International Municipal Lawyers Association
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IMLA NEWS
Issue 5 – March 4, 2022

FEATURED CASE:

Qualified Immunity: Reversal of qualified immunity where force not justified, despite subsequent guilty plea to interference in arrest

Moser v. Etowah Police Dep't, no. 21-5162 (6th Cir. Mar. 3, 2021).

Reversing the district court, the Sixth Circuit holds that, where the plaintiff did not actively intervene in an ongoing arrest, there was no justification for an officer's throwing her to the ground, breaking her femur, and putting his full weight on her for up to 23 seconds—despite the fact that she subsequently pleaded guilty to interference in the arrest.

Plaintiff Linda Moser ("Moser") lived with her daughter Johnnie Moser ("Johnnie"). One night in September 2017, Johnnie was physically assaulted by her boyfriend James Ferguson ("Ferguson") and ran to a neighbor's house. The neighbor reported the incident to police, and Officers Tim Davis ("Davis") and Austin Parton ("Parton") from the Etowah Police Department soon arrived. Johnnie provided the officers with a physical description of Ferguson.

Looking for her daughter, Moser then came to the neighbor's house, trailed by Ferguson. Officer Parton recognized Ferguson as the assailant, directed Moser to take a seat on the porch, and began to handcuff Ferguson. Moser shouted "no," telling the officers to leave Ferguson alone because he had not done anything, and stating that Ferguson was with her. She then placed a hand on Parton, whereupon Officer Davis stepped onto the porch, grabbed Moser, and took her to the ground, telling Moser "you don't grab my guy."

Moser claims that Davis grabbed her by the hair and threw her down, then placed his knee on her back and applied his full weight for more than 20 seconds. Moser learned that she had suffered a fractured hip and femur, but she was charged with, and pleaded guilty to, interfering with the arrest of another in violation of Tenn. Code Ann. § 39-16-602. Moser brought an action against the Etowah Police Department, Davis, Parton, the City of Etowah, and others, but the parties agreed to dismiss all defendants except Davis and the City of Etowah. The district court granted summary judgment to both, ruling that taking Moser to the ground and pinning her did not amount to excessive force because Moser was actively interfering with Parton's attempt to arrest Ferguson.

In the alternative, the district court ruled that Davis was entitled to qualified immunity because it was not clearly established that either action constituted excessive force; in the absence of excessive force, the district court also granted summary judgment to the City of Etowah.

On appeal, the Circuit considered Moser's allegations as one excessive-force claim because Davis' actions could not be meaningfully separated into two distinct uses of force. Although the court typically analyzes "the subject event in segments when assessing the reasonableness of a police officer's actions," it has considered immediately consecutive uses of force as one excessive-force claim "when the plaintiff asserted that the uses of force were excessive for the same reasons." That analysis applied here: "When Davis decided to intervene on the porch, he took Moser to the ground, and he immediately pinned her to the ground. In other words, Davis's alleged kneeling on Moser was effectively a continuation of his efforts to bring Moser to the ground."

There were differing narratives as to what precipitated the take-down: Moser described her intrusion into the Ferguson arrest as minimal, a mere touching of Parton's arm. "To the extent that these narratives differ, we take the facts in favor of the plaintiff as the non-moving party. We do so by giving full weight to any facts objectively compelled by the videotape. Our careful and repeated view of the videotape does not compel the officer's version of the facts, to the extent that they differ from Moser's version." Viewing these facts in a light most favorable to Moser as required at this stage in the case, the Circuit found that a reasonable juror could conclude that Moser's yelling was only an attempt to get Parton to listen to her explain (albeit incorrectly) that Ferguson was innocent. In fact, Parton had stated "I didn't even feel her on me. I didn't even know she was there" when he was explaining his arrest of Ferguson.

The body-camera footage was also problematic, indicating that Davis could have kneeled on Moser for up to 23 seconds, and could have been applying his full weight. "A reasonable juror could therefore conclude that Davis put his full weight on Moser despite not touching her with his torso simply by bearing his weight on his knee to pin her to the porch." These factors required reversal:

> On these facts, which of course may ultimately be rejected in whole or part by the jury, Davis violated a clearly established constitutional right, and Davis was

> therefore not entitled to summary judgment on the excessive-force claim. Of course, to prevail on an excessive-force claim, Moser must show that Davis's use of such force amounted to a violation of Moser's clearly established constitutional rights. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). By September 2017, it was clearly established in this circuit that a person has a constitutional right to be free from injury-threatening physical force when he or she is not actively resisting the police, and Davis violated this right by taking Moser to the ground with such force that she broke two bones and then pinning her to the ground.

The court acknowledged *Ashcroft's* mandate "not to define clearly established law at a high level of generality." But it confirmed its stance that "[d]rawing the line at a suspect's active resistance defines the right at a level of particularity appropriate for a claim pursued under § 1983." Analyzing the *Graham* factors, the Circuit developed "a simple dichotomy" with respect to resisting arrest: "[w]hen a suspect actively resists arrest, the police can use [force] to subdue him; but when a suspect does not resist, or has stopped resisting, they cannot." Davis argued that Moser actively resisted arrest because she touched Parton and simultaneously raised her other hand, which held her cell phone, somewhere around Parton's head. "But some physical contact does not automatically rise to the level of active resistance." And Moser's subsequent conviction was not determinative of whether she had actively resisted Parton's attempt to arrest Ferguson. Enough evidence of excessive force had been adduced to require reversal of qualified immunity for Davis. This in turn required reversing summary judgment on the municipal-liability claim, which had been granted to Etowah on the basis of no underlying Fourth Amendment violation.

LINK

Short Summaries:

1st Circuit – Employment Discrimination – Equal Protection – Valid Comparators

I usually applaud the 1st Circuit for the brevity of its decisions and the way the court cuts to the chase. In this case, I'd be inclined to think the court could have cut to the chase more quickly, but it's still a short, yet well analyzed decision. A sanitation worker is injured on the job and seeks an accommodation for the resulting changed circumstances in his ability to perform the job. The city works with him over the years but eventually terminates him based on his inability to perform the required functions of the job and for his failure to fully participate in seeking an accommodation. During the pendency of all this the employee sought a disability retirement which was ultimately granted and was retroactive to before his termination. The court concluded that the only comparator that the Plaintiff used was not a valid comparator as the two differed because the Plaintiff did not have a CDL and the comparator did which fit into why the comparator was treated differently. To me, the disability retirement seemed a valid

basis on which the court could have dismissed the case. I certainly could be wrong, but If you have a have disability retirement, you're saying you can't do the job, so why is getting terminated from the job a sufficient cause to justify a discrimination claim?

Fincher v. Town of Brookline
LINK

3rd Circuit – No harm no foul

In something of an unusual case, an inmate was incorrectly classified as a sexual offender on entering prison and fearful for his life based on that classification did not eat with the prison population and lost quite a bit of weight but despite the misclassification and his fear for his well being, the inmate was not harmed by other inmates and was correctly classified in relatively short order. Recognizing that courts are not "superheroes", the panel concluded that the inmate while having his rights violated suffered no harm and that his sought after injunction was mooted by the correct reclassification.

Dongarra v. Officer Smith
LINK

5th Circuit – Vaccine mandate—religious exemption

5th Circuit refuses to lift injunction against Navy's vaccine mandate as applied to several Navy Seals who sought a religious accommodation.
Navy Seals 1-26 vs. Biden (try clicking on the case number where there should be a hyperlink)

U.S. Navy SEALs v. Biden
LINK

5th Circuit – Qualified Immunity – Excessive Force – No right to ignore police

In this case the 5th Circuit upheld a lower court's grant of qualified immunity to officers who shot and killed a fleeing suspect. The Officers learned via dispatch of a man brandishing a firearm at an apartment complex. An officer stops a car fitting the description and the passenger flees with an automatic weapon in hand. The officer gives chase ordering the man to stop and drop the firearm. He does not. Another officer joins the chase from the opposite direction an toward whom the man is fleeing. After some evasive maneuvers the man emerges from a bush line and is ordered to

drop the firearm, does not and is shot and killed. Force under these circumstances was not constitutionally excessive. Of note, to the argument that open carry is legal in the state and the man did not shoot at anyone, the court pointed out that a person confronted by police and told to drop a weapon has not right to refuse.

> "Louisiana's open-carry law does not permit armed suspects to flee from officers and disobey lawful commands to relinquish their guns. See State v. Gibson, 12-350 (La. App. 5 Cir. 10/30/12), 103 So.3d 641, 650 (officer had "probable cause to arrest defendant after he was observed fleeing [from police] with a gun")."

Wilson v. City of Bastrop
LINK

6th Circuit – Excessive Force – Qualified Immunity – Dissent worth noting

The panel of the 6th Circuit in a 2-1 decision proved once again that judges on that court are omniscient in retrospect and can transport themselves into the mind of a police officer when confronted with an aggressive mentally ill individual to allow them to make what they believe would be better choices. (Compare to other cases reported today.) Here, the police officer was called to address what was clearly a family problem between folks dealing with a family member who was mentally ill. The officer arrived and sought to deal with the subject of the complaint who was entirely uncommunicative throughout the incident and also thoroughly non-compliant. The officer sought to have the individual show his hands, but he did not. The officer sought to have the individual stop advancing on the officer, but he did not as the officer retreated. The officer used a taser to stop the man, but that failed and eventually, the officer shot him. Several shots were fired, the result of which killed the individual and entered his body in various different directions. All of these facts led the majority of the panel to conclude that an officer cannot use deadly force under these circumstances to which the dissent offered the following:

> "If one were unsure about the power a circuit court can wield, this case is a blunt example. With two circuit judges in agreement, a majority opinion can run roughshod over a well-reasoned opinion by an experienced and dispassionate district court judge. It can selectively amplify arguments barely made by the parties and can willfully resurrect others long ago abandoned. And, perhaps most striking of all, it can entirely ignore our Court's prior decisions as well as those from the Supreme Court, comforted by the knowledge that few decisions garner review beyond the appellate panel stage."

Palma v. Johns
LINK

7th Circuit – Qualified Immunity – Search of Wrong Dwelling – Failure to Abandon Search – Informer's Privilege

In a synopsis last week I wrote of a case from the 7th Circuit where a police officer was denied qualified immunity for misstatements in a warrant application due to recklessness. In this case out of the same Circuit where another John Doe was an informant and where the police similarly entered the wrong apartment in a multi-dwelling unit, the court accorded qualified immunity because the Plaintiffs were unable to show in the record that the police acted recklessly in securing the warrant. The court also concluded that while officers must immediately abandon a search when they learn it is for a different dwelling than that for which they asserted probable cause, that the Plaintiff did not prove when the officers learned of their mistake in relationship to the abandonment of the search. There's also quite a bit of discussion regarding informer's privilege and why the court believed the lower court did not err in denying the Plaintiffs discovery of the informant. Great work by the Chicago legal team on this case.

Wade v. Ramos
LINK

7th Circuit – Qualified Immunity – Misstatements in Search Warrant Applications

A 7th Circuit panel dealt with a difficult case and overturned the grant of qualified immunity to an officer who had applied for a search warrant and arrest warrant. A brief synopsis of the facts: The officer got information from a confidential informant about a felon with a gun. The CI took the officer to the person's home which was in a multi-dwelling unit. The CI described the unit and how to get to it. Rather than include that information in the warrant, the officer guessed at the address and was wrong. The warrant issued to the supposed address, but the officer having the CI's description executed the warrant at the correct person's dwelling. That person was not there and the described gun was not there, but a handgun was present. The officer then sought a warrant for a felon in possession. Long story short, the court admonished the police for guessing at an address on the basis that it would have taken too long to confirm it and denied the officer qualified immunity.

As someone who once worked with police officers in reviewing warrant applications, I think it fair to say that getting a warrant is not like on TV and it can be a long process (even more so before we had computers and the Internet), often stretching for long hours into the wee hours of the morning. Despite how long it might take, the key learning lesson for police and prosecutors should be that there are no short cuts. An application that describes with specificity how to get to a unit in a multi-unit dwelling may be sufficient even without the specific apartment number; so, describe it. The Court discussed the sufficiency of the officer's description of the reliability of the CI and found it lacking but found it negligent as opposed to reckless or false. Another key learning

lesson for all of us should be to provide sufficient information for a court to judge the reliability of a an anonymous CI without including so much information that the CI's identity can be discovered. If time does not allow a full research of something like an address, explain why in the application and how the alternative to the research offers sufficient clarity to offer probable cause. Although the court reversed one aspect of the case, the Chicago legal team did a great job defending the city and its officers in this case.

Taylor v. Hughes
LINK

9th Circuit – 14th Amendment requires "shock to the conscience" – wrongful deprivation of companionship claim

Rather than bring a claim for wrongful death or under the 4th Amendment, this claim by relatives of a man killed by police was brought under the 14th Amendment for wrongful deprivation of companionship and association. The Court concluded that the officers conduct did not violate the requirements of the 14th Amendment which requires acts to "shock the conscience".

Ochoa v. City of Mesa
LINK

10th Circuit – Unreported Social Media Case – Blocking – Qualified Immunity

A panel of the 10th Circuit reversed a lower court decision denying qualified immunity to a county commissioner who created a social media account and later blocked comments from someone with whom the commissioner disagreed. The lower court relying on several noteworthy cases from other circuits denied qualified immunity. The panel reviewed the 4th Circuit's Davidson case and found that the complaint did not sufficiently allege that the commissioner acted similarly in establishing the social media account. The panel reviewed the 5th Circuit case involving the Hunt County Sheriff's case and concluded that the differences between the cases were stark as the Sheriff's office was clearly a governmental agency as opposed to a politician. Finally, the panel looked at the 2nd Circuit case involving the former President's social media account and concluded that one out of circuit case does not provide sufficient clarity upon which to deny someone in the 10th Circuit qualified immunity.

Swanson v. Griffin
LINK

10th Circuit – Unreported – Excessive Force

In a case where officers were called to address an individual who had acted aggressively at a convenience store and who was brandishing a sword, the court concluded that summary judgment for the officers was appropriate on a claim that the officers used excessive force in killing the suspect. A nice quote in a footnote at the outset of the case, especially for those in the 10th Circuit:

> "In a claim of excessive force, "the only evidence relevant to the propriety of [the officer's] actions is what [the officer] observed or what he was informed of by others." Cox v. Wilson, 971 F.3d 1159, 1166 (10th Cir. 2020)."

Lennen v. City of Casper
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