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QUALIFIED IMMUNITY TRENDS IN SECTION 1983 LITIGATION

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Qualified Immunity Principles

- 42 U.S.C. §1983 provides that every person who acts under color of law to deprive another of a constitutional right shall be answerable to that person in a suit for damages.

- Section 1983 does not provide any immunities on its face; but, common law immunities that existed when the statute was enacted in 1871 are applicable.

Qualified Immunity Principles

- *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982)
  - "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."
  - This is an objective inquiry and thus a legal question. Subjective motivations of officials are not relevant.
  - Decision for the court and not jury. *Hunter v. Bryant*, 502 U.S. 224 (1991).

Qualified Immunity Principles

Purposes:

- 1- Allows government officials to act and make decisions without the fear of being sued for money.
- 2 – Defeats insubstantial claims and reduces the cost of defending suits without resort to trial.

- Thus, it is an immunity from suit resolved typically at the summary judgment stage.

Qualified Immunity Principles

Qualified Immunity standard strikes a balance:

- Government officials should know basic, unquestioned constitutional rights;
- But, officials should not be charged with predicting the future course of constitutional law.
- Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law, and allows officials breathing room to make reasonable but mistaken judgments about open legal questions. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).

Qualified Immunity Principles

Pearson v. Callahan, 129 S. Ct. 808 (2009)

- Qualified immunity is a two-pronged test:
  - Was the right violated by the defendant?
  - If so, was the right clearly established at the time of the incident?
- Courts have discretion to decide the prongs in any order.

Qualified Immunity Principles

Anderson v. Creighton, 107 S. Ct. 3034 (1982)

- Qualified immunity standard depends on level of generality of the right at issue.
- Contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right.

Hope v. Pelzer, 122 S. Ct. 2508 (2002)

- Case on all fours is not required to defeat immunity.

Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011)

- While case on point is not required, "**existing precedent** must have placed the statutory or constitutional question **beyond** debate."
- Once defendant raises qualified immunity defense, it is the plaintiff's burden to defeat it.

Qualified Immunity Principles

What "existing precedent" governs?

- Has the Supreme Court addressed the right at issue?
- Is the present case materially different on its facts from other Supreme Court cases?
- Is there an emergence of either "controlling authority" or a "robust consensus of cases of persuasive authority."
  - *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011)

Qualified Immunity Principles

- Immediately appealable (collateral order doctrine). *Mitchell v. Forsyth*, 472 U.S. 511 (1985).
- But, cannot appeal where district court denies immunity based on questions of fact.
  - *Johnson v. Jones*, 515 U.S. 304 (1995); *Tolan v. Cotton*, 134 S. Ct. 1861 (2014).
- But, if facts are undisputed, it is core responsibility of appellate courts to decide legal issue of whether official violated clearly established rights. *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014).

Qualified Immunity Principles

Trends:

- Pro-defendant standard at least at Supreme Court level.
- It is Plaintiff's burden to present fact-specific case to defeat qualified immunity.
- Existing precedent is defined at Supreme Court level.
- Circuit court's cases may not necessarily establish clear law if there is inter-circuit disagreement.

Mullenix v. Luna, 136 S. Ct. 305 (2015)

- Officers attempted to arrest Israel Leija on a warrant.
- 18-minute, 25-mile high speed pursuit on interstate highway.
- Speeds of 85 to 110 mph.
- Suspect twice called dispatcher and said he had a gun and threatened to shoot at police if they did not stop chase.
- Dispatcher radioed threat to officers and said Leija may be intoxicated.
- Police set up spike strips under overpass ahead of chase.
- Before spike strips could be used, Officer Mullenix fired six shots from top of overpass to disable car.
- Four shots strike suspect, killing him; no shots hit the car.

Mullenix v. Luna, 136 S. Ct. 305 (2015)

- Leija's family sued police under Section 1983 alleging excessive force.
- 5th Circuit affirmed denial of qualified immunity.
  - Disputed issues of fact as to recklessness.
  - Granted rehearing and issued revised opinion.
    - Agreed with dissent that objective reasonableness is question of law that can be decided on summary judgment.
    - But, officer's actions were objectively unreasonable and law was clearly established that use of deadly force absent imminent threat violated Fourth Amendment.

Mullenix v. Luna, 136 S. Ct. 305 (2015)

- Supreme Court reversed:
  - Court did not address merits of Fourth Amendment issue and instead found law was not clearly established.
  - 5th Circuit failed to consider the degree of factual specificity required to find a constitutional right clearly established.
  - Mullenix confronted a intoxicated fugitive, fleeing from police at high speeds, who threated to shoot police and was approaching officer manning spikes under overpass.
  - Supreme Court has never found that deadly force in connection with dangerous car chase to violate Fourth Amendment let alone basis for denying qualified immunity.

Mullenix v. Luna, 136 S. Ct. 305 (2015)

- J. Scalia concurred, stating that this was not a seizure – not a use of deadly force. Compared it to a tree falling on the car.
- J. Sotomayor dissented, stating that majority sanctioned "a 'shoot first, think later' approach to policing."

- Similar to *Plumhoff v Rickard,134 S. Ct. 2012* (2014).

City & County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015)

- Teresa Sheehan suffered from a schizoaffective disorder and was living in a group home.
- Worker at home called police, stating that Sheehan was acting erratically and threatened to kill social worker.
- Officers entered the room and then retreated after Sheehan threatened them with a knife.
- Officers were afraid that Sheehan would harm herself or escape through the 2nd story window.
- Officers re-entered the room.
- Sheehan wielding a knife.
- Pepper spray is unsuccessful.
- Police shoot her twice and she survives.

City & County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015)

- Sheehan filed suit under ADA (failure to accommodate her disability) and Section 1983 (excessive use of force).
- 9th Circuit held:
  - ADA applied to arrest but there was a jury question as to failure to accommodate claim;
  - Jury question as to whether police provoked Sheehan;
  - Denial of qualified immunity.

City & County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015)

- Supreme Court reversed:
  - Court finds that *certiorari* improvidently granted as to ADA claim.
  - Finds that officers were entitled to qualified immunity.
    - Law was not clearly established that officers failure to accommodate Sheehan's mental illness violated the Fourth Amendment.

Taylor v. Barkes, 135 S. Ct. 2042 (2015)

- Barkes had mental health/substance abuse problems.
- Arrested and jailed for violating probation.
- Mental health screening by nurse to assess suicide risks - only two risk factors so routine referral.
- Barkes called wife and said he could not live this way anymore but wife did not call jail.
- Hung himself the next day in his jail cell.

Taylor v. Barkes, 135 S. Ct. 2042 (2015)

- Barke's family brought a Section 1983 suit against DOC Commissioner and Warden alleging failure to supervise the nurse who was private contractor.
- 3rd Circuit affirmed denial of qualified immunity.
  - Citing two 3rd Circuit decisions, found that it was clearly established that inmates had an Eighth Amendment right to proper implementation of adequate suicide prevention protocols.
  - Fact questions as to whether right was violated precluded summary judgment.

Taylor v. Barkes, 135 S. Ct. 2042 (2015)

Supreme Court – reversed

- Constitutional right was not clearly established "beyond debate."
- No Supreme Court case had established the right in question or even discussed it.
- Weight of authority across the federal appellate circuits suggested that such a right did not exist.
- Disagreed that 3rd Circuit cases relied upon the right at issue in its holdings.

7th Circuit Trends

- Generally, 7th Circuit has been limiting the effect of qualified immunity in 2015.
  - But there are counter examples.
- Existing precedent is defined at Circuit Court and Supreme Court level.
  - Other circuit court's cases may not necessarily establish clear law if there is disagreement with the 7th Circuit.
  - However, other circuit cases may establish clear law if there is no 7th Circuit precedent on point.

7th Circuit

Prison/Jail Cases

Thompson v. Holm, 809 F.3d 376 (7th Cir. 2016)

- Michael Thompson, a state prisoner, missed two days of meals during Ramadan.
  - Thompson alleged the meals were deliberately withheld.
- Thompson brought a First Amendment claim under Section 1983.
- District Court granted summary judgment for defendant prison staff, finding that this was not a substantial burden on religion, especially given that Thompson had other ways of celebrating Ramadan.

Thompson v. Holm, 809 F.3d 376 (7th Cir. 2016)

7th Circuit reversed (Ripple, Rovner, and Williams).

- Found that the intentional denial of two days worth of meals was substantial and not *de minimis*.
- Held that the defendants were not entitled to qualified immunity.
  - "[W]e have held that 'a prisoner's religious dietary practice is substantially burdened when the prison forces him to choose between his religious practice and adequate nutrition."
  - "Because the evidence supports an inference that the defendants intentionally and unjustifiably forced this burdensome choice on Thompson, qualified immunity is unavailable."
- Relied on both 7th Circuit and other Circuits' precedent.
- None of the cases cited involved a 2-day denial.

Kingsley v. Hendrickson, 801 F.3d 828 (7th Cir. 2015)

- Michael Kingsley, a pretrial detainee alleged that his Fourteenth Amendment rights were violated when the correctional officers used excessive force against him with a Taser.
- The case went to trial and the jury found for the defendants.
- The instructions required Kingsley to establish the subjective intent of the officers was improper.
- The question on appeal was whether the jury instructions were correct.

Kingsley v. Hendrickson, 801 F.3d 828 (7th Cir. 2015)

- 7th Circuit initially affirmed the judgment on the district court and determined that the jury instructions correctly stated the subjective-intent standard under the Fourteenth Amendment.

- The Supreme Court reversed, resolving a split among the circuits.
  - Held that "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."
  - The defendant's statement of mind was irrelevant.

Kingsley v. Hendrickson, 801 F.3d 828 (7th Cir. 2015)

- On remand, the 7th Circuit reversed its prior holding and addressed the defendants' qualified immunity argument (Ripple, Hamilton, and Stadtmueller).
- The 7th Circuit rejected this argument.
  - Assumed Kingsley was not resisting.
  - Agreed that the scope of the right at issue was narrow: "[W]hether the law was clearly established that the use of a Taser on a non-resisting detainee, lying prone and handcuffed behind his back, was constitutionally excessive."
  - However, held that the law was clearly established before and after the Supreme Court's decision that the use of a Taser on a non-resisting detainee was excessive.

Kingsley v. Hendrickson, 801 F.3d 828 (7th Cir. 2015)

- "To accept the defense of qualified immunity here, we would have to accept the dubious proposition that, at the time the officers acted, they were on notice only that they could not have a reckless or malicious intent and that, as long as they acted without such an intent, they could apply any degree of force they chose. As we have noted, however, the law clearly established that the amount of force had to be reasonable in light of the legitimate objectives of the institution." (emphasis added)

7th Circuit

The “obvious” constitutional violation as an exception to the rule.

Gustafson v. Adkins, 803 F.3d 883 (7th Cir. 2015)

- Female officer for police and security service at VA brought *Bivens* action alleging unconstitutional search (Fourth Amendment).
- Female officers changed in and out of uniform in an empty office.
- In 2007, Detective William Adkins was instructed by Chief Myron Thomas to install a hidden surveillance camera in the ceiling of the office to identify supervisors who were sleeping while on-duty.
- Detective Adkins was hesitant to install a camera in the office and contacted the VA's Office of the Inspector General and the Assistant Chief, both of whom informed him that such conduct would be illegal.
- Adkins installed the camera and it captured images of female officers dressing and undressing. The images were sent to Chief Thomas's office for viewing.
- Continued into 2009 when the VA discovered the surveillance equipment during a renovation.

Gustafson v. Adkins, 803 F.3d 883 (7th Cir. 2015)

- District Court denied Adkin's motion for summary judgment on qualified immunity grounds and Adkin appealed.
- Adkins contended that there was no case directly on point.
  - He cited *O'Connor v. Ortega*, a Supreme Court case involving a search of personal items in the office. The Supreme Court, in a plurality opinion, ruled that a workplace search is lawful if the search is reasonable under all the circumstances. It did not involve a video surveillance.
  - Adkins also cited *City of Ontario v. Quon*, where the Supreme Court noted that "In the two decades since *O'Connor*…the threshold test for determining the scope of an employee's Fourth Amendment rights has not been clarified further." (emphasis added)
- Neither party identified 7th Circuit cases involving video surveillance of employees.

Gustafson v. Adkins, 803 F.3d 883 (7th Cir. 2015)

- The 7th Circuit disagreed (Flaum, Manion, and Sykes) with Adkin's argument and affirmed the denial of qualified immunity.
- Found that the plurality opinion in O'C*onnor*, as well as subsequent 7th Circuit cases, "clearly established the right of employees to be free from unreasonable employer searches by the time Adkins installed the hidden surveillance equipment in 2007."
- "[A] broad constitutional test, such as the O'C*onnor* plurality's reasonableness test, is sufficient to clearly establish the law 'in an obvious case…even without a body of relevant case law."

7th Circuit

Police Excessive Force Cases and the Mentally Ill

William v. Indiana State Police Dep't, 797 F.3d 468 (7th Cir. 2015)

- Consolidation of two cases involving suicidal individuals killed by officers.
- The 7th Circuit panel (Rovner, Ripple and Kennelly) found the officers in the first case were entitled to qualified immunity while the officers in the second case were not.
- Court relied heavily on *Sheehan*.

William v. Indiana State Police Dep't, 797 F.3d 468 (7th Cir. 2015)

- Case #1:
  - Family members called police when William Williams locked himself in the bathroom, had taken all Xanax left in a prescription bottle and had cut himself and complained that it was taking too long to bleed out.
  - Williams threatened to stab anyone who opened the bathroom door.
  - The officers did not have a good vantage point to see him.
  - The officers opened the door and fired Tasers at Williams, to no effect.
  - Williams turned towards the officers with a knife raised over his head.
  - He came towards one of the officers, who shot him while backing up. Williams managed to fall on top of the officer and cut one of his fingers.
  - The other officers fatally shot him.
  - 2-4 seconds had passed between Williams exiting the bathroom and being fatally shot.

William v. Indiana State Police Dep't, 797 F.3d 468 (7th Cir. 2015)

- Plaintiffs' case focused on the officers' actions after Williams exited the bathroom, and they did not challenge the constitutionality of the officers' use of deadly force once Williams came towards them with a knife.
- Plaintiffs argued that using a Taser was excessive since a reasonable officer would have been able to see that Williams was not at risk of bleeding out and therefore there were no exigent circumstances necessitating action.

- 7th Circuit acknowledged that, under *Sheehan*, the officers were entitled to enter the room to render emergency assistance.
- The Court then found, as a matter of law, that the officers possessed an objectively reasonable belief that action was needed.
- The Court rejected the idea that the officers could only act in the event of imminent death.

William v. Indiana State Police Dep't, 797 F.3d 468 (7th Cir. 2015)

- The Court held that "no clearly established law renders the officers' use of force unreasonable in light of the circumstances that they faced."
  - Plaintiffs failed to present any case that established that use of a Taser in similar circumstances was excessive.
  - "Rather than establishing that such force was impermissible, our cases repeatedly have upheld the use of non-lethal force such as tasers in such situations."

William v. Indiana State Police Dep't, 797 F.3d 468 (7th Cir. 2015)

- Case #2:
  - John Brown locked himself in the bedroom of his mobile home and cut himself with a folding knife.
  - Brown's mother had a key, came come in and spoke with him. Brown would not let go of knife. His mother said she was going to get help and left the room to call the police. Brown locked the door to his bedroom once she left to call 911.
  - Mother told dispatch that her son was attempting suicide and had a knife. She stated that there were no other weapons in the room and that Brown was bipolar, had been drinking and had cut himself in the past.
  - Deputies arrived and spoke to Brown through the door.
  - Officers could see him through the bedroom window.
  - An officer kicked the bedroom door in and ultimately fatally shot Brown who possessed a knife.

William v. Indiana State Police Dep't, 797 F.3d 468 (7th Cir. 2015)

- 7th Circuit found a genuine issue of fact as to whether Brown was raising a knife and advancing towards the deputies when he was shot (as described by the deputies).

Court identified two theories of liability:

- (1) Blanchard unreasonably created an encounter that led to the use of force against Brown.
  - Court found that Blanchard was entitled to qualified immunity for this pre-seizure conduct.
    - "Our caselaw is far from clear as to the relevance of pre-seizure conduct, or even as to a determination as to what conduct falls within the designation 'pre-seizure,' although the majority of cases hold that it may not form the basis for a 4th Amendment claim."

William v. Indiana State Police Dep't, 797 F.3d 468 (7th Cir. 2015)

- (2) Blanchard used deadly force against Brown in the absence of probable cause to believe that Brown was threatening him at the time.
  - Court found that Blanchard was not entitled to qualified immunity under this theory.
  - Under the facts taken in the light most favorable to plaintiff, Blanchard "resorted to the use of lethal force as an initial matter."
  - It is well established that "a person has a right not to be seized through the use of deadly force unless he puts another person (including a police officer) in imminent danger or he is actively resisting arrest and the circumstances warrant that degree of force."

Weinmann v. McClone, 787 F.3d 444 (7th Cir. 2015)

- Susan Weinmann called 911 and told dispatch that her husband, Jerome, was in the garage, had access to a long gun, and was threatening to kill himself.
- Deputy Patrick McClone responded to the scene.
  - He checked two windows of the garage and did not see Jerome. He did not check the other windows.
  - He knocked on the garage door but got no response.
  - McClone heard something that sounded like "pattering on cupboard doors" and feared that Jerome was attempting suicide.
  - McClone kicked in the door.
  - Jerome was sitting on a lawn chair with a shotgun across his lap.
  - McClone shot him 4 times.

- District Court denied qualified immunity on summary judgment, finding that a dispute of fact existed.

Weinmann v. McClone, 787 F.3d 444 (7th Cir. 2015)

7th Circuit affirmed (Wood, Easterbrook and Williams).

- Found issues of fact on whether there was a constitutional violation and turned to second prong of analysis.
- Jerome cited *Graham v Connor*, *TN v Garner*, and several cases from other circuits for the proposition that a person has a constitutional right not to be shot unless an officer reasonably believes he poses a threat to the officer or another.
- The 7th Circuit agreed that the law was clearly established.

Weinmann v. McClone, 787 F.3d 444 (7th Cir. 2015)

- "Even if we were to conclude that no other decisions are sufficiently analogous to be pertinent, we would still be unable to uphold a finding of qualified immunity on this record. McClone's shooting of Jerome while Jerome was passively sitting in a chair with the gun across his lap would meet the alternative standard of plainly excessive conduct … Kicking down a door and immediately shooting a suicidal person who is neither resisting arrest nor threatening anyone save himself is an excessive use of force. And each of the four shots inflicted injury on Jerome. McClone did not look through the other windows into the garage to see what Jerome was doing, nor did he try to talk to him. Instead, within three minutes of arriving at the scene, McClone opened fire. Either viewed as so plainly excessive that no analogous case is needed, or viewed in light of existing authority, this was an excessive use of force." (emphasis added).

7th Circuit

Police failure to investigate/protect

Doe v. Vill. of Arlington Heights, 782 F.3d 911 (7th Cir. 2015)

- Jane Doe, a minor female, was drinking with a group of three male minors at an apartment complex.
- Site manager for the apartment complex called 911 to report them.
- Arlington Heights Police Officer Mark Del Boccio arrived, rolled down his window and spoke to the males.
- Del Boccio allowed the males to leave the scene with Doe.
- Del Boccio did not ask for any identification. If he had, he would have learned the Doe and the males were minors and that one of them were on probation for armed robbery.

Doe v. Vill. of Arlington Heights, 782 F.3d 911 (7th Cir. 2015)

- Del Boccio reported to dispatch that he had checked the scene and that the subjects of the call were gone on arrival. He also called off another officer who was dispatched to the scene.
- The males were observed taking Doe into the laundry room by the site manager, who again called 911.
- Mount Prospect Officers arrived and caught one of the males sexually assaulting Doe in the laundry room. The males were arrested.

Doe v. Vill. of Arlington Heights, 782 F.3d 911 (7th Cir. 2015)

- Against Del Boccio, Doe alleged that (1) he failed to investigate the 911 complaint, and (2) acted to prevent other officers from arriving on the scene by calling off the other officer and making a false report to dispatch.
- District Court dismissed the claims, finding in relevant part that Del Boccio was entitled to qualified immunity. Doe appealed.
- The 7th Circuit affirmed the finding of qualified immunity for Del Boccio.
  - "Doe has not identified any case factually similar to this one that would have provided a reasonable officer with notice that he had a constitutional duty to protect Doe in the situation that Del Boccio encountered."
  - Doe also did not argue that the constitutional violation was obvious.

Doe v. Vill. of Arlington Heights, 782 F.3d 911 (7th Cir. 2015)

- "The district court correctly determined that it was not clearly established that calling off another police officer or falsely reporting to dispatch that the scene was clear violates a constitutional right of a victim of private violate."

Biographies

- Mike Bersani is a partner with Hervas, Condon & Bersani, P.C. Mike received his undergraduate degree from the University of Illinois, Urbana-Champaign in 1985, and his law degree from John Marshall Law School in 1988. Following law school, Mike clerked for the Honorable Judge Edward T. Barfield, State of Florida Court of Appeals, 1st District. In 1990, Mike entered private practice and has concentrated his practice in defending local governments in federal civil rights and municipal tort litigation. His typical case load includes claims involving police misconduct, jail conditions, wrongful termination, employment discrimination and retaliation, and premises and vehicular liability. Mike is admitted to the bars of the U.S. Supreme Court, Seventh Circuit, and the U.S. District Courts for the Northern and Central Districts of Illinois. He is co-contributor to the IICLE chapter on Civil Rights Liability and is rated AV Preeminent® in Martindale-Hubbell. Mike also practices in the area of municipal and park district law, and he served as the 2013-14 Chairman of the Illinois State Bar Association Local Government Law Section Council.
- Yordana Sawyer is an associate with Hervas, Condon & Bersani, P.C. She received her law degree from Chicago-Kent College of Law in May 2006 and her bachelor degree from the University of Wisconsin–Madison. Following law school, Yordana was a Research Staff Attorney at the Illinois Supreme Court in Springfield. She joined Hervas, Condon & Bersani, P.C. in 2008. She is admitted to the bars of the State of Illinois Seventh Circuit, and the U.S. District Courts for the Northern and Central Districts of Illinois. Yordana practices in the areas of civil rights and local government litigation, §1983 claims, and municipal law.