

Section 1983 Litigation - How the Summary Judgment Hurdle is Getting Higher and Higher

By: Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy

Section 1983 cases can present a number of challenges for local government attorneys, including sympathetic plaintiffs and courts stumbling over the standards for summary judgment and qualified immunity. Interestingly, the question of how the summary judgment and qualified immunity standards overlap came up during the oral argument (though only briefly) in a recent Supreme Court case: *District of Columbia v. Wesby*. In that case (which we have previously highlighted in this column), Justice Kagan asked the Solicitor General for the District of Columbia: how does "the summary judgment standard fit with the probable cause standard [the primary issue in that case] and also with the qualified immunity standard? How do those three things work together here?" And while the Justices were subsequently diverted from that line of questioning into procedural issues pertaining to the Respondent's filings in that case, the fact that the question was asked shows that courts are still not clear on how to apply these standards in conjunction.

One concerning trend that we have observed in relation to this open question is that courts are increasingly denying qualified immunity in Section 1983 cases, particularly where deadly force was utilized, claiming that factual issues preclude the court's ability to afford the officers with the defense. The Ninth Circuit has even noted that in deadly force cases, summary judgment should be granted sparingly as the officer defendant is often the only surviving witness. *See Gonzalez v. City of Anaheim*, 747 F.3d 789 (9th Cir. 2014). But, the idea that an officer's testimony should be looked on with skepticism, and qualified immunity therefore rarely granted, goes far beyond the requirement that courts must draw all inferences in favor of a non-moving party at summary judgment.

IMLA is currently involved as an amicus in two Section 1983 cases out of the Ninth Circuit that involve the foregoing problem: *Silva v. City and County of Honolulu* and *Estate of Lopez v. Gelhaus*. While the individual with whom the police were interacting ultimately died in both cases, the facts and circumstances in each were quite different. What the cases have in common is each court's decision to use non-material disputed facts or really the existence of any disputed facts to deny the officers qualified immunity.

Silva v. City and County of Honolulu

Silva involved an erratic individual who was dressed in all black and walking down the middle of a busy six-lane roadway at 8 pm during the end of rush hour. After refusing officers' commands and evading arrest while remaining in the middle of the street, the officers pepper sprayed him and when that did not work, attempted to Tase him three times (it was disputed as to whether the Taser probes actually made contact with him, but for the purposes of appeal that point is conceded). The individual ultimately died after this interaction with the police. It turns out that he was on methamphetamine and had an enlarged heart, both of which were found to be the likely causes of his death, though the cause of death is largely irrelevant for the purposes of summary judgment and qualified immunity.

The court claimed the disputes as to how busy the road was at that time (8 pm on a weekday) and whether the Taser probe actually made contact with the deceased precluded the court's ability to grant qualified immunity. The court simply noted "with disputed facts as to the use of force in this case, summary judgment is inappropriate." On the second question in the qualified immunity analysis, i.e., whether the law was clearly established, the court held that that question also turned on disputed facts; specifically, the effectiveness of the Taser and whether the deceased posed a threat to the officers or others (presumably based on how busy the street was) precluded the officers from receiving qualified immunity. Citing to the Ninth Circuit case *Ortega v. San Diego Police Dept.*, 669 Fed. Appx. 922, 923 (9th Cir. 2016), the court concluded that "police officers are not entitled to summary judgment on the basis of qualified immunity when there are disputes of fact that could lead a jury to find in favor of the plaintiff." Notably, the court even refused to find that the officers' use of pepper spray was reasonable or that they were entitled to qualified immunity for their use of the pepper spray.

But that begs the question: what were the officers supposed to do in

this situation? The individual was putting his life and the life of motorists traveling on a six-lane highway (regardless of how busy it was at that time) at risk by refusing to get out of the middle of the road. The officers tried verbal commands and pepper spraying him to no avail (which according to the court was at least arguably unconstitutional). They next deployed intermediate force, the use of the Taser. And this is where the court makes a fundamental error. Yes, the parties disputed whether the Taser made contact with the individual, but so what? Even if you take the facts in the light most favorable to the deceased, as you must on a motion for summary judgment, it is hard to imagine what else these officers could have done under the circumstances short of throwing their hands up in the air and abandoning their duty to protect the public. It is therefore hard to believe that their conduct violated this individual's Fourth Amendment rights or that if it did, the law was clearly established at the time such that every reasonable officer in their position would have known they could not have deployed the Taser. In fact, the district court noted that the cases the plaintiffs relied on in the Taser context are distinguishable from the current case and "do not assist" them when discussing whether the law was clearly established, but nonetheless declared that the material disputes of fact precluded the entry of summary judgment.

Estate of Lopez v. Gelhaus

Estate of Lopez involved a tragic set of facts that likely swayed the judges' sympathies in this decision. Specifically, the officers saw an individual, whom they believed was an older teen, walking down the street in the afternoon with what appeared to be an AK-47 assault-rifle. The officers drove toward the teen and flipped on the car's emergency lights, "chirped" the siren, and parked about 40 feet from the teen.

One of the officers got out of the vehicle and drew his pistol and positioned himself in the V of his open door and knelt on the ground for cover. He yelled loudly at the teen, who had continued walking and was now about 60 feet away, "Drop the gun!" The parties do not dispute that the teen did not drop the gun, and instead started to rotate his body toward the officers while continuing to hold the weapon. As the gun began to rise (just how much it was rising is disputed, but the district court did find it was "beginning to rise"), the officers shot and killed him. It turns out he was just a 13-year-old boy with a toy gun that had the orange tip removed, so the officers could not have determined that it was a fake from their vantage point.

The district court denied the officers' qualified immunity. Noting that it grants summary judgment "sparingly" in excessive force cases, particularly where the "only witness other than the officers was killed during the encounter," a divided panel for the Ninth Circuit upheld the denial of qualified immunity. In so holding, the Ninth Circuit relied on a number of immaterial facts in coming to the conclusion that the teen was not an immediate threat to the officers' safety and therefore under the *Graham* factors, qualified immunity was inappropriate. These factual disputes included: 1) whether the teen looked over his shoulder when the officers "chirped" the police siren; 2) how many times Gelhaus, one of the officers, shouted to drop the gun (the court accepted there was at least one shout); 3) which hand the teen was holding the gun in; and 4) the movement of the teen's gun. On this last point, the Ninth Circuit noted that it must accept the facts the district court assumed in denying summary judgment, and here the district court had made an express factual finding that "the rifle barrel was beginning to rise; and given that it started in a position where it was pointed down at the ground, it could have been raised to a slightly-higher level without posing any threat to the officers."

The majority also strangely discusses a witness' earlier observation of the teen and the belief of this particular witness (who did not see the interaction with the police) that the gun the teen was holding looked "fake" and that it was probably a BB gun. The dissent points out that the majority likely discussed this witness so as to attempt to create a genuine dispute of material fact. But as the dissent properly notes, this witness' "perception was based largely on facts and circumstances unique to him...so it should play no part in the analysis."

The dissent sums up the problem with the majority's opinion as follows: "The majority opinion exhaustively recounts the facts of the case, but for me, they are largely irrelevant. One critical fact—the upward motion of the fake gun—resolves the qualified immunity issue in [the officer's] favor. ...I agree with the majority, therefore, that the precise angle at which [the teen] pointed the gun is a disputed fact, but as I explain below, that is not material to the qualified immunity analysis."

The dissent goes on to explain that the majority incorrectly characterized the situation as the teen merely standing on the sidewalk holding a gun that was pointed down on the ground, which is qualitatively different than what the undisputed facts showed – i.e., the gun was rising. Finally, the dissent criticizes the majority for creating a "novel rule—that we must accept as true all facts not conclusively disproved by evidence in the record even if those facts have no evidentiary support of their own—"and notes that such a rule "is plainly wrong."

While the facts of *Silva* and *Estate of Lopez* are quite distinct, what they have in common is that both courts went to great lengths to find disputed facts and regardless of their materiality, they used those facts to deny summary judgment and qualified immunity to the officers in these cases. This results in an erosion of the policy rationales behind qualified immunity – specifically, that it is immunity from suit, not immunity from damages. Officers who

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are entitled to the defense should have their cases dismissed at the earliest possible time. Moreover, these types of cases undermine officer safety, as police officers will be less likely to defend themselves or others from valid threats when they are worried about crippling litigation down the line.

Until the Supreme Court weighs in on this precise issue, the trend of conflating the qualified immunity and summary judgment standards is likely to continue, at least in some circuits.

Other Current 1983 Cases

In addition to the foregoing cases, IMLA has submitted (or will shortly submit) amicus briefs in a number of other pending Section 1983 litigations, including a Supreme Court merits case and two Supreme Court petition stage cases. *City of Hays v. Vogt*, a Supreme Court merits case, involves the question of whether a "compelled" statement that is used at a probable cause hearing (as opposed to at a criminal trial) violates a person's Fifth Amendment rights, thereby allowing the person to sue a local government under Section 1983. This case has important implications for municipalities both in terms of law enforcement liability and liability for local governments and their officials in the employment context. As of this writing, oral argument has not been scheduled for *City of Hays*, but the case will be heard this term.

IMLA filed an amicus brief in support of the City of Phoenix and one of its police officers in *Hanlon v. Atencio*, a Supreme Court petition stage case. This case involved the question of the continued vitality of the Ninth Circuit's integral participation rule, which holds officials vicariously liable for arguably unforeseeable acts of excessive force by other defendants. In their petition for certiorari, the officers argued that the integral participant doctrine "allows an end run around the prohibition against vicarious § 1983 liability, substitutes 'but-for' causation for proximate causation, and undermines the purpose of qualified immunity." The Court denied certiorari in this case in mid-October, but this is an issue that is sure to make its way back to the Court in the near future.

IMLA also filed an amicus brief in another Supreme Court petition stage Section 1983 case, *Park v. Thompson*. *Park* involves the question of whether a §1983 claim exists for an alleged violation of compulsory process / fair trial where a person is acquitted at trial, claims no damages for malicious prosecution or incarceration, but rather for "emotional distress" because her defense was impeded by alleged unconstitutional acts of the police. This case presents a host of practical issues for local governments. For instance, how are damages calculated if someone is acquitted, but nonetheless claims that one avenue of defense was denied to her? Someone may believe that a particular witness would be uniquely beneficial at trial, but how does she know? The witness may in fact be someone who testifies poorly.

It is also impossible to say how much of a person's emotional distress was derived from her inability to present certain evidence or testimony as opposed to the emotional distress involved in defending oneself in a criminal case to begin with. The damages the plaintiff sought in the *Park* case underscores these practical issues as she was out on bail pending trial and was acquitted so her only avenue of damages was emotional distress, claiming the jury would have returned a verdict in her favor sooner than it actually did. As the foregoing demonstrates, allowing these claims to go forward leaves too much room for speculation and conjecture and summary judgment would be almost impossible.

If you need help with amicus assistance or would like more information about IMLA's legal advocacy program, contact Amanda Kellar at akellar@imla.org. ML

IN MEMORIAM





Cameron Robinson

IMLA remembers Cameron Robinson, a 28-year old staff member at the Las Vegas Law Department, who was among the 58 victims of the senseless carnage in that city on October 1. We were fortunate to meet Cameron as a host committee volunteer at our 80th Annual Conference in 2015. IMLA joins Las Vegas City Attorney Brad Jerbic and his colleagues in honoring Cameron's memory.