Local Government Law Bulletin

DAVID M. LAWRENCE, Editor

Qualified Immunity from Liability for Violations of Federal Rights—a Modification

Michael R. Smith

THIS BULLETIN EXAMINES the qualified immunity defense available to protect public officials from liability for damages in lawsuits brought under 42 U.S.C. § 1983 that allege that the official violated the plaintiff's federal rights. The United States Supreme Court recently modified the standard applied to those cases. In *Harlow v. Fitzgerald*[1] the Supreme Court held that public officials may not be required to pay damages if their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In other words, a public official may be required to pay damages in a Section 1983 lawsuit only if he acted contrary to settled law. The defense of qualified immunity plays a prominent role in many Section 1983 lawsuits against public officials. The *Harlow* decision therefore is bound to have important consequences for Section 1983 litigation and deserves close consideration.

DEVELOPMENT OF THE QUALIFIED IMMUNITY DEFENSE

The federal statute 42 U.S.C. § 1983 authorizes a person to sue and recover damages from a public official who has violated one of that person's federal constitutional or statutory rights. Of course, the official's best defense is that his conduct in fact did not violate the plaintiff's federal rights. But is a public official automatically required to pay damages if a court finds that his conduct violated someone's federal rights? The language of Section 1983 does not suggest that an official who violates someone's rights ever is entitled to immunity from liability for damages. However, in a series of cases the United States Supreme Court has declared that officials sued under Section 1983 are entitled to claim a defense of qualified immunity.[2]

In *Scheuer v. Rhodes*[3] the Court gave two reasons why qualified immunity was needed to protect public officials who perform discretionary functions from liability for damages: (1) it would be unjust to hold those officials liable in the absence of bad faith for decisions they are legally obligated to make; and (2) such liability would chill the decisiveness of public officials and make them afraid to respond to local needs. The Court therefore ruled that a public official will be immune from liability only if, when he acted, there were reasonable grounds for him to believe that his action was lawful and he held that belief in good

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The author is an Institute of Government faculty member who has written extensively on the liability of governments and government officials. This article is adapted from an article that appears in *School Law Bulletin* 14, no. 1 (January 1983).

1. 50 U.S.L.W. 4815 (1982).

2. The Supreme Court has extended qualified immunity to various public officials in the following line of cases: Pierson v. Ray, 386 U.S. 547 (1967) (police officers); Scheuer v. Rhodes, 416 U.S. 232 (1974) (governor and executive officers); Wood v. Strickland, 420 U.S. 308 (1975) (school board members); O'Connor v. Donaldson, 422 U.S. 563 (1975) (hospital superintendent); and Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials and officers). Immunity has been extended to those public officials who historically were accorded immunity at common law, but only if immunity for those officials also is compatible with the remedial purposes of Section 1983. Owen v. City of Independence, 445 U.S. 622, 638 (1980).

3. 416 U.S. 232 (1974).

INSTITUTE OF GOVERNMENT, The University of North Carolina at Chapel Hill

faith.[4] Moreover, the Supreme Court also noted that the scope of the qualified immunity available to a public official varies with "the scope of discretion and responsibilities of the office . . . ."[5]

In *Wood v. Strickland* (1975),[6] the Supreme Court refined the qualified immunity standard. In that case two high school students sued school board members under Section 1983, alleging that their right to procedural due process was violated when they were expelled from school. The Supreme Court announced that a public official must establish that he acted with *both* objective *and* subjective good faith in order to be protected from liability for damages by the defense of qualified immunity. *Subjective good faith* existed if the official acted with a sincere belief that his conduct was lawful. It did not exist if he acted with a malicious intent to violate someone's federal rights. *Objective good faith* was established if the official could not reasonably have known that his official conduct would violate someone's federal rights. Objective good faith did not exist if he disregarded "clearly established" federal law. On the other hand, a public official was not required to "[predict] the future course of constitutional law" in order to establish objective good faith. The standard announced in *Wood* required an official sued under Section 1983 to clear both hurdles to invoke the qualified immunity defense and avoid liability for damages.

THE NEW QUALIFIED IMMUNITY STANDARD

In *Harlow v. Fitzgerald* the plaintiff, a former federal employee, sued the defendants, White House aides to former President Nixon, alleging that they had conspired to violate his federal constitutional rights.[7] Defendants moved for judgment before trial on grounds that as senior aides to the President they were entitled to absolute immunity. When that motion was denied, the defendants took the case to the court of appeals, which dismissed the appeal. The defendants then appealed to the Supreme Court, which heard the case. The Court also refused to extend absolute immunity from liability for damages to presidential aides, but it did rule that presidential aides are entitled to qualified immunity.

In *Harlow* the Supreme Court also re-examined its decision in *Wood* and revised the qualified immunity standard. A fundamental reason for granting this immunity to public officials is to permit the quick termination of meritless lawsuits without a trial, but the subjective element of qualified immunity announced in *Wood* had prevented this result. Essentially, a plaintiff could force a public official to undergo the cost, risk, and disruption of a full civil trial simply by calling his subjective good faith into question. The reason: Some courts have considered the subjective good faith of a public official to be an issue of fact that must be resolved by a jury at trial, not by a judge before trial. Therefore, to expedite the resolution of insubstantial lawsuits, in *Harlow* the Supreme Court deleted the subjective good-faith requirement from the qualified immunity standard.

The new qualified immunity standard provides that public officials who perform discretionary functions "*are shielded from liability for damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.*"[8] In other words, the qualified immunity defense is now composed entirely of the objective good-faith element announced in *Wood v. Strickland*. Significantly, the decision whether to grant qualified immunity to a public official should now be made by the judge before trial. If the law was not clearly established at the time of his alleged misconduct, the defendant official could not reasonably have known that his conduct was unlawful and he is entitled to qualified immunity. Still, though it would be unfair to require a public official to predict subsequent legal developments in order to avoid liability for damages under Section 1983, he is expected to be familiar with clearly established law governing his conduct. A public official who violates someone's rights in the face of clearly established law therefore will not be protected by qualified immunity except in extraordinary circumstances. Again, the Supreme Court in *Harlow* emphasized that insubstantial lawsuits under Section 1983 should not be allowed to proceed to trial.

It is important to understand that certain public officials sued under Section 1983 are entitled to absolute immunity from liability for damages. The Harlow decision applies only to qualified immunity and does not affect the defense of absolute immunity. For example, judges are entitled to absolute immunity for actions taken in the course of performing their judicial functions.[9] Similarly, prosecutors are granted absolute immunity from liability for actions closely associated with the judicial phase of a criminal

4. *Id.* at 247-48.

5. *Id.* at 247.

6. 420 U.S. 308 (1975).

7. The *Harlow* lawsuit was brought against federal officials for alleged violations of federal rights. But the Supreme Court noted in a footnote that "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." 50 U.S.L.W. 4820, n. 30, *quoting* Butz v. Economou, 438 U.S. 478, 504 (1978). The qualified immunity standard announced in *Harlow* therefore should be applied in lawsuits against state and local officials officials brought under Section 1983. Wolfel v. Sanborn, 691 F.2d 270 (6th Cir. 1982).

8. 50 U.S.L.W. at 4820 (emphasis added).

9. Stump v. Sparkman, 435 U.S. 349 (1978).

case.[10] Local legislators sued under Section 1983 are entitled to absolute immunity for acts taken in a legislative capacity, such as the enactment of an unconstitutional zoning ordinance.[11] Again, the absolute immunity defense available to those public officials *is not* changed by *Harlow*.

Not long ago the Supreme Court decided that local governments are strictly liable for damages in lawsuits brought under Section 1983 for violations of federal rights caused by a unit's official policy or custom.[12] In other words, local units of government are not even entitled to a defense of qualified immunity. Of course, that harsh rule of liability is not affected by the *Harlow* decision.

WHAT IS CLEARLY ESTABLISHED LAW?

The qualified immunity standard announced in *Harlow* is different from the earlier one, but it is not new. In fact, the *Harlow* standard is the objective component of the qualified immunity standard announced in *Wood v. Strickland*. The Supreme Court in *Wood* and later in *Harlow* sketched an outline of the objective test but did not say precisely how it is to be applied in different situations. Specifically, the Court did not identify when a federal right is considered clearly established. However, reliable guidance concerning the now current *Harlow* standard can be drawn from lower court decisions that have interpreted the objective test found in *Wood*.

1. **The particular right allegedly violated should be examined in determining whether an official violated a clearly established federal right.**

The ultimate issue in deciding whether a public official is entitled to qualified immunity is whether he reasonably should have known that his actions would violate someone's specifically established federal rights. An official's knowledge of a general constitutional provision, such as the First Amendment, does not always tell him whether a proposed action will violate that general provision. The availability of the qualified immunity defense therefore depends on an analysis of whether the courts have decided that a particular right is included within the protection of a general constitutional provision. A public official will not be required to pay damages unless the particular federal right allegedly violated was clearly established at the time he acted.

The Supreme Court in *Procunier v. Navarette*[13] recognized the basic distinction between general and particular constitutional rights for purposes of the qualified immunity defense. A convicted prisoner alleged that prison officials violated his First Amendment right to free speech by interfering with his outgoing mail. At the time of the challenged interference the following state of the law existed: (1) The Supreme Court had ruled that an addressee's constitutional rights may be violated by interference with a convicted prisoner's outgoing mail, but it had not ruled on whether the *prisoner's* rights were violated. (2) Lower federal courts had ruled that prisoners have a constitutional right to receive newspapers and magazines. And (3) a federal district court had ruled that defendants who are confined before trial have a First Amendment right in their correspondence. None of the cases decided at that time had specifically addressed the rights of convicted prisoners in their mail. The Supreme Court in *Procunier* ruled that the prison officials were entitled to qualified immunity as a matter of law because the specific constitutional protection accorded a prisoner in his outgoing mail was not clearly established at the time of the challenged actions. Most lower federal courts have recognized the distinction between general and specific constitutional rights in determining whether a public official is entitled to qualified immunity.[14] Of course, they sometimes differ over how specifically a federal right must have been addressed before it is considered clearly established.[15]

An attorney who is arguing that a public official is entitled to qualified immunity must focus the court's attention on the specific constitutional right allegedly violated. Of course, in almost all cases there will be a body of general constitutional law surrounding the right in question that may be used as a point of reference. An attorney should examine the state of the law at the time of the official's challenged conduct and argue that the specific right allegedly violated does not fall within the general framework of decided cases. Obviously, a public official's attorney increases his chance of prevailing on grounds of qualified immunity if he frames a plaintiff's allegations as narrowly as is reasonably possible. A defendant public official

10. Imbler v. Pachtman, 424 U.S. 409 (1976). The Supreme Court has not addressed the scope of immunity available to prosecutors for investigative actions not connected with the judicial phase of a criminal proceeding. Most federal courts have ruled that prosecutors are entitled to qualified—not absolute—immunity from liability for administrative or investigative actions. 50 U.S.L.W. at 4818, n. 16. The qualified immunity standard announced in *Harlow* applies in those cases.

11. *See, e.g.*, Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980). However, local legislators are entitled to qualified immunity only for administrative actions, such as hiring and firing. Uisser v. Magnarelli, 542F. Supp. 1331 (N.D.N.Y. 1982); Detz v. Hoover, 539 F. Supp. 532 (E.D. Pa. 1982).

12. Owen v. City of Independence, 445 U.S. 622 (1980).

13. 434 U.S. 555 (1978).

14. *See, e.g.*, Sullivan v. Meade Indep. School Dist., 530 F.2d 799 (8th Cir. 1976) (board members entitled to qualified immunity for dismissing unmarried teacher who lived with boyfriend because it was unclear whether the general constitutional right to privacy included particular privacy right asserted); Tate v. Alexander, 527 F. Supp. 796 (M.D. Tenn. 1981) (governor entitled to qualified immunity for blocking release of inmates granted pardons or commutations by former governor because it was not clearly established that general right to liberty included specific right to be released pursuant to disputed commutations). *See also* Jihaad v. O'Brien, 645 F.2d 556 (6th Cir. 1981).

15. *See* 653 F.2d 1164 (7th Cir. 1981).

should be entitled to qualified immunity as a matter of law if the right allegedly violated was not clearly established at the time he acted.

It must be noted that at least one general constitutional prohibition is so well known and scrupulously defended that the law always is considered clearly established. No public official will be protected by qualified immunity if it is shown that he illegally discriminated against someone on grounds of race or national origin. In *Flores v. Pierce*,[16] for example, the plaintiffs, two Mexican-Americans, showed that various public officials discriminated against them on the basis of either race or national origin by filing official protests that delayed issuance of their requested liquor license. The court of appeals ruled as a matter of law that the officials were *not* entitled to qualified immunity from liability. Further, it found that the general right to be free from such invidious discrimination is well established and "that all public officials must be charged with knowledge of it."[17] It was irrelevant that the general prohibition against racial discrimination had not been applied in court decisions to this precise situation—the general constitutional rules clearly prohibited all invidious discrimination.[18]

2. The decisions of the United States Supreme Court, the appropriate federal court of appeals, the local federal district court, and the highest state court should be used as a point of reference in determining whether the specific right allegedly violated was clearly established.

Neither the Supreme Court nor any other federal court has provided clear guidelines that may be used to determine whether a specific federal right has been clearly established. On the contrary, the federal courts have criticized the objective good-faith standard for being vague and have noted that "there are no bright lines"[19] for deciding whether the law's treatment of particular conduct at any given time is clearly established. However, an examination of the case law reveals patterns that permit general statements about what sources should be considered in assessing whether a specific federal right is clearly established at a given time.

An obvious conclusion should be stated at the outset: A specific federal right is clearly established if it has been addressed authoritatively by the United States Supreme Court.[20] As the final arbiter of the Constitution, the Court's decisions are binding on all public officials and all governments. In *Fowler v. Cross*,[21] for example, the plaintiff claimed that his constitutional rights were violated when he was returned to prison for alleged parole violations without first being given a preliminary parole-revocation hearing. Two years earlier the Supreme Court clearly ruled that parolees have a constitutional right to a preliminary hearing shortly after being arrested for an alleged parole violation.[22] As a result, the Fifth Circuit Court of Appeals ruled that the defendant officials in *Fowler* were not entitled to qualified immunity because the specific right allegedly violated was clearly established. In other words, the law was uncertain before the Supreme Court's earlier decision, but that decision "brought clarity to the area" and established the law.[23]

It is difficult to draw firm conclusions about the sources that should be examined to decide whether a legal issue is clearly established if the Supreme Court has not addressed the specific federal right allegedly violated. The Fourth Circuit Court of Appeals has suggested that officials should not be required to pay damages "where the controlling law had not been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state . . . ."[24] Though many courts would accept that sample as a reasonable starting point, most courts probably would require a slightly broader inquiry to determine whether a particular right is clearly established. The Supreme Court has suggested that the "state of the law be evaluated by reference to the opinions of [the Supreme Court], of the Courts of Appeals, or of the local District Court . . . ."[25] Some combination of these two standards represents a recommended scope of inquiry for determining whether particular actions of a public official were clearly unconstitutional at the time they were taken.

Typically, a lower court begins its inquiry into a defendant official's right to qualified immunity by conducting a thorough search of all federal court cases decided before the alleged unconstitutional action took place. In many instances that search will reveal that no decided case has addressed the specific constitutional right allegedly violated.[26] Of course, under those circumstances the specific federal right allegedly violated is not clearly established and the official is entitled to qualified immunity from liability as a matter of law.[27] In other words, a court may not have to decide whether cases not found in the above list of recommended sources clearly establish a constitutional right.

16. 617 F.d 1386 (9th Cir. 1980).

17. *Id.* at 1392.

18. *See also* Williams v. Anderson, 562 F.2d 1081 (8th Cir. 1977) (general constitutional prohibition against racial discrimination clearly established and defendants not entitled to qualified immunity in particular case).

19. Barker v. Norman, 651 F.2d 1107 (5th Cir. 1981).

20. *See* Clanton v. Orleans Parish School Board, 649 F.2d 1084, 1101 (5th Cir. 1981); Jihaad v. O'Brien, 645 F.2d 556, 563 (6th Cir. 1981); Williams v. Anderson, 562 F.2d 1081, 1101-02 (8th Cir. 1977).

21. 635 F.2d 476 (5th Cir. 1981).

22. 408 U.S. 471 (1972).

23. 606 F.2d 621 (5th Cir. 1971).

24. Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980). *See also* Bogard v. Cook, 586 F.2d 399, 420 (5th Cir. 1978); Williams v. Anderson, 562 F.2d 1081, 1101-02 (8th Cir. 1977); Bertot v. School District No. 1, 522 F.2d 1171, 1185 (10th Cir. 1975).

25. Procunier v. Navarette, 434 U.S. 555, 565 (1978). *See also* Clanton v. Orleans Parish School Board, 649 F.2d 1084, 1101 (5th Cir. 1981); Fujiwara v. Clark, 477 F. Supp. 822, 833 (D. Haw. 1979).

26. Clanton v. Orleans Parish School Board, 649 F.2d 1084, 1101 (5th Cir. 1981); Jihaad v. O'Brien, 645 F.2d 556, 563 (6th Cir. 1981); Lock v. Jenkins, 641 F.2d 488, 499-500 (7th Cir. 1981).

27. Sala v. County of Suffolk, 604 F.2d 207, 209 (2d Cir. 1979).

Nevertheless, difficult questions concerning whether a particular federal right is clearly established have not been answered. For example, should a specific federal right be considered clearly established if it has been addressed by a court of appeals from another federal circuit but not by the official's circuit court of appeals? No. Nor should it be considered clearly established if it has been addressed by a district court without jurisdiction over the official. But it will be considered clearly established if it has been decided by the court of appeals in the circuit where the suit was brought. Significantly, it is unclear whether a single decision by a district court with jurisdiction over an official clearly settles the federal right addressed for all officials in that district. What if the issue has been resolved by six of the eleven federal circuit courts of appeals but the public official's circuit court of appeals has not addressed it? That is a closer question. The decisions from the other courts of appeals are not binding on the sued official, but perhaps he should have recognized a trend to protect the specific right involved. These and other difficult questions have not been addressed in the decided cases.

A public official's attorney should recognize that the general statement at the beginning of this section is not a foolproof guide for determining whether a specific federal right is clearly established. It is no more than a rough map that must be applied with common sense in each case. The attorney's preferred option in any case is to argue that there is no decision by *any* court that addresses the specific constitutional right allegedly violated. If *some* federal court has decided a case that deals with the specific right, the best option is to argue that the case was decided by a court that is not binding on the sued public official. In either event, the federal right allegedly violated was not clearly established at the time of the alleged violation, and the public official is immune from liability for damages.

OTHER FACTORS IN DETERMINING WHETHER TO GRANT QUALIFIED IMMUNITY

The existence of the factors discussed below traditionally has entitled public officials to qualified immunity from liability for damages. However, those factors generally have little to do with whether a public official should have known that his conduct would violate someone's clearly established rights—the *Harlow* qualified immunity standard. For example, the existence of a valid court order protects a public official from liability even if it authorizes clearly unconstitutional conduct. Unfortunately, some lower courts have created confusion by analyzing the following factors as part of the *Harlow* qualified immunity standard. A local government attorney should keep in mind that they are separate.

1. The existence of a state statute that authorizes the challenged action taken by a public official establishes that the official is entitled to qualified immunity.

The courts have adopted a reasonable approach when public officials defend against liability for damages by arguing that they were following a state statute. Such officials usually are granted qualified immunity. The United States Supreme Court, in *Pierson v. Ray*,[28] ruled that a police officer who arrests someone he reasonably believes is violating a state statute will not be held liable if that statute later is declared unconstitutional. A public official will not be required to predict which state laws are constitutional in order to avoid liability. Of course, to avoid liability for damages, a defendant official must demonstrate that he reasonably believed that the statute permitted his specific conduct.[29] In *Familias Unidas v. Briscoe*,[30] for example, a group of citizens alleged that their First Amendment rights to freedom of association were violated when school officials demanded that they publicly disclose their membership in a private organization. The demand was made pursuant to a Texas statute that permitted forced disclosure of membership in organizations that were designed to interfere with peaceful operation of the schools. The plaintiffs sued under Section 1983, seeking money damages from the officials who had demanded the disclosure. The Fifth Circuit Court of Appeals ruled that the forced-disclosure statute was an unconstitutional interference with the plaintiffs' freedom of association, but it nevertheless refused to hold the school officials liable. The reason: The school officials relied on a state statutory scheme and they could not reasonably be expected to know that the statute was unconstitutional.[31]

2. The existence of a court order that authorizes the challenged action taken by a public official usually establishes that the official is entitled to qualified immunity.

A public official who executes an apparently valid court order that causes the violation of someone's federal rights may not be held liable. That principle does not address directly the issue of whether an official's conduct violated someone's clearly established rights. But whether such an official violated established law is not relevant. An official

28. 386 U.S. 547 (1967).

29. *Id.* at 557. On the other hand, a clear violation of a state statute may establish the existence of a constitutional violation as a matter of law. In Landrum v. Moats, 576 F.2d 1320 (8th Cir. 1978), for example, the court of appeals found that police officers had used unreasonable force as a matter of law and were not entitled to qualified immunity because they shot and killed a fleeing nonviolent felon in violation of a Nebraska statute. The officers did not reasonably believe that the fleeing felon they shot was violent.

30. 619 F.2d 391 (5th Cir. 1980).

31. *See also* Garner v. Memphis Police Department, 600 F.2d 52, 54 (6th Cir. 1979) (police officers acted pursuant to statute authorizing use of any means necessary to make arrest); Sebastian v. United States, 531 F.2d 900, 903 (8th Cir. 1976) (sheriff's deputies acted pursuant to involuntary commitment statute); Hollis v. Bailey, 524 F. Supp. 565, 567 (E.D. Mo. 1981) (police officer acted pursuant to statutes authorizing traffic enforcement and confiscation of weapons from arrestees).

executing a court order normally acts in a ministerial capacity. In other words, the order is delivered to him for execution and he has little choice in the matter. For example, in *Turner v. Raynes*[32] a sheriff executed an arrest warrant issued for a person who violated the conditions of a bond that required him not to commit a breach of the peace. However, the sole remedy under state law was a civil action and the arrest was illegal. The Fifth Circuit Court of Appeals ruled that the sheriff was entitled to qualified immunity from liability for damages as a matter of law. The court explained that "[i]t would be a strange and unworkable rule that required a sheriff, at his peril, to determine the ultimate legal validity of every warrant—regular on its face and issued by proper authority—before serving it."[33] A public official will not be required to investigate the underlying validity of a court order, including an order issued by a magistrate, in order to avoid liability for its enforcement.[34]

A word of caution is required. Qualified immunity will not always protect a public official from liability for actions taken *before* the issuance of a court order,[35] and it will not always protect him for actions taken *after* issuance of the order. For example, a police officer who procures an arrest or search warrant by making up facts and presenting them to a judicial official may not hide behind the warrant to avoid liability.[36] The reason: The officer would have reasonable grounds to believe that his actions violated the clearly established constitutional rights of others.[37] The issuance of the court order (warrant) would not protect him from liability. Of course, common sense indicates that the existence of a court order will not always protect an official against liability for actions taken during its execution. A police officer will not be found liable for damages in a Section 1983 lawsuit if he conducts a search pursuant to a warrant later declared invalid. However, an officer may be required to pay damages if he conducts a search in an unreasonable manner. An arrest warrant permits an officer to take a named defendant into custody. But an officer may be required to pay damages if he violates a defendant's constitutional rights by using excessive force and injuring him. A court order protects an official against civil liability in a Section 1983 lawsuit only when the authorized action is conducted in a reasonable manner.[38]

3. A public official is more likely to be granted qualified immunity if his actions that violate someone's rights were taken pursuant to a department policy or procedure, a superior's order, or the advice of an attorney.

The courts consider a variety of factors before granting a public official qualified immunity from liability for damages. The factors listed above may be useful in establishing qualified immunity. In a few cases lower courts have found that the existence of one of those factors is sufficient to establish immunity, but in others a combination has been required. Obviously, an attorney increases a defendant public official's chances of avoiding liability to the extent that he is able to combine several of the above factors. So far those factors have been used most often to establish that police officers were entitled to qualified immunity, but they should be equally useful in establishing immunity for other public officials.

A public official who violates someone's federal rights by following department policy or procedure generally is entitled to qualified immunity. For example, an arresting officer who followed standard department procedures and refused to permit an arrestee to make a telephone call was granted qualified immunity.[39] Another federal court has ruled that police officers who followed the provisions of their police manual and thereby used excessive force are protected by qualified immunity.[40] Other federal courts also have recognized that a public official who has followed department procedures and violated someone's federal rights should not be required to pay damages.[41]

The decided cases make it clear that department regulations are a two- edged sword. As already noted, a public official usually will be immune from liability if he has followed applicable guidelines or regulations. But a failure to follow regulations typically will weigh heavily against granting qualified immunity. In *Logan v. Shealy*,[42] the Fourth Circuit Court of Appeals declared unconstitutional a department policy that required a strip search in private of all detainees brought to the jail. The court stated that while a jailer might reasonably believe that the search policy was valid just because it was promulgated by a superior and therefore be entitled to qualified immunity, he could not reasonably believe that a search was valid if he conducted it in public. In other words, a jailer who violated the policy by conducting a strip search in public is not entitled to qualified immunity. Other courts have

32. 611 F.2d 92 (5th Cir. 1980).

33. *Id.* at 93. Atkins v. Lanning, 536 F.2d 485, 487 (10th Cir. 1977); Fowler v. Alexander, 478 F.2d 694, 696 (4th Cir. 1973); Bezdek v. City of Elmhurst, 70 F.R.D. 636, 639 (N.D. Ill. 1976).

34. Langton v. Maloney, 527 F. Supp. 538, 548 (D. Conn. 1981). However, a court order must be valid on its face in order to provide a defense based on the objective good-faith enforcement of that order. Douthit v. Jones, 619 F.2d 527, 536-37 (5th Cir. 1980).

35. *See, e.g.*, 607 F.2d 858 (9th Cir. 1979).

36. Farmer v. Lawson, 510 F. Supp. 91, 96 (N.D. Ga. 1981).

37. The inquiry in such a case is not whether the officer acted with malice. That is the rejected subjective component of the qualified immunity standard. Rather, his knowledge that the judicial official's finding of probable cause was based on false information gives him reasonable grounds to believe that the arrest or search is unconstitutional.

38. *See* Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977).

39. Logan v. Shealy, 660 F.2d 1007, 1012 (4th Cir. 1981).

40. Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir. 1978).

41. *See, e.g.*, McCray v. Burrell, 516 F.2d 357, 370 (4th Cir. 1975); Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980).

42. 660 F.2d 1007, 1014 (4th Cir. 1981).

concluded that a public official's failure to follow a department regulation militates against the reasonableness of his belief in the lawfulness of his action.[43]

A public official also is more likely to be protected by qualified immunity if he has consulted with a lawyer who approved his proposed action. In *Street v. Cherba*,[44] for example, two Maryland detectives were sued for extraditing an arrestee from the District of Columbia in violation of his federal rights. The Fourth Circuit Court of Appeals found that the detectives were entitled to qualified immunity because they could reasonably have believed that the extradition was lawful. The reason: They had relied on the advice of a military lawyer.[45] Other courts, in finding that an official was entitled to qualified immunity, have emphasized that the defendant had followed an attorney's advice.[46] Still, a public official is more likely to be protected from liability by qualified immunity if the fact that he relied on an attorney's advice is coupled with other evidence that he reasonably believed that his action was lawful.[47] For example, a police officer would be in a better position to claim qualified immunity if he could establish that he also followed department regulations.

Finally, the fact that a superior official ordered the defendant to take a particular action may help establish that in following that order, the subordinate defendant reasonably believed that his action was lawful. In *Wallace v. King*[48] the Fourth Circuit Court of Appeals adopted an approach that is fairly typical. The court granted qualified immunity to officers accused of conducting an illegal search in part because they had followed their superior officers' instructions. But in granting immunity the court considered it equally important that the controlling law had not been clearly established and that the officers had conducted the search in a reasonable manner. The lesson appears to be that a public official's reliance on the orders of a superior is more likely to support a claim of qualified immunity if it is joined with other factors that indicate that he reasonably believed in the lawfulness of his actions.[49] A reliance on such orders alone probably is not sufficient to establish qualified immunity from liability.

The combination of factors discussed above will be useful in proving a public official's right to qualified immunity only in borderline cases. They will *not* entitle him to qualified immunity if at the time he acted the law was clearly established and he should have known that his conduct was unlawful.[50] In *Villanueva v. George*,[51] for example, the Eighth Circuit Court of Appeals refused to grant prison guards qualified immunity from liability for damages in a case challenging conditions of pretrial confinement simply because they followed the orders of their superior officers. The court of appeals stated that "if they knew or should have known that their [failure to act was] violating the plaintiff's constitutional rights, [they may not] hide behind the cloak of institutional loyalty."[52] In other words, a public official may not use the fact that he consulted a lawyer or a superior's order to avoid responsibility for violating someone's clearly established federal rights.

Recent court decisions increasingly indicate that having followed department regulations, having consulted a lawyer, and having received orders from a superior will be more likely to protect lower-level employees than higher-level officials from liability for damages. Few courts have followed the Supreme Court's admonition in *Scheuer v. Rhodes*[53] that the scope of qualified immunity available to a public officer varies "dependent upon the scope of discretion and responsibilities of the office . . . ."[54] In *Logan v. Shealy*,[55] the Fourth Circuit Court of Appeals honored that distinction and indicated that the standards for determining qualified immunity for a sheriff and his deputy are different. The sheriff was required to satisfy a higher standard—namely, could he reasonably have believed that his strip-search policy was lawful, since presumably he had some knowledge of existing law. The test for the deputy, a lower-level employee, was easier to satisfy. Qualified immunity would have been granted to the deputy if he had simply applied the sheriff's policy as it was promulgated. Other federal courts have applied a less demanding qualified immunity standard for low-level employees,[56] though even a low-level school employee will not always be able to avoid liability by relying on the advice of others or following department regulations if his actions violate clearly settled law. Nevertheless, a public official's attorney should

43. *See, e.g.*, Dellums v. Powell, 566 F.2d 167, 184 (D.C. Cir. 1977); McCray v. Burrell, 516 F.2d 357, 370 (4th Cir. 1975).

44. 662 F.2d 1037 (4th Cir. 1981).

45. *Id.* at 1040.

46. *See* Schiff v. Williams, 519 F.2d 257, 261 (5th Cir. 1975); Burgess v. Miller, 492 F. Supp. 1284 (N.D. Fla. 1980).

47. *See e.g.*, Jihaad v. O'Brien, 645 F.2d 556, 563 (6th Cir. 1981); Walker v. Hoffman, 583 F.2d 1073, 1075 (9th Cir. 1978).

48. 626 F.2d 1157 (4th Cir. 1980).

49. *See e.g.*, Allred v. Svarczkopf, 573 F.2d 1146, 1153 (10th Cir. 1978); Langton v. Maloney, 527 F. Supp. 538, 547 (D. Conn. 1981).

50. *See* Jihaad v. O'Brien, 645 F.2d 556, 563 (6th Cir. 1981); Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980). *Cf.* Glasson v. City of Louisville, 518 F.2d 899, 910-11 (6th Cir. 1975).

51. 659 F.2d 851 (8th Cir. 1981).

52. *Id.* at 855, *quoting* Putnam v. Gerloff, 639 F.2d 415, 423 (8th Cir. 1981).

53. 416 U.S. 232 (1974).

54. *Id.* at 247.

55. 660 F.2d 1007, 1014 (4th Cir. 1981).

56. *See* Langton v. Maloney, 527 F. Supp. 538, 547 (D. Conn. 1981). The Fifth Circuit Court of Appeals takes a somewhat different approach that probably leads to the same result for low-level employees. In Douthit v. Jones, 619 F.2d 527, 535 (5th Cir. 1980), the court ruled that ministerial public employees who exercise no discretion and are under little time pressure, such as jailers, will be held to a higher standard than public officers who exercise greater discretion. For example, a jailer might be held liable if he fails to keep adequate records and holds a prisoner beyond his release date. That means that a low-level employee generaly should be granted qualified immunity, as in *Logan*, if he follows a policy promulgated by the sheriff. The reason: He has carried out his ministerial duties by acting strictly in accord with established policy.

rely on the distinction announced in *Scheuer* to argue that those factors should be afforded greater weight in determining whether such an employee is entitled to qualified immunity.

QUALIFIED IMMUNITY MUST BE PROVED BY THE DEFENDANT

In a Section 1983 lawsuit a plaintiff need make only two allegations to state a valid claim for damages: (1) some person deprived him of a federal right, and (2) that person acted under color of state law.[57] The plaintiff need not allege that the defendant official acted in bad faith. Qualified immunity is an affirmative defense that the defendant must plead.[58] In other words, an official who is sued under Section 1983 has the burden of pleading that his conduct did not violate clearly established constitutional or statutory rights of which a reasonable person would have known.

A sued public official not only has the initial burden of raising the qualified immunity defense but also then must prove to the court that his conduct did not violate clearly established rights of which a reasonable person would have known,[59] though some courts under certain circumstances have permitted a defendant official to shift the burden of proof to the plaintiff.[60]

QUALIFIED IMMUNITY AND CLAIMS FOR INJUNCTIVE RELIEF

A public official who violates someone's federal rights may satisfy the requirements for qualified immunity and avoid liability for damages, but the defense of qualified immunity does not bar a plaintiff's request for injunctive or declaratory relief.[61] In *Wallace v. King*,[62] for example, the Fourth Circuit Court of Appeals declared unconstitutional a police department policy that generally permitted officers to search the premises of a third person for a person named in an arrest warrant without first obtaining a search warrant. Officers who conducted searches pursuant to the policy were entitled to qualified immunity from liability for damages because they could not reasonably have known that the policy was unconstitutional, but the court directed the lower court to enter a judgment declaring the policy unconstitutional and to enjoin its future enforcement. The court's decision is based on the belief that an award of damages under such circumstances might make public officials afraid to act but the entry of injunctive relief will not. A defendant public official granted qualified immunity also will be protected from liability for an award of back pay though the local unit may be required to pay.[63]

RETROACTIVE APPLICATION OF THE NEW STANDARD

It appears that the qualified immunity standard announced in *Harlow* applies to cases pending at the time it was decided—June 24, 1982. The Supreme Court has vacated the judgments in two cases and remanded them for further consideration in light of its decision in *Harlow*.[64] Without directly addressing the issue of its retroactivity, several federal courts nevertheless have applied the *Harlow* standard to pending cases.[65] However, the issue of whether *Harlow* should apply retroactively has not been conclusively addressed.

SUGGESTIONS FOR SUMMARY JUDGMENT MOTION BASED ON QUALIFIED IMMUNITY

The Supreme Court emphasized in *Harlow* that insubstantial lawsuits should not be allowed to proceed to trial. A federal district court judge should grant summary judgment for a public official if that official could not reasonably have known that his actions would violate the plaintiff's clearly established federal rights. A public official's attorney must focus the court's attention on the state of the law as it existed when the official's challenged conduct occurred. To do so the attorney must provide the court with a snapshot of the applicable law as it existed on a specific date—the date of the official's alleged misconduct.

57. Gomez v. Toledo, 446 U.S. 635 (1980).

58. *Id.* at 640.

59. *See, e.g.*, Harris v. City of Roseburg, 664 F.2d 1121, 1128 (9th Cir. 1981); Logan v. Shealy, 660 F.2d 1007, 1014 (4th Cir. 1981); Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir. 1978); Dellums v. Powell, 566 F.2d 167, 176 (D.C. Cir. 1977). Justice Rehnquist, in Gomez v. Toledo, 446 U.S. 635, 642 (1980), noted that the Supreme Court has addressed only the burden of pleading—not the burden of proving—qualified immunity. But the Court in dicta has indicated that the official who claims immunity has the burden to demonstrate his entitlement. Dennis v. Sparks, 449 U.S. 24, 29 (1980).

60. The Fifth Circuit Court of Appeals has adopted an approach that shifts the burden of proof to the plaintiff on the qualified immunity issue. First, a sued public official generally must establish that his challenged actions were within the scope of his authority. The burden then shifts to the plaintiff. To defeat an official's claim to immunity, the plaintiff must prove that the official violated clearly established rights of which a reasonable person would have known. Barker v. Norman, 651 F.2d 1107, 1120-21 (5th Cir. 1981). *See also* Jihaad v. O'Brien, 645 F.2d 556, 564 (6th Cir. 1981).

61. *See, e.g.*, Rodriguez v. Board of Education, 620 F.2d 362, 366 (2d Cir. 1980); Bertot v. School District No. 1, 522 F.2d 1171, 1184 (10th Cir. 1975).

62. 626 F.2d 1157, 1161 (4th Cir. 1980).

63. Clanton v. Orleans Parish School Board, 649 F.2d 1084, 1101 n. 20 (5th Cir. 1981); Paxman v. Campbell, 612 F.2d 848, 856 (4th Cir. 1980); Bertot v. School Dist. No. 1, 522 F.2d 1171, 1184-85 (10th Cir. 1975).

64. Sanborn v. Wolfel, 50 U.S.L.W. 3998.10 (June 29, 1982); Velde v. National Black Police Assn., Inc., 50 U.S.L.W. 5033 (June 29, 1982).

65. Williams v. Bennett, 689 F.2d 1370, 1385 (11th Cir. 1982); Saldana v. Garga, 684 F.2d 1159, 1164-65 (5th Cir. 1982).

Subsequent court decisions are irrelevant, and even if the specific federal right in question has since been clearly established, that fact is also irrelevant. A public official's attorney should argue that the law was not clearly established by applying the principles discussed above to the law as it existed at the time of the alleged violation. Of course, a public official is entitled to qualified immunity as a matter of law if the federal right allegedly violated was not clearly established when he acted.

The *Harlow* decision in part was a reaction to the reluctance of lower federal courts to grant sued public officials judgment before trial on the basis of qualified immunity. Those courts now should be less reluctant to grant summary judgment because the decision to do so may be based on objective legal grounds. Nevertheless, lower federal courts still may hesitate to grant public officials qualified immunity before trial as a matter of law. Attorneys for sued public officials may be able to discourage such a reluctance by making the following argument: Lower federal courts have a duty "to deal with possibly dispositive statutory issues before reaching questions turning on the construction of the Constitution."[66] In *Wood* the Supreme Court held that the question of a public official's right to qualified immunity in a Section 1983 lawsuit involves the construction of a federal statute, and it therefore ruled that the question of qualified immunity should be considered before the merits of constitutional questions raised in the lawsuit are addressed. A public official's attorney might urge a federal court to uphold the strong federal policy against unnecessarily deciding constitutional questions by granting judgment for his client on grounds of qualified immunity.

CONCLUSION

The Supreme Court's decision in *Harlow* evidently makes it easier for a public official to establish qualified immunity from liability for damages. The official's subjective state of mind is no longer a crucial inquiry.[67] Rather, the Supreme Court formulated an objective test: Could the official reasonably have known that his conduct would violate someone's federal rights? Significantly, the *Harlow* decision emphasized that an official's right to qualified immunity may be decided as a matter of law before trial. A public official's attorney may well be able to apply the principles discussed in this article to resolve Section 1983 lawsuits against public officials without a trial.

66. Wood v. Strickland, 420 U.S. 308, 314 (1975).

67. It is not clear whether a public official's subjective good faith has any significance in a court's decision to grant him qualified immunity. For example, the Eleventh Circuit Court of Appeals recently held that the subjective good faith of a public official remains relevant in lawsuits alleging a constitutional deprivation of cruel and unusual punishment. Williams v. Bennett, 689 F.2d 1370, 1386 (11th Cir. 1982). *See* Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982).