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

*Part 1 (Last month)*

- Introduction
- Some Basic Principles
- Right to a Ruling
- Qualified Immunity Granted

*Part 2 (This month)*

- Qualified Immunity Denied
- Some Suggestions to Consider
- Resources and References

*This is part two of a two-part article. To read part 1, click [here](#).*

❖ **Qualified Immunity Denied**

*Qualified immunity will be denied if it appears that the alleged facts, if true, would violate clearly established federal constitutional or statutory law. It will also be denied when there are unresolved material issues of fact, the determination of which would make a difference as to whether clearly established law was violated.*

In [Booker v. South Carolina Department of Corrections](#), #15-7679, 855 F.3d 533, (4th Cir. 2017), prison officials were not entitled to qualified immunity on a prisoner's claim that they retaliated against him for filing a grievance by imposing disciplinary charges against him in violation of his First Amendment rights. While no prior published Fourth Circuit decision directly addressed whether filing a

grievance was protected First Amendment conduct, the right was clearly established based on general constitutional principles or a consensus of persuasive authority. In this case, the inmate's right was found to have been clearly established based on the Second, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits all recognizing in published decisions that inmates possess a First Amendment's Petition Clause right to be free from retaliation in response to filing a prison grievance.

***Private parties working in correctional facilities may not be able to assert qualified immunity*** according to [\*McCullum v. Tepe\*](#), #11-3424, 693 F.3d 696 (6th Cir. 2012). That case involved a pre-trial detainee in a county facility who had a history of depression but had exhibited no signs of suicidal tendencies. A social worker decided not to forward his request to see a prison psychiatrist to ask for anti-depressant medication. After the detainee hung himself and died, a lawsuit was filed for deliberate indifference against the psychiatrist, who was an employee of a private nonprofit organization which furnishes medical services to the facility. The psychiatrist could not seek qualified immunity from federal civil rights liability as a private doctor working part-time for a government entity, as there was no history of such immunity for such doctors at the time the federal civil rights statute was enacted.

***An example of the need to preserve the issue of qualified immunity for appeal or lose it*** is a case in which a former prisoner in an Ohio facility claimed that a correctional officer had sexually assaulted her on two consecutive nights, and sued two superintending prison officers, a case manager on her living unit, and a prison investigator. She claimed that the case manager failed to take any action to prevent the second assault after she reported the first one, and that the investigator retaliated against her for her accusations by placing her, shackled and handcuffed, in solitary confinement in a cell without adequate heat, clothing, bedding, or blankets. The trial court denied the defendants summary judgment on the basis of qualified immunity, finding that there were disputed material issues of fact, and the defendants did not appeal that ruling. After a full trial, a jury awarded the plaintiff \$350,000 in compensatory and punitive damages against the case manager and \$275,000 against the investigator.

The defendants did not then file a motion seeking judgment as a matter of law after the verdict, nor did they seek a new trial. Instead, they argued, on appeal, that the trial court should have granted their motion for summary judgment on the basis of qualified immunity. A federal appeals court agreed, and reversed the jury's verdict. The U.S. Supreme Court disagreed, reversing the appeals court, and holding that a party may not appeal a denial of summary judgment after a district court has conducted a full trial on the merits. There was no "purely legal" issue of qualified immunity preserved for appeal, as the dispute was not over what the pre-existing law was, but instead what the facts were--such as whether the case manager was adequately informed, after the first attack, of the assailant's identity. The defendants could not argue, on appeal, that the plaintiff had not proven her case, as they failed to raise an issue of the sufficiency of the evidence by a post-judgment motion for judgment as a matter of law. [\*Ortiz v. Jordan\*](#), #09-737, 562 U.S. 180 (2011).

The issue of when something becomes clearly established law is date sensitive. The Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. Sec. 2000cc et seq., for example, became "clearly established law" when it was signed into law, so that prison officials were required to follow the law, and were not entitled to qualified immunity for allegedly confiscating several religious publications received by the plaintiff prisoner prior to when the U.S. Supreme Court issued a decision in 2005 definitively declaring that the RLUIPA was constitutional. The confiscations took place in May and June of 2003, and in November of 2003, a panel of the U.S. Court of Appeals ruled that the RLUIPA was unconstitutional, a ruling later rejected by the Supreme Court. The court noted that the Sixth Circuit decision occurred after the alleged actions, and therefore could not be used by the prison officials to obtain qualified immunity at a time when the statute was "presumptively constitutional." [\*Figel v. Overton\*](#), #06-2199, 263 Fed. Appx. 456, 2008 U.S. App. Lexis 3311 (Unpub. 6th Cir.).

For another date sensitive example, look at some inmates' lawsuit claiming that, while being transported, they were subjected for 10 to 15 hours in restraints so tight that many of them were injured and were denied access to water, defendant officers were entitled to qualified immunity, because the law on the use of severely tight restrains and denial of water for an extended period being constitutional violations was not "clearly established" until two years after the incident in question, in the

U.S. Supreme Court case of [\*Hope v. Pelzer\*](#), #01-309, 536 U.S. 730 (2002).  
[\*Anderson-Bey v. District of Columbia\*](#), #00-2000, 466 F. Supp. 2d 51 (D.D.C. 2006).

**A good example of a case in which the court declined to find qualified immunity because the alleged facts, if true, would violate clearly established force is [\*Bozeman v. Orum\*](#), #04-11073, 422 F.3d 1265 (11th Cir. 2005).**

The case involved a pre-trial detainee in the Montgomery County Detention Facility in Alabama who died as a result of a struggle with correctional officers. His estate brought a federal civil rights lawsuit against correctional officers claiming excessive force and deliberate indifference to serious medical needs.

The detainee, who was 17 years old, had a history of mental illness and was being held pending trial on a charge of escape from a state youth facility. He appeared to have a mental breakdown in his cell, stripping off his clothes, and flooding the area by stopping up the commode. He also started shouting phrases like “the blood of Jesus is on me,” “Jesus come get me,” and dipped his face and head in the water in the commode. He also tied a string around his neck in an apparent “though futile” attempt to strangle himself, as the string was not strong enough to support his weight.

Officers responding to the disturbance were unsuccessful in trying to calm him down, and made a decision to enter the cell. A prisoner in an adjacent cell later said that the officers told the detainee that if they had to come in the cell, they were going to “kick his ass.” During the subsequent fight, the officers were able to subdue him on his bunk and handcuff and shackle him, and to remove him from his cell.

He was allegedly carried out, face-down and covered by a sheet, by four officers, using batons passed through the shackles and handcuffs, which made his weight bear down on his upper body and chest, restricting his ability to breath. The detainee was subsequently found to be not breathing, and all attempts to resuscitate him were unsuccessful. He was pronounced dead, and an autopsy indicated that the cause of death was asphyxia.

A federal appeals court ruled that the officers were not entitled to qualified immunity on an excessive force claim, because their alleged continuation of the use of force after the detainee gave up struggling, holding him face-down on the bunk while his head pushed into the mattress, resulting in him becoming unconscious, if true, was

an excessive use of force for the very purpose of causing harm, and the law on the subject was clearly established.

The appeals court also found that the officers were not entitled to qualified immunity on the estate's claim that they acted with deliberate indifference to the detainee's serious medical needs by allegedly waiting 14 minutes before calling for medical assistance after taking him from his cell while he was unconscious and not breathing. The court found that this, if true, constituted conduct which should have been known, by any objectively reasonable correctional officer to be a violation of the detainee's due process rights.

### ❖ **Some Suggestions to Consider**

**Qualified immunity, when properly asserted, is a very powerful defense. Accordingly, the following suggestions should be considered:**

1. Qualified immunity is an *affirmative* defense. That means that if it is not asserted in a timely manner, it may be deemed waived and lost. Therefore, an assessment of whether qualified immunity is an available defense should be examined early in the process in any prisoner litigation.
2. Qualified immunity is a defense available to individual defendants sued in their individual, rather than official, capacity.
3. A properly presented and denied motion for qualified immunity brings into being the right to an immediate interlocutory appeal of the denial if based on the law. Such an appeal will be rejected if the basis for the denial was that there remain disputed issues of material fact on the resolution of which hinge the issue of whether clearly established law was violated.
4. When available and arguably meritorious, such an interlocutory appeal should be pursued, as the defense of qualified immunity is not just an immunity against personal liability for money damages (as well as attorneys' fees and costs) but an immunity against trial and its burdens and expenses, including in appropriate cases the discovery process.

## ❖ Resources•

- [Defenses: Qualified Immunity](#). AELE Civil Case Summaries.
- [Qualified Immunity](#). Wikipedia article.
- [Qualified Immunity](#). AELE Jail Case Summaries.
- [Qualified Immunity](#) Definition. West Legal Dictionary. Legal Information Institute, Cornell University Law School.

## ❖ Prior Relevant Monthly Law Journal Articles

- [Civil Liability for Use of Deadly Force-- Part Two. Qualified Immunity and Inadequate Training](#), 2007 (12) AELE Mo. L.J. 101.
- [The Scope of Federal Qualified Immunity in Civil Rights Cases](#), 2009 (2) AELE Mo. L. J. 501.
- [Trickery and Memory Lapse: Officer who testified based on a faked lab report was not entitled to qualified immunity](#), 2012 (1) AELE Mo. L. J. 501.
- [Fourth Amendment Search and Seizure, Qualified Immunity and the Technological Age](#), 2012 (6) AELE Mo. L. J. 501.
- [When is Law “Clearly Established” for Purposes of Qualified Immunity in Civil Rights Litigation?](#), 2017 (3) AELE Mo. L. J. 101.

## ❖ References: (*Chronological*)

1. [United States Supreme Court Clarifies “Clearly Established Law” for Qualified Immunity in Deadly Force](#), by Jack Ryan, Legal & Liability Risk Management Institute (January 2017).
2. [The Supreme Court’s Quiet Expansion of Qualified Immunity](#), by Kit Kinports, 100 Minn. L. Rev. 62 (2016).
3. [The Qualified Immunity Defense: What’s “Clearly Established” and What’s Not](#), by Karen M. Blum, Touro Law Review: Vol. 24:No. 3, Article 4 (2014)

4. [Qualified Immunity: How It Protects Law Enforcement Officers](#), by Richard G. Schott, FBI Law Enforcement Bulletin (September 2012).
5. [The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law](#), by Alan K. Chen, 47 American University Law Rev. 1 (1997).
6. [The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights](#) by David Rudovsky, University of Pennsylvania Law School, Faculty Scholarship Paper 150 7 (1989),

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