

Part IX Qualified Immunity

Hi. I'm Tim Miller. This is Part IX of our podcast series on use of force. Before we close, I would like to discuss a legal defense to standing civil trial that a police officer may raise. It's called qualified immunity.

V. Qualified Immunity

If sued by a plaintiff for a constitutional violation, the officer may request qualified immunity. Qualified immunity is a defense to standing civil trial. It's raised by the officer well in advance of the actual trial on the merits. If granted, the plaintiff's claim of excessive force against the officer is dismissed. But dismissal is qualified, however, by the officer's use of force being objectively reasonable.

A. The Rationale

The rationale behind qualified immunity for police officers is two-fold. First, it permits officers to perform their duties without fear of constantly defending themselves against insubstantial claims for damages. Second, it allows the public to recover damages when a reasonable officer would know that the officer unreasonably violated a plaintiff's constitutional or federal legal rights. Qualified immunity is designed to protect all but the plainly incompetent or those who knowingly violate the law.

B. Getting Qualified Immunity

Law enforcement officers are entitled to qualified immunity when their actions do not violate a clearly established statutory or constitutional right. The objective reasonableness test determines the entitlement. The officer is judged from the perspective of a reasonable officer on the scene, rather than with the vision of 20/20 hindsight.

Qualified immunity must be raised by the officer. It protects the officer in an individual capacity; and *not* the governmental entity employing the officer.

Part IX Qualified Immunity

C. Analyzing Claims of Qualified Immunity

Qualified immunity has two elements.

1. *Did a Constitutional Violation Occur?*

The first element is whether the officer violated a constitutional right, under the plaintiff's version of the facts.¹ If no violation occurred, there is obviously no basis for the lawsuit, and the suit is dismissed.

2. *Was the Right "Clearly Established?"*

Assuming the court finds that the officer violated the Fourth Amendment, the court examines the second element: Was the right clearly established by law? To deny the officer qualified immunity, the court must find a constitutional violation that was clearly established by law. The Supreme Court stated:

"Clearly established" for purposes of qualified immunity means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

If the law was not clearly established at the time an action occurred, an officer could not be reasonably expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.²

¹ Since the defense of qualified immunity is raised well in advance of trial, and if granted denies the plaintiff his day in court, the judge must consider the facts in a light most favorable to the plaintiff.

² *Wilson v. Layne*, 526 U.S. 603 (1999).

Part IX Qualified Immunity

Sometimes after examining both elements, the court finds a constitutional violation, but that the law was not clearly established at the time. Brooks v. City of Seattle is an example. The Ninth Circuit held that in the specific context of that case, it was constitutionally excessive to tase a pregnant woman three times in less than one minute. However, the officers still received qualified immunity because the law was not sufficiently clear so that every reasonable officer would have understood that what he was doing violated that right.

And sometimes the court simply holds that the law is not clearly established *without* addressing whether or not the officer violated the constitution. The Supreme Court held that courts do not have to address the elements in any particular order. In Cockrell v. City of Cincinnati, the court refused to decide whether a misdemeanant, fleeing from the scene of a non-violent misdemeanor, but offering no other resistance and disobeying no official command, had a clearly established right *not* to be tased. The court expressed no opinion on the matter. It held that the law was not clearly established and the officer received qualified immunity.

E. Reasonable Mistakes Can be Made

An officer can have a reasonable, but mistaken belief as to what the *law* requires, and still receive qualified immunity. Moreover, officers can have reasonable, but mistaken beliefs as to the *facts*. The following cases are illustrative:

1. Reasonable Mistakes About the Law

The case of Garner v. Memphis Police Department,³ was part of the litigation that eventually resulted in Tennessee v. Garner. The officer relied on a state statute that authorized *all necessary force* to stop a fleeing felon. The Supreme Court later declared the statute unconstitutional, in so much as it authorized deadly force to stop any fleeing felon, but the officer reasonably relied upon it at the time of the shooting.

³ *Garner v. Memphis Police Department*, 600 F.2d 52 (6th Cir. 1979).

Part IX Qualified Immunity

2. *Reasonable Mistakes About the Facts*

Officer may make reasonable, but mistaken beliefs about the facts. In Hudspeth v. City of Shreveport, for example, an officer mistook a silver object in the suspect's hand for a handgun. It turned out to be a cell phone.

F. Qualified immunity, denied.

It is not unusual for a court to deny an officer qualified immunity, even if the officer did - in fact - act reasonably. The reason for such a seemingly unfair result is because the judge, in deciding whether to grant the officer immunity from trial, must consider the plaintiff's version of the facts. Why? Granting qualified immunity to the officer denies the plaintiff his day in court. Therefore, the judge must consider the facts in a light most favorable to the plaintiff. In granting qualified immunity to the defendant officer the judge says, in effect, "Mr. Plaintiff, even considering the facts in your favor, no reasonable jury could find for you.

At trial, however, the burden shifts back to the plaintiff. Ellis v. Wynalda was discussed earlier. Officer Wynalda was denied qualified immunity because at the time Wynalda shot Ellis, a fleeing burglary suspect, Ellis had turned away. The bullet struck Ellis in the back, and considering the facts in a light most favorable to Ellis/plaintiff, the jury could find that he did not pose an immediate threat of serious bodily harm.

But at trial the burden shifts. Recall that Ellis threw a bag at Wynalda after the Officer ordered him to halt. Could a reasonable officer believe that Ellis posed an immediate threat at that time? The court thought so. If Wynalda had shot Ellis while he was throwing the bag, that would have been permissible as the actions of a reasonable officer facing a dangerous felon. Expert witnesses may also testify that once an officer makes a decision to pull the trigger, it takes about .30 seconds to stop and that within that time, Ellis could have already turned away.

Part IX Qualified Immunity

VI. Conclusions About Use of Force.

A law enforcement officer triggers the 4th Amendment's objective reasonableness test when she terminates a suspect's movement by a means intentionally applied. The courts weigh the nature of the intrusion against the countervailing interest at stake. In short, "what did the officer do, and why did she do it?" The more intrusive the seizure, the stronger the governmental interest should be for effecting it. To find that governmental interest, courts look to the Graham factors. Courts look at the seriousness of the crime, the threat to the officer or others, and whether the suspect is resisting or fleeing from a lawful seizure. Threat is generally respected as the most important.

Facts make force reasonable. Officers should articulate what they saw, heard, smelled, tasted or touched at the scene. By using good action verbs, the officer helps the court envision what she was experiencing on the street. Experts will say that officers often experience sensory deprivation in use of force encounters. Tunnel vision and auditory exclusion are two common physiological reactions to a perceived threat. But officers should still try to tell their story with the sounds, smells, and colors that they remember. While it may be impossible to recall exactly what the suspect said, the officer may still remember, "The suspect screamed at me"; that "his face was beet red"; and that "he clenched his fists, like a boxer."

The general rule is that the more intrusive the seizure, the stronger the governmental interest should be for effecting it. And since the Supreme Court stated that deadly force is unmatched, there should be a compelling government interest for using it. Over the years, it has been clearly established that deadly force is a reasonable force option when the officer has probable cause to believe that the suspect poses an immediate threat of death or serious bodily harm to the officer or others. While a warning adds to the reasonableness of any force options, it is not always feasible.

Part IX Qualified Immunity

Batons, tasers, and oleoresin capsaicin (OC) spray are often called intermediate weapons and like any force option, they must pass the objective test. Courts weigh the *nature of the intrusion* against the countervailing *governmental interest* at stake.

A baton is a reasonable force option against combative suspects – meaning someone who poses an articulable threat of harm to the officer. *These are fights*. Fights are dynamic encounters, and while officers cannot always predict what will happen in a fight, the Physical Techniques Division teaches officers to strike at the suspect's attacking limbs and large muscle groups and to avoid areas like the head, neck, or spine - unless deadly force is objectively reasonable.

Tasers in the dart-mode are reasonable when the suspect poses an immediate threat to the officer or others. The key is to be able to articulate facts that could lead a reasonable officer to believe that the suspect poses a threat. In Draper v. Reynolds, Officer Reynolds - with the help of his police car's dash cam video – the threat was articulable. In Bryan v. MacPherson, it was not. *Finally*, while there may be facts supporting the initial use of a taser, the facts may change, and the threat may also diminish, as it did in Beaver v. City of Federal Way when a back-up officer arrived.

Tasers have also been used to stop fleeing suspects, but officers should be mindful that the temporary paralysis caused by a taser in the dart-mode may cause secondary impact injuries. Officers should remember the rule that the Graham factors should not be considered in a vacuum; flight “alone” may not be a sufficient basis for using a taser in the dart-mode. The court in Cockrell held that the law was not clearly established in a case where a police officer used a taser to stop a fleeing jaywalker.

But the law is *clear* when a force option creates a foreseeable risk of death or serious bodily harm. Tasing someone in a tree, climbing over a fence, off of a raised platform, or around flammable liquids, creates such a danger.

Part IX Qualified Immunity

Officer should be ready to articulate a very strong governmental interest for using the taser under those circumstances, such as when the suspect poses an immediate threat of serious bodily harm.

And finally, OC and stun-drive tasers may be used as pain compliance tools in situations where suspects refuse to cooperate in their arrest. These are cases where the accused is charged with a minor crime. The officer is unable to point to any articulable threat. Flight is not an issue. The suspect simply refuses to get out of their car. Or, he refuses to get into the arresting officer's car. In other situations, protesters have simply sat down and refused to leave. Another common factor was time. The officer had plenty of time to choose a reasonable force option. The issue? Could a reasonable officer believe that the pain compliance tool was necessary to effect the arrest?

In *Headwaters*, OC was not necessary to remove trespassing protestors. The protestors had been safely and effectively removed by lesser means of force on prior occasions. When the OC or stun-drive taser is necessary, officers are well advised to give warning and to give the suspect time to reconsider his decision.

That's it. I hope you have found these podcasts helpful. Our job at the Legal Division is to help you enforce the law safely, effectively, and in accordance with our Constitution. If you have comments, please send them to me. I'm at Tim.Miller@fletc.dhs.gov. God bless you.