19] its primary purpose is now "to educate undergraduates as members of the South Carolina Corps of Cadets and to prepare [undergraduates] for post-graduate positions of leadership through academic programs of recognized excellence supported by the best features of a structured military environment."[20]

For more than a century, The Citadel provided this unique educational experience to males only. Compelled by a court order, The Citadel admitted a female cadet in August 1995.[21] Jeanie Mentavlos and three other females enrolled as cadets the following year.[22]

Shortly after her arrival at The Citadel, Mentavlos received her first exposure to the Fourth Class System. According to her account, the treatment she experienced from at least five cadets constituted "'sexual harassment, intimidation, and abuse.'"[23] Mentalvos claimed that this treatment was the result of a conspiracy "to perpetuate the former all-male Corps of Cadets by driving her from the school.[24] Two of the cadets, John Justice Anderson and James Saleeby, were defendants in the case.[25]

As to Cadet Anderson, the district court found sufficient evidence to support allegations that he: (1) left welts on Mentavlos' chin by pushing cardboard in her face because she smiled while standing at attention, (2) possibly subjected Mentavlos to unequal treatment when she was found drinking alcohol, and (3) threatened her with physical harm or death on numerous occasions.[26]

Regarding Cadet Saleeby, the court concluded that evidence supported allegations that he: (1) kicked Mentavlos without leaving bruises, (2) entered her room wearing only gym shorts and sandals, and (3) ordered another cadet to light Mentavlos' clothing on fire while she was wearing it and then put out the fire with his foot.[27]

Mentavlos alleged that due to these and other incidents, she decided to withdraw from The Citadel in December 1996.[28]

---

19. *See* ORIGINS, *supra* note 13. The buildings that came to be called The Citadel originally served as guard houses that provided military and police protection for Charleston in the late 1820s and 1830s. *Id.* Guard duty was later combined with education in 1842, and the current version of The Citadel began to take shape. *Id.*

20. THE CITADEL, MISSION STATEMENT, *at* http://www.citadel.edu/library/KnobScan/citadel_mission1.pdf (last visited Mar. 16, 2002) [hereinafter MISSION STATEMENT]. *But see* Mentavlos v. Anderson, 249 F.3d 301, 314 (4th Cir. 2001) (stating that The Citadel's mission statement during Mentavlos' attendance read "'to educate male undergraduates'") (citation omitted).

21. *See supra* note 2 and accompanying text.

22. Burritt, *supra* note 3, at A14.

23. *Mentavlos*, 249 F.3d at 306 (citation omitted).

24. *Id.*

25. *Id.*

26. Mentavlos v. Anderson, 85 F. Supp. 2d 609, 613 (D.S.C. 2000).

27. *Id.* at 612-13. The fire incident did not burn Mentavlos. *Id.* at 612.

28. *Id.* at 611. In addition to the incidents described by the court, allegations of other instances of hazing have surfaced. For example, Mentavlos was allegedly denied food until she could correctly answer a question "about the Knights of the Golden Circle, an extreme faction of the [Ku Klux Klan]." *Female Cadet at The Citadel Allegedly Hazed for Lack of Klan Knowledge*, JET, June 30, 1997, at 26.

B. Procedural Background

In 1997, Jeanie Mentavlos filed a lawsuit in the United States District Court for the District of South Carolina, claiming that her constitutional right to equal protection was abridged in violation of 42 U.S.C. § 1983 and 42 U.S.C. § 1985; she also argued that her right to receive an education was abridged in violation of Title IX of the Educational Amendments of 1972.[29] She named as defendants The Citadel and its governing Board of Visitors, Captain Richard Ellis, and five upper-class cadets of "Echo Company,"[30] the unit of cadets to which she had been assigned.[31]

Before the trial commenced, all defendants except one moved for summary judgment.[32] Eventually, The Citadel, Captain Ellis, and three of the cadets settled with Mentavlos.[33] Mentavlos subsequently amended her complaint to assert a § 1983 claim against only Anderson and Saleeby, and she chose to proceed to trial solely on the § 1983 claim.[34] Anderson and Saleeby thereafter moved for summary judgment, arguing that they were not state actors because they "did not act 'under color of' state law for purposes of § 1983."[35]

Judge Joseph Anderson agreed that the defendants were not state actors and granted both of their summary judgment motions.[36] The district court subsequently certified the case for immediate appeal.[37] Mentavlos acted upon this certification and appealed Judge Anderson's ruling to the United States Court of Appeals for the Fourth Circuit.[38]

On appeal, Mentavlos asserted that the district court erroneously granted summary judgment to cadets Anderson and Saleeby.[39] Specifically, she contended that the district court erred in holding that neither cadet was a state actor for purposes of § 1983 because the cadets performed "powers traditionally exclusively reserved to the State,"[40] and their actions were "fairly attributable to the State."[41] In affirming the district court's grant of summary judgment, the Fourth Circuit held

---

29. *Mentavlos*, 249 F.3d at 306.

30. *Id.* at 306. Captain Ellis was the commanding administrative officer of Echo Company. *Id.*

31. *Id.*

32. *Id.* One cadet was in default. *Id.*

33. *See id.*; *see also Citadel Ex-Cadet's Suit Dismissed*, WASH. POST, Feb. 16, 2000, at A8 (noting that The Citadel settled with Mentavlos for $100,000, that the settlement terms included no admission of fault by The Citadel or its administrators, and that this settlement also covered Captain Ellis).

34. *Mentavlos*, 249 F.3d at 306.

35. *Id.*

36. Mentavlos v. Anderson, 85 F. Supp. 2d 609, 628 (D.S.C. 2000). Regarding Saleeby, the district court alternatively granted his motion for summary judgment because Mentavlos failed to prove that his actions were "motivated by gender bias." *Id.*

37. *Mentavlos*, 249 F.3d at 307.

38. *Id.*

39. *Id.* at 312.

40. *Id.* at 314 (citation omitted).

41. *Id.* at 318.

that the cadets were not state actors because they neither exercised exclusively state functions nor acted in a manner that was fairly attributable to the State.[42]

III. ANALYSIS

A. None of the Traditional State-Action Tests Argued by Mentavlos Supports a Finding That the Cadets Are State Actors for Section 1983 Purposes

To establish a § 1983 claim, a plaintiff must demonstrate that the defendant "deprived him of a right secured by the 'Constitution and laws' of the United States," and he must show that the defendant "deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.'"[43] Thus, to succeed on her § 1983 claim against cadets Anderson and Saleeby, Mentavlos had to prove that they deprived her of a constitutional right while acting under color of state law. Both the district court and the Fourth Circuit dodged the issue of whether the cadets deprived Mentavlos of a constitutionally guaranteed right,[44] though the trial court granted summary judgment for Saleeby on the alternative ground that Mentavlos had failed to prove that her actions were discriminatory.[45] Consequently, the Fourth Circuit addressed only the issue of whether Mentavlos had proved that the cadets' actions were, in essence, actions of the state.[46] Mentavlos advanced two unpersuasive arguments in an attempt to illustrate how the cadets were state actors.

Mentavlos first argued that she should avoid summary judgment based on the "traditional government function" state-action test, claiming that The Citadel's use of unique techniques to train civilians for military service represented a traditional state function.[47] Her argument is misplaced for two reasons. First, and most obviously, The Citadel does not train civilians for military service;[48] rather, the school seeks to train responsible and outstanding civic leaders.[49] The court properly noted that educating and preparing students for community leadership have never been exclusive functions of the State.[50] Additionally, the school is not a service academy which merely trains civilians for the military; rather it incorporates a military model into its educational curriculum.[51] Mentavlos failed to demonstrate how The Citadel's offering of an educational curriculum based on a military model

---

42. *Id.* at 322-23. The Supreme Court recently denied Mentavlos' petition for certiorari. Mentavlos v. Anderson, 122 S. Ct. 349 (2001) (mem.).

43. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

44. *Mentavlos*, 249 F.3d at 323 n.8.

45. Mentavlos v. Anderson, 85 F. Supp. 2d 609, 628 (D.S.C. 2000).

46. *Mentavlos*, 249 F.3d at 305.

47. *Id.* at 312, 314.

48. *Mentavlos*, 249 F.3d at 314.

49. MISSION STATEMENT, *supra* note 20.

50. *Mentavlos*, 249 F.3d at 314.

51. *Id.* at 316. The court notes that in this respect, "there is 'no significant distinction between what The Citadel does and what many private secondary schools do.'" *Id.* (quoting Mentavlos v. Anderson, 85 F. Supp. 2d 609, 623 (D.S.C. 2000)).

proved that its cadets performed functions traditionally reserved to the state. Even if Mentavlos had proved that The Citadel was a state actor due to its unique educational style, she still would have had to show that the state or the institution cloaked the cadets "with sovereign powers traditionally reserved exclusively to the government."[52]

Mentavlos' claim was further weakened by her argument that Citadel cadets are given government authority because they are in the military just like cadets at federal military-service academies.[53] Simply put, Cadets Anderson and Saleeby were not government military personnel performing traditional government functions when they enforced military-style discipline at The Citadel. Both the district court and the Fourth Circuit discussed at length the absence of the cadets' ties with the United States Armed Forces as a crucial factor in determining whether the State delegated to the cadets traditional government powers.[54] Mentavlos argued that because The Citadel required its cadets to participate in a Senior Reserve Officers' Training Corps (ROTC) program, they were granted military powers by the State.[55] However, the Fourth Circuit found that cadets participated in ROTC just like other state-supported college students, which partly defeated Mentavlos' claim that the state cloaked the cadets with some special authority.[56] Furthermore, cadets are not enlisted members of any military service branch, and they incur no military-service commitment by virtue of their attendance at The Citadel.[57] In finding that Citadel cadets were not similar to service-academy cadets, the Fourth Circuit attached particular significance to the fact that none of the cadets involved in the

---

52. *Id.*

53. *Id.* at 315-16. Cadets at the federal military-service academies incur a service commitment by enrolling and attending the academies. *Id.* at 315. For example, at the United States Military Academy (West Point), cadets who enroll automatically agree to serve for five years of active duty and for three years of reserve duty as "repayment" for the cost-free education they receive at the academy. *See* FAQS: ABOUT WEST POINT, *at* http://www.usma.edu/admissions/ faqs_wp.asp (last visited Mar. 16, 2002).

54. *Mentavlos*, 249 F.3d at 314-18; *see also Mentavlos*, 85 F. Supp. 2d at 622-23.

55. *See Mentavlos*, 249 F.3d at 315. As part of its curriculum, The Citadel requires all cadets to participate in Senior ROTC programs, meaning that the cadets receive military education and training to prepare them for a possible commission in the armed forces upon graduation. *See* UNITED STATES ARMY: CADET COMMAND HEADQUARTERS, FREQUENTLY ASKED QUESTIONS, *at* http://www.rotc.monroe.army.mill/faqs/ (last visited Mar. 16, 2002). However, only cadets who are on scholarship under these programs and who have an intent to enter active military duty upon graduation are under a "commitment contract." *Id.* Mere attendance at The Citadel or participation in a Senior ROTC program, without more, does not mean that a cadet has a military service commitment or is considered to be in the military. *Mentavlos*, 249 F.3d at 315.

56. *Mentavlos*, 249 F.3d at 315. The military-style discipline which upper-class cadets exercise over fourth-class cadets on a constant basis is not a product of the ROTC program. The disciplinary system is part of the greater overall military-style educational experience offered by The Citadel, of which the ROTC programs are an integral part. *See id.* In other words, upper-class cadets exercise their unique discipline over fourth-class cadets even when the cadets are not performing in their ROTC programs. Therefore, the mere existence of ROTC programs at The Citadel does not grant cadets any special authority because most institutions of higher education also offer these programs. *See id.*

57. *Id.*

case held ROTC commitment contracts; furthermore, the court noted that "only about one-third of the Corps of Cadets enter[ed] military service upon graduation."[58] Accordingly, the court correctly concluded that the cadets were not military personnel.[59] Consequently, they could not be held as state actors for § 1983 purposes based on the argument that they were cloaked with traditional government powers by virtue of their being in the military.[60] Thus, Mentavlos' reliance upon the traditional government function state-action test was faulty, and this argument utterly failed to convince the district court and the Fourth Circuit that summary judgment was improper.[61]

Mentavlos next argued the "fairly attributable" state-action test, claiming that because the State provides funding to The Citadel and regulates its administration, the cadets' actions thereunder should be treated as under color of state law.[62] This argument also falls short of the mark. Mentavlos argued in the district court that both the State and The Citadel empowered the cadets to perform traditionally state functions by promulgating the rules and regulations that established the disciplinary system under which these cadets improperly harassed and discriminated against Mentavlos.[63] However, cadets' authority over freshmen is generally of limited scope.[64] The regulations underlying the Fourth Class disciplinary system prohibit gender-based harassment and discourage abuse of the special position occupied by upperclassmen over freshmen.[65] Under The Citadel's own regulations, an upper-

58. *Id.* Mentavlos also relied on the doctrine of *Feres v. United States*, 340 U.S. 135, 146 (1950), which states that the Federal Tort Claims Act did not provide a cause of action against the United States for military personnel who sustained injuries due to military service. *Id.* at 314. The *Feres* doctrine has been applied to cadets at the federal military-service academies, and therefore Mentavlos argued that Citadel cadets were similarly "in the military." *Mentavlos*, 249 F.3d at 314; *see also* Collins v. United States, 642 F.2d 217, 220-21 (7th Cir. 1981) (holding that Air Force Academy cadets were "in the military" for purposes of the *Feres* doctrine). Nevertheless, for the reasons discussed in the text above, the Fourth Circuit concluded that *Feres* had no application to this case, and that Citadel cadets were not "in the military." *Mentavlos*, 249 F.3d at 315-16. In fact, during the academic year 1996-97, the term for which Mentavlos was admitted, 1821 cadets were at The Citadel, and only 264 of them were on an ROTC scholarship and under a commitment contract; furthermore, only thirty-two percent of the graduating seniors received commissions in the United States military. THE CITADEL, CORPS OF CADETS, *at* http://www.citadel.edu/planningandassessment/factbook/corps (last visited Mar. 16, 2002).

59. *Mentavlos*, 249 F.3d at 315-16.

60. *Id.* at 316.

61. *Id.*; *see also* Mentavlos v. Anderson, 85 F. Supp. 2d 609, 624 (D.S.C. 2000).

62. *Mentavlos*, 249 F.3d at 318.

63. *Mentavlos*, 85 F. Supp. 2d at 623; *see also* Leon Friedman, *Anatomy of a State Action Case:* Mentavlos v. Anderson, *in* 641 PRACTISING LAW INSTITUTE, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 355, 379-81 (2000) (discussing the alleged nexus between the state and the Citadel cadets).

64. *See* THE FOURTH CLASS SYSTEM MANUAL, *supra* note 15, at 7-8; *see also Mentavlos*, 249 F.3d at 308 (stating that the fourth class system expressly prohibits impermissible discrimination, provides for complaint procedures, and strictly prohibits hazing or abusive treatment).

65. THE FOURTH CLASS SYSTEM MANUAL, *supra* note 15, at 6-8.

class cadet can not touch freshmen without permission, and even then touching is allowed only in limited circumstances.[66]

Based on the foregoing analysis, Mentavlos' focus on the school's disciplinary regulations to prove Cadets Anderson and Saleeby acted under color of state law seems flawed. If The Citadel's rules prohibit the exact type of treatment that Mentavlos allegedly received from Cadets Anderson and Saleeby, then her argument that the cadets' actions, under these same rules, were fairly attributable either to the state or to The Citadel must fail.[67] The court agreed that cadets' authority under the Fourth Class System did not grant them powers traditionally reserved to the state.[68] Furthermore, The Citadel administration disciplined many of the cadets involved in the alleged harassment,[69] which further convinced the court that neither The Citadel nor its regulations extended to the cadets authority to engage in harassment, abuse, or discrimination.[70] Based on the foregoing considerations, the court correctly held that "the challenged actions of Anderson and Saleeby could not be fairly characterized as taken in furtherance of the limited authority granted to upper-class cadets to instruct and correct fourth class cadets."[71]

A particularly weak point in Mentavlos' argument is that she focused on the wrong "person" as acting under color of state law. To bolster her § 1983 claim, Mentavlos should have focused on how Cadets Anderson and Saleeby themselves acted under color of state law.[72] Evidence that The Citadel receives funding from and is regulated in various respects by the State does not show how the individual cadets' actions were to be taken as actions of the State.[73] Cadets Anderson and Saleeby were merely private students who benefitted from a government-regulated and publicly-assisted institution of higher education.[74] In the absence of evidence that the State provided special assistance to the Citadel cadets, the Fourth Circuit believed that mere government funding and regulation of The Citadel was insufficient to make the cadets' actions fairly attributable to the state.[75]

As pleaded and argued, Mentavlos' § 1983 claim was doomed to fail against the cadets' summary judgment motions. She had the burden of proving that in some manner Cadets Anderson and Saleeby, as private students at a non-federal military service academy, were transformed from students to state actors when they allegedly harassed her, discriminated against her, and denied her an equal right to education because of her gender. The strategy of using traditional state-action tests

66. *Mentavlos*, 249 F.3d at 308 (citations omitted). Touching can occur only in open view of another cadet and only for instructional or correctional purposes. *Id.*

67. *See Mentavlos*, 85 F. Supp. 2d at 625.

68. *See Mentavlos*, 249 F.3d at 320-21.

69. *See* Hewitt & Sider, *supra* note 6, at 43 (indicating that eleven cadets were brought up on disciplinary charges, and at least one was suspended, due to the alleged harassment).

70. *See Mentavlos*, 249 F.3d at 320-21.

71. *Id.* at 321.

72. *See supra* note 10 and accompanying text.

73. *Mentavlos*, 249 F.3d at 318-19.

74. *Id.* at 319.

75. *Id.*

to prove that private students could become state actors clearly failed to persuade either the district court or the Fourth Circuit. Mentavlos needed to look beyond the face of § 1983 to find an argument that could overcome the cadets' summary judgment motions. Such an argument exists in a variation of the state-action tests under § 1983 which will be discussed below.[76]

B. Public Policy Supports Finding That Cadets as Individually and Privately Acting Students Are Not Themselves State Actors for Purposes of Section 1983

Courts have consistently held that § 1983 does not reach purely private conduct; the statute reaches private discriminatory conduct only when it is facilitated and authorized by the actor's state-derived power.[77] This limited scope is evidenced by § 1983's required element of state action.[78] The United States Supreme Court has reasoned that § 1983's scope is so limited because "[w]ithout a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them."[79] If the Fourth Circuit were to have held that private cadets' conduct constituted state action under the traditional state-action tests, the Supreme Court's fears would have been realized. Section 1983's scope limitations would have become illusory.

Mentavlos' two principal arguments attempted to circumvent § 1983's established purpose and policy. First, Mentavlos failed to produce evidence that The Citadel's military-style education transformed it into a service academy which trained civilians for the military and performed traditional state functions.[80] Second, she failed to demonstrate how private cadets who attended non-service academies, who incurred no service commitment, and who were not bound under a ROTC contract performed traditional state functions.[81] Mentavlos essentially asked the Fourth Circuit to find that private students were state actors merely because they attended an institution that incorporated military-style discipline into its curriculum. Such a position is contrary to § 1983 case law and is unsound from a policy standpoint.[82]

A recent Ninth Circuit case, *Sutton v. Providence St. Joseph Medical Center*,[83] has rejected a similar argument as to why private employers should be considered

---

76. *See infra* Part III.C.

77. *See, e.g.*, Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 58 (1999) (refusing to attribute a private insurer's decisions to the state); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 835 (9th Cir. 1999) (noting that private discriminatory acts are not reached by § 1983 even when they are particularly egregious).

78. *See supra* note 10 and accompanying text.

79. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

80. *See supra* notes 47-52 and accompanying text.

81. *See supra* notes 53-61 and accompanying text.

82. See *supra* notes 77-79 and accompanying text.

83. 192 F.3d 826 (9th Cir. 1999).

state actors for purposes of § 1983. In *Sutton*, the plaintiff filed various actions against a private employer after the employer refused to hire him.[84] The plaintiff was not hired because he refused to provide the employer with a social security number as mandated by law due to his religious beliefs.[85] The *Sutton* plaintiff argued that the statute constituted governmental compulsion, and thus, the employer's refusal to hire him was an action performed under color of state law.[86] The *Sutton* court declined to find that private employers were state actors when they merely complied with an applicable law, noting that the plaintiff's argument would result in the unsound policy of "convert[ing] every employer—whether it ha[d] one employee or 1,000 employees—into a governmental actor every time it complie[d] with a presumptively valid, generally applicable law . . . . Private employers would then be forced to defend those laws and [to] pay any consequent damages."[87]

The *Sutton* plaintiff's argument is very similar to Mentavlos' first argument. Mentavlos contended that by mere attendance at a military-type school, students are transformed into military personnel and thus serve traditional government functions.[88] If the Fourth Circuit agreed with Mentavlos, then every private person who entered an educational institution that based its curriculum on military-style discipline would, by his attendance alone, be in the military and consequently would be a state actor for § 1983 purposes.

The danger in upholding Mentavlos' traditional state-action arguments is evident. Holding that Citadel cadets are state actors merely due to their attendance at a military-style educational institution would unnecessarily expand § 1983's limited scope, would create a new class of state actors, and would drastically increase private students' potential liability.[89] High schools, junior colleges, and many public and private universities throughout the country base their curricula in whole or in part on the military model, even though they are not service academies.[90] In effect, Mentavlos' argument would significantly expand the scope

---

84. *Id.* at 830-44. The *Sutton* plaintiff asserted a claim under the Religious Freedom Restoration Act (RFRA), which includes an "under color of state law" provision similar to § 1983's. *Id.* at 834; *see* 42 U.S.C. § 2000bb-2(1). Indeed, the court analyzed the "under-color-of-state-law" provision of RFRA in light of § 1983 decisions concerning that provision. *Sutton*, 192 F.3d at 834-36. The court noted that "'[w]hen a legislature borrows an already judicially interpreted phrase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase, but the judicial construction of that phrase.'" *Id.* at 834-35 (quoting Long v. Dir., Office of Workers' Comp. Programs, 767 F.2d 1578, 1581 (9th Cir. 1985)). Furthermore, the court indicated that "'the required degree of [government] action under RFRA is analyzed under the same standard as § 1983.'" *Id.* at 835 (quoting Brownson v. Bogenschutz, 966 F. Supp. 795, 797 (E.D. Wis. 1997)) (alteration in original).

85. *Sutton*, 192 F.3d at 829-30. The plaintiff contended that social security numbers were the "Mark of the Beast" and that "his religion prevented him from providing such a number." *Id.*

86. *Id.* at 837.

87. *Id.* at 838.

88. *See supra* notes 47-61 and accompanying text.

89. *See* Mentavlos v. Anderson, 85 F. Supp. 2d 609, 623 (D.S.C. 2000).

90. Some high schools, like the Fork Union Military Academy (Fork Union, VA) and the Marine Military Academy (Harlingen, TX), base their educational curriculum on a military model, even though the schools are not federal service academies. *See* FORK UNION MILITARY ACADEMY, ABOUT

of § 1983 to cover the private action of all students who attended an institution with even a hint of "military flavor," when by its very language that scope is limited to state action.[91] Students' personal actions, even if taken under a particular type of model or system, do not, without more, rise to the level of action under color of state law because there is no extension or element of action by the state. Such private actions fail to satisfy the traditional state-action tests, and the Fourth Circuit correctly declined to extend § 1983's coverage to private students simply because they attended a school which implemented a military-style education.[92]

Mentavlos' second argument—that the cadets' actions under the state-regulated disciplinary curriculum were fairly attributable to the state and thereby made them state actors[93]—is also contrary to § 1983's policy. Although state regulation and funding of The Citadel demonstrates more state involvement than was shown in Mentavlos' first argument, her second argument is nevertheless fatally flawed. Mentavlos produced no evidence showing that the defendants or any of the cadets themselves received special state funding or were subject personally and individually to state regulation.[94] Therefore, her argument failed to demonstrate any state involvement in the cadets' personal decisions and actions.[95] Certainly, the State regulates some general aspects of The Citadel through funding and by virtue of having various of the institution's employees on its payroll, but this evidence goes to prove that The Citadel itself, rather than the cadets, is a state actor.[96] To agree with Mentavlos is to transform private action into state action merely because students, by virtue of attending an institution whose systems and regulations are promulgated by the State and by the institution itself, act pursuant to those systems and regulations. The State does not direct, regulate, or mandate individual students' actions; rather, it solely controls the institutional infrastructure.[97] If anyone is to be liable as a state actor for constitutional injuries resulting from these policies and procedures, the liable party should be the institution that implemented and administered the system, rather than the students whose private actions merely

---

FUMA, *at* http://www.forkunion.com/info/about/index.html (last visited Mar. 16, 2002); MARINE MILITARY ACADEMY, CHARACTERISTICS OF INSTITUTION, *at* http://www.ies-ed.com/descriptions/marine_military/1.html (last visited Mar. 4, 2002). Some colleges, like the Virginia Military Institute (Lexington, VA), employ military models for their entire educational style and institutional infrastructure. VIRGINIA MILITARY INSTITUTE, VIRGINIA MILITARY INSTITUTE, *at* http://www.vmi.edu (last visited Mar. 16, 2002). Other colleges, such as Texas A&M University (College Station, TX), provide a non-military-based curriculum while simultaneously offering students who desire a military-style education a separate learning experience. TEXAS A&M, FACTS AND STATS, *at* http://www.tamu.edu/univrel/sheets/d00.html (last visited Mar. 16, 2002).

91. *See* 42 U.S.C.A. § 1983 (West Supp. 2001).

92. Mentavlos v. Anderson, 249 F.3d 301, 314-16 (4th Cir. 2001).

93. *See supra* notes 62-75 and accompanying text.

94. *Mentavlos*, 249 F.3d at 319.

95. *Id.*

96. *Id.*

97. The State of South Carolina originally established The Citadel to train cadets in the context of a military-style educational curriculum. *See* ORIGINS, *supra* note 13. This institutional infrastructure has continued to the present. *See* MISSION STATEMENT, *supra* note 20.

conformed to the system. Thus, Mentavlos' argument failed to prove the requisite connection between the cadets' private actions and the State's involvement.[98]

Mentavlos' position also presents the threat of a "slippery slope" and unnecessarily expands the scope of § 1983's coverage. For the Fourth Circuit to hold that private students' actions are fairly attributable to the state because the students acted pursuant to institutional systems regulated and funded by the state would subject many students acting in various capacities to § 1983 liability.[99] For example, a high school or college football player acts under and in accordance with rules and regulations enacted by athletic associations, and courts have held that the associations are themselves state actors.[100] Following Mentavlos' theory to its logical conclusion, these players would become state actors for § 1983 purposes when they participated in games and practices; thus, any perceived constitutional injury that occurred during those events would subject those students to liability. In this situation, and in many others similar to it, the state action occurs at the institutional level rather than at the individual student level. Mentavlos' interpretation of § 1983 would nevertheless reach this purely private conduct, even though such conduct has no connection with the state. Such a reading of § 1983 is plainly contrary to the statute's language and to its policy and purpose.[101]

C. *Both the Fourth Circuit and Mentavlos Overlooked a Section 1983 Theory That Could Have Allowed Mentavlos To Avoid Summary Judgment*

Although § 1983 is not intended to reach "'merely private conduct, no matter how discriminatory or wrongful,'"[102] an exception arises when private actors act jointly, or in concert, with a person recognized as a state actor for § 1983 purposes.[103] The United States Supreme Court has held that

> to act "under color of" state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions.[104]

Similarly, the Fourth Circuit has held that "'private persons who willfully participate in joint action with a state official act under color of state law within the

98. *Mentavlos*, 249 F.3d at 318.

99. *See supra* notes 89-91 and accompanying text.

100. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001).

101. *See* Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 835-36 (9th Cir. 1999).

102. *Mentavlos*, 249 F.3d at 310 (quoting Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999)).

103. Dennis v. Sparks, 449 U.S. 24, 27-28 (1980).

104. *Id.*

meaning of § 1983.'"[105] Thus, federal courts have recognized a theory that could subject Cadets Anderson and Saleeby to liability under § 1983 for their alleged sexual abuse and harassment of Mentavlos, even though the cadets were not themselves considered state actors.

If Mentavlos had pleaded and argued a "conspiracy" or "joint-action" claim under § 1983, she probably could have avoided summary judgment at the district court level. The Fourth Circuit has followed the holding that "'[t]o prove a conspiracy between the state and private parties under Section 1983, the [plaintiffs] must show 'an agreement or 'meeting of the minds' to violate constitutional rights.'"[106] Summary judgment is proper when there exists "no genuine issue as to any material fact" and when the "moving party is entitled to judgment as a matter of law."[107] The district court granted the cadets' motions for summary judgment because Mentavlos' arguments failed to create a genuine issue of material fact as to whether the cadets were state actors.[108] Mentavlos might have avoided summary judgment by creating an issue of fact as to whether the private cadets conspired or acted jointly with state actors and administrators to deprive her of her constitutional rights. To support this conspiracy or joint action assertion, Mentavlos would have had to argue and produce the following evidence: (1) Citadel administrators and her commanding officer were state actors for purposes of § 1983, and (2) they acted jointly with the cadets, including Anderson and Saleeby, to create a hostile and abusive environment for her.[109]

First, Mentavlos would have had to argue and prove that The Citadel, its administrators, and the company commander were state actors for § 1983 purposes.[110] Mentavlos inadvertently raised an issue of fact regarding The Citadel's status as a state actor in her discussion of Anderson and Saleeby's status. She claimed that the cadets were state actors because "The Citadel [is] a state-supported

---

105. *See* John Hancock Mut. Life Ins. Co. v. Anderson, No. 90-1749, 1991 WL 99073, at *2 (4th Cir. July 15, 1991) (quoting Scott v. Greenville County, 716 F.2d 1409, 1422 (4th Cir. 1983)); *see also* Lord v. Riley, No. 89-1479, 1990 WL 209862, at *2 (4th Cir. Jan. 23, 1991) (indicating that "[i]t is true that an otherwise private action may come within the scope of section 1983 if it can be established that an individual acted jointly with agents of the state in a conspiracy or 'meeting of the minds' to deprive the plaintiff of his or her civil rights."); McNabb v. North Carolina, No. 1:00CV203-T, 1:00CV205-T, 2001 WL 1020041, at *3 (W.D.N.C. Apr. 11, 2001) (stating that "[a] private [defendant] can act under color of state law if 'he is a willful participant in joint action with the state or its agents'") (quoting *Dennis*, 449 U.S. at 27-28)).

106. *See John Hancock*, 1991 WL 99073, at *2 (quoting United Steelworkers of Am. v. Phelps Dodge, 865 F.2d 1539, 1540-41 (9th Cir. (1989)) (alteration in original).

107. FED. R. CIV. P. 56(c); *see also* Reuber v. Litton Indus., Inc., No. JH-82-910, JH-85-2028, 1986 WL 3370, at *3 (D. Md. Mar. 14, 1986) (stating that "'[s]ummary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances'" (quoting Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co., 381 F.2d 245, 249 (4th Cir. 1967))).

108. *See Mentavlos*, 249 F.3d at 323.

109. *See supra* notes 103-05 and accompanying text.

110. *See supra* notes 103-05 and accompanying text.

college . . . and receives financial assistance and other support from the state."[111] Indeed, the Fourth Circuit responded to this argument, stating that "state assistance provided to The Citadel might be pertinent to a determination of whether The Citadel is a state actor."[112] The court further noted that the State of South Carolina created The Citadel, provides assistance to the school, and pays its employees' salaries.[113] Therefore, Mentavlos produced sufficient evidence to create a genuine issue of fact as to whether The Citadel and its administrators are state actors for § 1983 purposes.

Nevertheless, any alleged conspiracy may not have involved Citadel administrators. Therefore, Mentavlos would also need to show that her commanding administrative officer, Captain Richard Ellis, was a state actor in order to support a conspiracy claim under § 1983.[114] The Fourth Circuit referred to Captain Ellis as the "army officer" assigned to Mentavlos' unit.[115] Since Captain Ellis is an officer of the United States Army and was acting with supervisory authority at a state institution, he is arguably a state actor.[116] His position in the military and his state-promulgated authority in his capacity at The Citadel create a genuine issue as to whether he was a state actor for § 1983 purposes. Consequently, Mentavlos could likely have survived summary judgment based on a § 1983 conspiracy claim.

Second, and most importantly, Mentavlos would need to present proof that Cadets Anderson and Saleeby conspired or acted jointly with at least one state actor in depriving her of her constitutional rights.[117] To meet this burden, Mentavlos would have to show that the state actors and the private parties reached an agreement, or a meeting of the minds, to deprive her of her federally guaranteed

111. *Mentavlos*, 249 F.3d at 318-19. The Citadel does in fact receive state support. *See* S.C. CODE ANN. § 59-107-10 (West Supp. 2000). Mentavlos also argued that The Citadel is "governed by state officials whose powers are defined by statute." *Mentavlos*, 249 F.3d at 319. However, while some South Carolina high officials are part of The Citadel's Board of Visitors, they serve *ex officio* in their capacity as board members. *See* S.C. CODE ANN. § 59-121-10 (West Supp. 2000). However, there is clearly some state involvement in The Citadel's operation as Mentavlos asserted.

112. *Mentavlos*, 249 F.3d at 319.

113. *Id.*

114. *See supra* notes 103-05 and accompanying text.

115. *Mentavlos*, 249 F.3d at 306. At the time of the Mentavlos incidents, Captain Ellis was in fact an active duty commissioned officer in the United States Army; he was assigned through the Army ROTC program at The Citadel as the officer in charge of Mentavlos' unit and its barracks where much of the alleged harassment occurred. *See* Sybil Fix, *Mentavlos Tells Story*, POST & COURIER (Charleston, S.C.), Feb. 15, 1997, at A1.

116. *See supra* notes 53-61 and accompanying text.

117. *See supra* notes 103-05 and accompanying text.

rights.[118] Satisfying this burden may prove difficult,[119] but to avoid summary judgment Mentavlos would need only to create an issue of fact about whether the administrators and the cadets reached an agreement to deprive her of her constitutional rights.[120]

Mentavlos must initially create a factual issue as to whether Cadets Anderson and Saleeby reached some type of agreement with administrators or with their commanding officer.[121] In her brief to the Fourth Circuit, Mentavlos alleged various facts that could create such an issue. She asserted that The Citadel's unfriendly response to Shannon Faulkner's admission and its subsequent jubilation in her withdrawal evidenced an internal desire to create an environment hostile to female cadets.[122] She also claimed that Citadel administrators openly resisted changes in the school's tradition of "zealously oppos[ing] the introduction of females into the student population" by failing to make appropriate procedural changes to encourage gender integration.[123]

However, the assertions Mentavlos made concerning the history of the company into which she was placed upon her arrival at The Citadel are most significant for conspiracy purposes. Mentavlos claimed that the administration consciously placed her into Echo Company, a cadet company allegedly "known for its strict military methodology, low grades, and harshness on knobs."[124] If Citadel administrators truly had a tacit desire to treat women as harshly as possible to ensure that they would withdraw from the school, then Mentavlos could argue that

---

118. *See* McNabb v. North Carolina, No. 1:00CV203-T, 1:00CV205-T, 2001 WL 1020041, at *3 (W.D.N.C. Apr. 11, 2001); *see also* John Hancock Mut. Life Ins. Co. v. Anderson, No. 90-1749, 1991 WL 99073, at *2 (4th Cir. July 15, 1991) (noting that private parties must willfully participate with a state actor).

119. *See* Lord v. Riley, No. 89-1479, 1990 WL 209862, at *2 (holding that since the plaintiff did not produce any evidence of an agreement between a police officer and a firefighter, she failed to show a conspiracy under § 1983 for improper arrest); *see also John Hancock*, 1991 WL 99073, at *2 (holding that where evidence showed the defendant merely acquiesced in a police investigation, the plaintiff failed to prove a conspiracy under § 1983, *but see* Dennis v. Sparks, 449 U.S. 24, 29 (1980) (holding that "[p]rivate parties who corruptly conspire with a judge in connection with [bribery concerning that judge] are thus acting under color of state law within the meaning of § 1983").

120. *See supra* notes 103-05 and accompanying text.

121. *See supra* note 118 and accompanying text.

122. *See* Friedman, *supra* note 63, at 427-67 (containing Mentavlos' appellate brief to the Fourth Circuit, submitted by Leon Friedman, who served as one of Mentavlos' counsel). The brief's "Statement of Facts" details incidents surrounding the hostile welcome Shannon Faulkner received at The Citadel. *Id.* at 433. Mentavlos asserts that the administration did little or nothing to accept or to protect Faulkner, and that upon her departure from The Citadel, cadets "danced and rejoiced in the rain." *Id.* Mentavlos even compared The Citadel's response to female cadets being admitted to "the welcome which [the first black student] received when he enrolled at the University of Mississippi Law School in 1962." *Id.*

123. *Id.* at 435.

124. *Id.* at 437. Mentavlos also alleged that Echo Company was nicknamed "the Stalag." *Id.* Furthermore, Mentavlos' "Statement of Facts" claims that Echo Company had an open obsession with Nazism and Adolf Hitler, which was evidenced by members, "openly display[ing] swastikas in one form or another, and etch[ing] double lightning-bolts, representing Hitler's elite 'SS' troops during WWII, on the outside of their hats." *Id.*

the administrators deliberately ignored Echo Company's allegedly blemished history and placed her in a unit in which she would be harassed and pressured to quit. Whether this argument and the facts on which it is premised are credible would be an issue for the jury to decide.

To survive summary judgment, Mentavlos would still have to show some agreement, understanding, or meeting of the minds between either the administrators or the commanding officer and the cadets of Echo Company.[125] Evidence to demonstrate such an agreement or understanding may exist due to the lenient punishment of one of the cadets involved in the alleged harassment. Citadel administrators reduced the punishment levied against one male cadet involved to the minimal level possible.[126] Such treatment, Mentavlos could argue, indicates an understanding between cadets and officials that allegedly abusive behavior will not only be tolerated by the school, but will also be tacitly condoned.[127]

However, the cadets would probably counterargue that their actions did not reflect any conspiracy or agreement and that they were simply acting under, and in accordance with, the rigorous disciplinary system that has been in place at the school for over one hundred years.[128] Furthermore, the cadets would likely point to procedures such as the grievance system and sensitivity training as evidence that both The Citadel and its cadets were attempting to strike a balance between gender integration and the proud traditions of the institution.[129]

Nevertheless, given her factual allegations as stated above and as outlined in her brief to the Fourth Circuit, Mentavlos could probably establish a genuine factual issue concerning an agreement or understanding between school leaders and cadets. She could likely illustrate The Citadel's steadfast opposition to admitting women, manifested by its cadets' jubilant celebration when the first woman to join the Corps of Cadets withdrew.[130] The cadets' and the administration's sense of tradition and their open opposition to gender integration engendered an atmosphere of hostility towards Mentavlos and other women. Mentavlos could then argue that officials understood that by placing her in Echo Company, she would be subjected to harsh treatment and would likely withdraw.[131]

Similarly, Mentavlos could assert that Echo Company cadets and commanders understood that the administration's decision to place her in their company meant that they were to treat her harshly enough to ensure her withdrawal. Mentavlos would definitely need more evidence to prove the agreement element of a conspiracy action under § 1983, but these facts and allegations would probably suffice to avoid summary judgment.[132]

---

125. *See supra* note 103-05 and accompanying text.

126. Freidman, *supra* note 63, at 440.

127. However, The Citadel did take some decisive disciplinary actions, including leveling two suspensions. *Id.* at 440 n.7.

128. *See* ORIGINS, *supra* note 13.

129. *See* THE FOURTH CLASS SYSTEM MANUAL, *supra* note 15, at 7-10.

130. *See supra* note 122.

131. *See supra* note 124 and accompanying text.

132. *See supra* notes 108-07 and accompanying text.

Finally, Mentavlos must prove that an actual deprivation of her constitutional rights occurred at the hands of private actors who conspired with state actors.[133] For her claim to survive summary judgment, Mentavlos needs to show a factual issue as to whether the cadets' actions constituted impermissible sexual harassment and gender discrimination.[134] This may be the toughest element for Mentavlos to satisfy.

The cadets would likely argue that the alleged abuse Mentavlos suffered was not due to her gender, but that she was subjected to the rigorous discipline imposed on every fourth class member regardless of gender.[135] Indeed, this argument may have merit because some of the incidents that Mentavlos described apparently did not single out female knobs. For example, two male cadets were allegedly victims of the "nail-polish remover" fire incident.[136] However, other incidents were arguably motivated by gender, and these incidents may suffice to create an issue of fact as to an actual deprivation of constitutional rights. Mentavlos could argue that the posting of a manufactured pornographic picture of her on the Internet was motivated by her gender.[137] Additionally, both Anderson and Saleeby may have physically touched and injured Mentavlos,[138] and there is no evidence suggesting that males suffered this same type of treatment. Mentavlos also allegedly received unequal treatment from Anderson regarding alcohol infractions.[139]

Consequently, there exists some evidence to suggest that a gender-based motivation underlay some of the cadets' actions.[140] These assertions would appear to be sufficiently contested such that a factual issue of whether gender-based harassment occurred would arise, and summary judgment would be improper.[141] Unfortunately, Mentavlos' complaint missed the state-action text that likely would have allowed her to avoid summary judgment.

---

133. *See* McNabb v. North Carolina, No. 1:00CV203-T, 1:00CV205-T, 2001 WL 1020041, at *3 (W.D.N.C. Apr. 11, 2001); *see also* Landrigan v. City of Warwick, 628 F.2d 736, 742 (1st Cir. 1980) (holding that it must be found that there was not only an agreement but also an "actual deprivation of a right secured by the constitution and laws" to make a conspiracy theory actionable).

134. *See* Mentavlos v. Anderson, 249 F.3d 301, 306 (4th Cir. 2001).

135. *See supra* notes 15-18 and accompanying text.

136. Hewitt & Sider, *supra* note 6, at 42.

137. *See* Friedman, *supra* note 63, at 438 (alleging that the Citadel administration knew about the picture); *see also* Hewitt & Sider, *supra* note 6, at 42 (indicating that male cadets also waved sex toys at Mentavlos and forced her to sing vulgar songs).

138. *Mentavlos*, 249 F.3d at 309.

139. *Id.*

140. Regardless of this evidence, proving that Cadet Saleeby engaged in gender-based harassment and abuse could have been a major problem for Mentavlos. The district court alternatively granted summary judgment for Saleeby on the ground that Mentavlos did not prove that his actions were discriminatory in nature. Mentavlos v. Anderson, 85 F. Supp. 2d 609, 628 (D.S.C. 2000). Nevertheless, because the Fourth Circuit affirmed the trial court's grant of summary judgment for both defendants on the ground that neither was a state actor for § 1983 purposes, it did not consider this alternative ground. *Mentavlos*, 249 F.3d at 323 n.8. Thus, Mentavlos might have been forced to proceed solely against Anderson.

141. *See supra* note 107 and accompanying text.

IV. CONCLUSION

As evidenced by the Fourth Circuit's holding in *Mentavlos*,[142] future actions under § 1983 that involve students should not incorporate traditional state-action tests to prove that the students were state actors. Since students are generally private individuals, the traditional state-action tests will rarely convince courts that they acted "under of color of state law" for purposes of § 1983.[143] Mentavlos argued that The Citadel cadets were state actors based on the "powers traditionally reserved to the State" and the "actions fairly attributable to the State" state-action tests.[144] Both the district court's granting and the Fourth Circuit's reaffirming of summary judgment in the cadets' favor demonstrate that courts are disinclined to reach students' private actions under § 1983, even though the students' actions may deprive another student of constitutionally and federally guaranteed rights. Consequently, future actions involving an alleged deprivation of a person's constitutional rights should not rely on the general, traditional tests used to determine who is a state actor for purposes of § 1983.

Instead, parties who wish to assert a § 1983 claim for deprivation of their constitutional rights at the hands of private students in publicly funded educational settings should look to alternative theories to avoid summary judgment. One such theory is the conspiracy or joint action claim under § 1983.[145] By showing that private actors conspired with state actors to deprive a person of constitutionally guaranteed rights, plaintiffs in such cases can circumvent the usual rule that § 1983 does not reach private action. Nevertheless, plaintiffs using this theory will still face the daunting task of demonstrating an agreement between the private and state actors as well as an actual deprivation of federal rights.[146] Due to the secret nature of conspiracies, proving an actual agreement and a deprivation of rights may be difficult. Indeed, Mentavlos may not be have been able to prove at a trial that

---

142. *Mentavlos*, 249 F.3d at 323.

143. *See* Yeo v. Town of Lexington, 131 F.3d 241, 254-55 (1st Cir. 1997) (holding that student editors' decisions on advertising, even with faculty advice, did not constitute state action); *see also* Indorato v. Patton, 994 F. Supp. 300, 307-08 (E.D. Pa. 1998) (holding that a scholarship football player who struck a referee was not a state actor even though the institution paid for many of the player's necessities and subjected the player to its own disciplinary rules).

144. *Mentavlos*, 249 F.3d at 314-23.

145. *See supra* notes 103-05 and accompanying text.

146. *See* McNabb v. North Carolina, No. 1:00CV203-T, 1:00CV205-T, 2001 WL 1020041, at *3 (W.D.N.C. Apr. 11, 2001). Different levels of "agreements" have been held sufficient to establish that element of the conspiracy theory under § 1983. For example, each conspirator need not know the details of the conspiracy, but there must be a common objective between them. See United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1541 (9th Cir. 1989). Therefore, an implied agreement where the conspirators' actions evidence a concerted effort in furtherance of a common objective to deny a person of federal rights would apparently be sufficient to demonstrate a conspiracy. *Id.* Nevertheless, to prove any conspiracy allegation, whether based on an express or implied agreement, the plaintiff must demonstrate a meeting of the minds between the conspirators. *McNabb*, 2001 WL 1020041, at *3. This meeting-of-the-minds requirement would probably be satisfied by evidence of a common objective and of acts taken in furtherance of that objective by the conspirators. *Phelps Dodge*, 865 F.2d at 1541.

Cadets Anderson and Saleeby conspired with Citadel officials to deprive her of her federal rights, but at least she would have had the opportunity.

This Note in no way argues that Mentavlos is entitled to judgment in her favor on the conspiracy claim; rather, it simply suggests that based on the facts and allegations surrounding the case, Mentavlos probably could have survived summary judgment by pleading and arguing a conspiracy under § 1983 rather than by arguing that the private cadets were themselves state actors. In this respect, the conspiracy claim would become a catalyst to allow Jeannie Mentavlos and other similarly situated plaintiffs the opportunity to present their claims to a jury.

John P. Fougerousse

*