



# LEGAL DEFENSE TRUST TRAINING BULLETIN

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## **SUPREME COURT CONTINUES PRO-POLICE TREND HOLDING THAT OFFICER IS ENTITLED TO HAVE QUALIFIED IMMUNITY DETERMINATION MADE EARLY.**

By Catherine M. Kelly, Esq.

The United States Supreme Court has just held that officer-defendants are entitled to an early judicial determination of their immunity in civil rights lawsuits alleging that the officers used excessive or unreasonable force. Lower appellate and trial courts, particularly here in the Ninth Circuit, held that a defendant-officer could never establish his entitlement to immunity before trial if there were factual disputes relative to the use of force. Such factual determinations, it has been held, are reserved for the jury.

In *Saucier v. Katz*, No. 99-1977 (June 18, 2001), 533 U.S. \_\_\_\_ the Court reversed the Ninth Circuit's holding that Officer Donald Saucier's claim to immunity was merged or "fused" with the question of whether his force during an arrest was reasonable, into one question for the trier of fact. The Supreme court held that the officer is entitled to have his claim to immunity decided early, before trial, separate and apart from the question of whether his force was reasonable.

Law enforcement personnel and their lawyers need to understand this case for the significant development that it is, in litigating excessive force cases, and in protecting the officer

from exposure to damages, particularly those that are punitive.

### *The Factual Setting*

In 1994, several hundred people gathered at the Presidio Army Base in San Francisco in honor of the conversion of the base to a national park. Vice President Al Gore. was one of the speakers at the event. Elliot Katz, president of a group called "In Defense of Animals", attended to protest the possibility that the Army's hospital would be used for conducting experiments on animals. Katz knew that members of the public had been asked to leave the military base in the past for engaging in certain activities, including distributing handbills. Therefore, Katz carried a 4' by 3' cloth banner concealed under his jacket as he walked through the base. Katz sat in the front row of the public seating area which was separated from the stage by a waist-high fence.

Donald Saucier, a military police officer, was on-duty working at the event. Saucier's supervisors had warned Saucier of the possibility of demonstrations and identified Katz as a potential protestor. At about the time Gore began speaking, Saucier and Sergeant Steven Parker recognized Katz. Katz had removed the banner

from his jacket, started to unfold it, and walked toward the fence and speakers' platform.

As Katz was hanging the banner on the other side of the fence, the officers grabbed Katz from behind, took the banner and rushed him out of the area. Each officer had one of Katz' arms, with his feet "barely touching the ground." Katz was wearing a visible, knee-high leg brace, although Saucier later testified he did not remember noticing it at the time. Saucier and Parker took Katz to a nearby military van, where Katz claims, he was pushed inside with "gratuitously violent shove." The reason for the shove remains unclear. Katz placed his feet somewhere on the outside of the van, perhaps the bumper, but there is a dispute whether he did so to resist. As a result of the shove, Katz claims, he fell to the floor of the van, where he caught himself just in time to avoid any injury.

Katz brought an action against Saucier and other officials alleging that they had violated his Fourth Amendment rights by using excessive force to arrest him.<sup>1</sup>

### ***The Lower Courts: Qualified Immunity and The Fourth Amendment Tests Are One and The Same***

First, this case was in the United States District Court for the Northern District of California. There, Saucier made motions for summary judgment on the grounds of qualified immunity. Basically, qualified immunity would

protect Saucier from personal liability even if his treatment of Katz violated Katz' constitutional rights, if a reasonable officer in this same situation would have believed his conduct was appropriate under the circumstances. If the District Court granted summary judgment on all of the claims against Saucier, the case would not then have gone to trial. Instead, the District Court granted Saucier's motions for summary judgment on all claims *other than* the excessive force claim against Saucier.

The reasoning behind the District Court's decision is important. The District Court held that a dispute on a material fact existed concerning whether excessive force was used to remove Katz from the crowd and place him into the van. First, the District Court found that the law governing excessive force claims was clearly established at the time of the arrest. Simply put, there was no question that Saucier was prohibited from using excessive force to arrest Katz. To evaluate what makes force excessive, the courts use the objective reasonableness test established in *Graham v. Connor*, 490 U.S. 386 (1989).

Moving to the second step of the qualified immunity test, both the District Court and Ninth Circuit used similar reasoning. According to these lower courts, the second step of the qualified immunity analysis looks at the objective reasonableness of the officer's conduct in light of the circumstances the officer faced at the scene. This same test is used to assess a Fourth Amendment excessive force claim. In both instances, these kinds of factual questions go to the jury, according to these courts.

For example on this Fourth Amendment claim, in this case, the jury would look at Saucier's conduct based on the surrounding circumstances. In determining whether Saucier used excessive force, the jury would consider such things as the safety issues associated with Gore speaking, Katz'

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<sup>1</sup>Years ago, the Supreme Court held that all claims of excessive force in connection with detentions or arrests should be decided under the Fourth Amendment's objective reasonableness standard because these cases involve a "seizure" of the person. *Graham v. Connor* 490 U.S. 386 (1989).

proximity to the speaker, and the volume of people in the area, among others. These must be considered in evaluating Saucier's conduct in light of the circumstances facing him at the scene.

The lower courts put the qualified immunity question and the Fourth Amendment question together as one because they require the same analysis. This fusion would hurt police officer defendants because if an officer could show that his conduct met the elements of qualified immunity (the law governing the official's conduct was clearly established and a reasonable officer could have believed, in light of the clearly established law, that his conduct was lawful), the case would end at that point and not go on to trial. If the question of qualified immunity gets mixed in with the Fourth Amendment excessive force question, the officer's case is pulled into a trial no matter what, even if the officer could have avoided trial due to qualified immunity.

### *The Supreme Court's Pro-police Analysis*

The Supreme Court of the United States decided to hear this case based on the decisions of the lower courts. It found the lower courts needed to look at the facts of the case with more specificity. This outlook reinforces a pro-police trend established in earlier cases dealing with qualified immunity.

First, the Court emphasized that the decision of whether a defendant has qualified immunity should be made early in the proceedings. Solving the issue early saves unnecessary costs and expenses of trial. Since the immunity allows a defendant to avoid trial, it is only fair to decide the immunity questions at the earliest possible stage in litigation.

Next, the Court outlined the step-by-step approach used to achieve this goal:

1. Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?

2. If a violation could be made out on a favorable view of the parties' submissions, was the right clearly established?

The Court noted that this second inquiry must be undertaken in light of the specific context of the case. A more specific approach helps to advance the understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable. Also, in deciding whether a right is clearly established, the courts look at whether it would be clear to a reasonable officer that his conduct was unlawful in the situation which he confronted. If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.

The Court pointed out that the qualified immunity inquiry goes beyond the Fourth Amendment excessive force inquiry. Importantly, *Graham* focuses only on the objective reasonableness of the officer's conduct. An officer, however, might have difficulty figuring out what the established law is when he's in a particular factual situation. The immunity defense protects the officer if he makes a mistake and his mistake as to what the law requires is reasonable. After all, the law is ever-changing and therefore, each case needs an individual analysis. Thus, qualified immunity operates to protect officers from the vague distinction between excessive and acceptable force and to ensure that officers were on notice that their conduct was unlawful before they are subjected to suit. This case accepts that an officer could make a reasonable mistake as to the legal constraints on particular police conduct.

In the *Saucier* case in particular, the issue was whether the force used violated a clearly established Fourth Amendment protection so that Saucier was not entitled to immunity. First, the Court assumed a constitutional violation could have occurred under the facts alleged based simply on the general rule prohibiting excessive force. Second, the Court looked at what Saucier reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards. The Court found that a reasonable officer in Saucier's position could have believed that hurrying Katz away from the scene, where Vice President Gore was speaking and Katz had just approached the fence designated to separate the public from the speakers, was within the bounds of appropriate police responses. Moreover, the same circumstances surrounding the shove that Katz received when he was placed into the van also show some degree of urgency.

Therefore, the Court found that Saucier was entitled to qualified immunity, and the suit should have been dismissed at an early stage in the proceedings.

### ***What The Case Means For You***

This Supreme Court case is extremely favorable to police defendants. First, it prohibits courts from putting the question of qualified immunity together with Fourth Amendment issues. The benefit of separating these concepts is that the courts will decide early in the proceedings whether a police officer is entitled to the qualified immunity defense. The officer, therefore, can avoid the expense, costs and stress associated with lengthy and unnecessary litigation.

Secondly, the Supreme Court decision forces courts to look at an officer's conduct on a case-by-case basis. Importantly, qualified immunity can apply in the event a police officer

has a mistaken belief that the amount of forced used in a situation was reasonable. This is similar to the case where an officer violates the Fourth Amendment by conducting an unreasonable, warrantless search. The officer is still granted immunity for reasonable mistakes as to the legality of the search. Thus, there is no difference between an excessive force case and any other Fourth Amendment suit.

In sum, Saucier guarantees that the officer is entitled to have qualified immunity determinations considered separately, early in the proceedings and on a more specific level.

This is an extremely important case for police defendants in typical civil rights (42 U.S.C. §1983) lawsuits. From here we will be looking to see how the lower courts apply this new look at qualified immunity.

Stay safe!  
-Catherine M. Kelly, Esq.-

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