



ISSN 1935-0007

Cite as: 2017 (12) AELE Mo. L. J. 301
Jail & Prisoner Law Section – December 2017

**An Introduction to
Qualified Immunity as a Defense in
Prisoner Civil Rights Litigation**

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❖ **Introduction**

One of the most important defenses that individual correctional personnel have in federal civil rights litigation filed against them by prisoners and detainees is *qualified immunity*. This, the first part of a two-part article, provides an overview of some basic principles concerning the defense, discusses the right that defendants have to a ruling on their assertion of the defense and an interlocutory (immediate) appeal of a denial, and examines some cases in which correctional defendants have been granted qualified immunity. Next month, part two of this article will examine some cases in which correctional defendants were denied qualified immunity, present some suggestions to consider, and end with a list of relevant and useful resources and references. This two-part series is intended only as an introduction to the topic.

❖ Some Basic Principles

One of the most important defenses available to individual defendants in federal civil rights lawsuits sued in their individual (as opposed to official) capacity is that of qualified immunity. Qualified immunity is what is known as an “affirmative” defense, which means that it must be raised by a defendant, or else it is lost.

The essence of the concept is that because police officers or correctional personnel are often called upon to make difficult decisions, sometimes with only split seconds to respond, they ought not face civil liability or the burden of the litigation process, including discovery and trial, in circumstances where they have not acted in violation of clearly established law.

Because the immunity involved offers the defendant relief not just from civil liability, but also from the burdens of litigation, a trial court’s denial of a defendant’s motion for qualified immunity is, with some exceptions, subject to immediate appeal. See [Anderson v. Creighton](#), #85-1520, 483 U.S. 635 (1987) and [Mitchell v. Forsyth](#), #84-335, 472 U.S. 511 (1985).

In circumstances where the defense of qualified immunity is upheld, an defendant will not be found liable, even if their conduct, such as the use of force, actually could be said to have violated the plaintiff’s federal civil rights, so long as an objectively reasonable correctional officer could have believed, under the circumstances, that the conduct was lawful.

Qualified immunity shields a defendant from suit when he makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances he confronted (or reasonably believed he was confronting). Because the focus is on whether the defendant had fair notice that his conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time (prior case law) did not clearly establish that the conduct would violate the Constitution, the defendant should not be subject to liability or, indeed, even the burdens of litigation.

In [White v. Pauly](#), #16-67, 137 S. Ct. 548, 196 L. Ed. 2d 463, 2017 U.S. Lexis 5, 85 U.S.L.W. 4027, 26 Fla. L. Weekly Fed. S 409, the U.S. Supreme Court noted that in the last five years it had issued a number of opinions reversing federal courts in qualified immunity cases.

The Court found it necessary to clarify the test for granting qualified immunity to a defendant:

“Today, it is again necessary to reiterate the longstanding principle that ‘clearly established law’ should not be defined ‘at a high level of generality.’ ... As this Court explained decades ago, the clearly established law must be “particularized” to the facts of the case. Otherwise, “[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.’ ... The panel majority misunderstood the ‘clearly established’ analysis: It failed to identify a case where an officer acting under similar circumstances as [the third officer] was held to have violated the Fourth Amendment. Instead, the majority relied on *Graham*, *Garner*, and their Court of Appeals progeny, which—as noted above—lay out excessive-force principles at only a general level. Of course, ‘general statements of the law are not inherently incapable of giving fair and clear warning’ to officers, but ‘in the light of pre-existing law the unlawfulness must be apparent.’”

Qualified immunity cannot be defeated by a plaintiff merely citing, for example, on a high level of abstraction and generality, cases that mandate that defendants, prior to using deadly force, give a warning first “if feasible” without examining the particular circumstances the defendant believed he was confronting.

❖ Right to a Ruling

When a defendant properly asserts a defense of qualified immunity in a lawsuit, they are entitled to a ruling on the issue which can be immediately appealed. This is because qualified immunity is not just immunity from liability but from having to go through the lengthy and burdensome process of trial.

This is illustrated by [*Payne v. Britten*](#), #12-3872, 749 F.3d 697 (8th Cir. 2017), in which an inmate claimed that officials violated his First and Fourteenth Amendment rights by improperly censoring and confiscating his mail. The trial court failed to issue a ruling as to whether an official was entitled to qualified immunity. When a defendant official properly and timely files a motion for dismissal or for summary

judgment asserting qualified immunity as a defense, the appeals court stated, they are entitled to a reviewable order either granting or denying qualified immunity before being required to progress further in the litigation. The trial court was ordered to issue such a ruling.

Such ruling must involve a detailed analysis. In [Handt v. Lynch](#), #11-1829, 681 F.3d 939 (8th Cir. 2012), a man who was sentenced to an alcohol treatment program on a DUI conviction was mistakenly held instead in jail for a month before the error in interpreting the sentencing order was discovered. He sued a number of correctional employees for alleged violations of his Fourth, Fifth, Eighth, and Fourteenth Amendment rights in falsely imprisoning him. The trial court denied the defendants' motions for qualified immunity. The appeals court found that the trial judge erred by failing to make a detailed analysis of whether each defendant was entitled to qualified immunity on each of the constitutional claims and therefore ordered further proceedings.

Qualified immunity can be raised as an affirmative defense in a defendant's answer to a complaint. But if it is not, it can still be asserted by a motion for summary judgment. In [Ahmad v. Furlong](#), #04-1450, 435 F.3d 1196 (10th Cir. 2006), a corrections officer and the former warden of Colorado's Sterling Correctional Facility (SCF) appealed from a federal trial court's refusal to decide whether or not they were entitled to qualified immunity on a claim made against them by a Muslim inmate under the [Religious Land Use and Institutionalized Persons Act](#) (RLUIPA), 42 U.S.C. § 2000cc et seq. Rejecting the trial judge's ruling that it need not decide the issue because the defense of qualified immunity was not asserted in the defendants' answer to the complaint, a federal appeals court found that the defendants adequately raised the issue in a motion for summary judgment.

The plaintiff inmate is an adherent to the “[Sunni](#)” branch of [Islam](#). His claims revolved around the prison's policy of refusing to allow prisoners to congregate for prayer outside their assigned cells without prior approval.

The statute at issue, RLUIPA, forbids a prison from “imposing a substantial burden on the religious exercise” of an inmate without demonstrating that imposing the burden on the prisoner furthers a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest. The defendants argued that they were not personally liable for any alleged RLUIPA violation and were entitled to qualified immunity because the law was not clear, at the time of their actions, that refusing to allow prisoners to gather for prayer without prior approval violates the statute.

The defendants, in their answer to the complaint, denied violating the RLUIPA and also challenged the constitutionality of the statute. The trial court found that the defendants, in doing so, had failed to properly assert a qualified immunity defense to the RLUIPA claim.

A federal appeals court agreed that the “best procedure” to plead an “affirmative defense,” such as qualified immunity (a defense which must be specifically raised or else it is lost), was to assert it in an answer or amended answer to a plaintiff’s complaint. However, the court also held that the failure to do so does not necessarily bar the defendants from attempting to raise a qualified immunity defense in a motion for summary judgment. It found, based on the record, that the defendants had adequately done so. The court acknowledged that the motion requested that “the claims” be dismissed on the basis of qualified immunity, and did not expressly mention the RLUIPA statute in the context of qualified immunity. The complaint in the case had also raised constitutional claims directly under the First Amendment, among others.

The court noted, however, that the plaintiff prisoner's response to the motion for summary judgment did address the issue of RLUIPA, so that it need “not worry” about whether any ambiguity in the defendants’ motion misled the plaintiff into believing that “qualified immunity was being relied upon only to defend against the constitutional claims.” The appeals court therefore ruled that the defendants had not waived the qualified immunity defense to claims under the statute, and remanded the case for a determination of whether such qualified immunity should be granted.

❖ Qualified Immunity Granted

Qualified immunity will be granted to a defendant on a claim when the alleged behavior did not violate “clearly established law” at that time, even if the law on the subject subsequently changed. Law can either be clearly established by a controlling U.S. Supreme Court decision, or by a controlling precedent in the U.S. Court of Appeals in which the incident arose. In [Hill v. Crum](#), #12-6705, 727 F.3d 312 (4th Cir. 2013), a prisoner claimed that a correctional officer used excessive force against him, assaulting him for approximately two minutes and knocking his head against a gate before moving him to a holding cell. A federal appeals court held that the officer was entitled to qualified immunity because the prisoner suffered no more than de minimus (minimal) injuries, if that, and combined with the lack of extraordinary circumstances, this did not violate any clearly established Eighth Amendment right in the Fourth Circuit in 2007, the date of the incident. The

requirement of more than de minimus injury was rejected after the date of this incident by the U.S. Supreme Court in [*Wilkins v. Gaddy*](#), #08-10914, 559 U.S. 34, 130 S. Ct. 1175 (2010).

In accord is [*Chappell v. Mandeville*](#), #09-16251, 706 F.3d 1052 (9th Cir. 2013). In this case, after a prisoner was visited by his fiancée, his undergarments tested positive for cocaine and bottles were found in his cell that tested positive for methamphetamine. Prison authorities placed him on contraband watch for six days until he had three bowel movements. These bowel movements did not reveal drugs.

Rejecting the argument that placing him on contraband watch had been cruel and unusual punishment, a federal appeals court ruled that the law at the time (April-May 2002) did not clearly establish that the types of measures prison officials took were unconstitutional, especially given the important purpose of discovering contraband. The defendants were therefore entitled to qualified immunity.

In [*Miller v. Harbaugh*](#), #11-3418, 698 F.3d 956 (7th Cir. 2012), a 16-year-old in an Illinois juvenile detention facility had a history of mental illness and three known prior in custody suicide attempts. The record of his latest intake assessment indicated that he suffered from major depression, psychosis, bipolar disorder, anger, behavior disorders and Attention Deficit Hyperactivity Disorder. He had also previously gone through drug abuse counseling. He had a history of setting fires, cruelty to animals, threatening to kill teachers, alcohol and cannabis use, gang affiliation, and putting a gun to a cousin's head.

Despite all this, the juvenile stated that he was not having depressive or manic symptoms and had not recently had suicidal thoughts. Prozac and lithium was prescribed for him and he was evaluated for suicide risk from time to time. Subsequently, he successfully hung himself in his cell. Even assuming that the plaintiff had shown that the defendants were aware of the suicide risk of using metal bunk beds in rooms for mentally disturbed detainees, and that alternative arrangements were feasible, the law was not clearly established enough to defeat the defendant supervisors' defense of qualified immunity. Additionally, a defendant doctor was not sufficiently enough involved with the decedent to be liable for his death.

In [*Sudler v. City of New York*](#), #11-1198, 698 F.3d 159 (2nd Cir. 2012), former prisoners of state and city prisons in New York claimed that their due process rights

were violated because they were kept incarcerated past the end of their court ordered sentences. Because there was no clearly established law concerning the issue of whether such prolonged incarceration violated due process, the defendant city and state prison officials and employees were entitled to qualified immunity from personal liability. The court emphasized that its decision did not “trivialize” the prisoners’ protected liberty interest in being released from custody promptly after their sentences were concluded.

In another case, a prisoner held in administrative segregation claimed that officials gave only “perfunctory” review, if any at all, as to whether prisoner behavior had improved. Such improvement was supposed to be the basis for promotion to a less restrictive level in the six-level administrative segregation system. The appeals court stated that it believed that “if a prison system wishes to encourage better behavior by implementing a stratified incentive program that involves an atypical and significant hardship, it must provide meaningful individualized review to prisoners to help them progress through the program.”

The defendants were entitled to qualified immunity from liability, however, since, at the time of the controversy, it was not clearly established that the review process should apply through all the program's levels or that the perfunctory reviews given at the first three levels or lack of any review at all on levels 4-6 would not be considered meaningful. [*Toeys v. Reid*](#), #10–1535, 685 F.3d 903 (10th Cir. 2012).

Also see [*Alston v. Read*](#), #10-15332, 663 F.3d 1094 (9th Cir. 2011), in which a prisoner was held longer than he should have been, and argued that, had prison officials checked court records, they would have noticed that he was ordered to serve concurrent rather than consecutive sentences, and released him sooner. The defendants were entitled to qualified immunity, since there was no clearly established case law imposing a duty on them to review a prisoner's original court records “beyond those in his institutional file.”

Qualified immunity may also be granted even if someone did violate a plaintiff’s clearly established constitutional or statutory rights, if the plaintiff fails to allege how an individual defendant is connected to the rights violation. This is illustrated by [*Feliciano-Hernandez v. Pereira-Castillo*](#), #11–1052, 663 F.3d 527 (1st Cir. 2011), *cert. denied*, #11-1110, 567 U.S. 906 (2012), in which a prisoner was sentenced as a habitual offender on his conviction for lewd and indecent acts on the basis of a prior rape conviction. The sentence was for “perpetual imprisonment

for treatment until his rehabilitation, to last a minimum of twelve years.” But he was not released until 27 years in custody, 15 years later than when he was eligible for release. He claimed that prison officials were liable for keeping him in custody beyond his lawful term of imprisonment, and that he ceased needing additional therapy treatment long before he was released. The defendants were entitled to qualified immunity because the prisoner failed to show that any of them individually were linked to specific acts that prevented him from being released earlier.

Another case showing lack of culpability on the part of an individual defendant is [Mann v. Lopez](#), #Civ.A. SA05CA0527, 404 F. Supp. 2d 932 (W.D. Tex. 2005), in which a county sheriff was found entitled to qualified immunity from personal liability for failing to prevent pretrial detainee suicides at the jail, given that there was no evidence indicating that he was personally aware that detainees previously had considered suicide, and there was also no evidence that he personally directed any actions concerning the detainees during their detention.

The time at which the law must be clearly established to deny qualified immunity is the time of the incident, not the time of the decision. Otherwise qualified immunity will be granted, as the defendant could have reasonably believed that their actions were not unlawful. This is illustrated by [Butler v. Yarborough](#), #03-5420, 2007 U.S. Dist. Lexis 56667 (E.D. Cal.). While the U.S. Court of Appeals for the Ninth Circuit in 2004 ruled that prison policies prohibiting all prisoner access to mail containing materials downloaded from the internet was unconstitutional in [Clement v. California Department of Corrections](#), #03-15006, 364 F.3d 1148 (9th Cir. 2004), there was no clearly established law on the subject in 2001, when this plaintiff prisoner’s mail containing such materials was returned, so that the prison warden was entitled to qualified immunity.

AELE Monthly Law Journal

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