

NINTH CIRCUIT REINTERPRETS THE DOCTRINE OF QUALIFIED IMMUNITY

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In its recent decision in *Cox v. Roskelley*, 359 F.3d 1105 (Feb. 20, 2004), the 9th U.S. Circuit Court of Appeals radically reinterpreted the defense of qualified immunity as it was defined in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Claude Cox was Safety/Loss Manager for Spokane County, Washington. The county performed a road repair project in a faulty manner, and many cars were damaged as a result. The county arranged for a contractor to repair the cars, and Cox was charged with overseeing the processing of drivers' claims. A number of problems arose during this process, including the revelation of an apparent personal relationship between Cox and the contractor, and the county eventually fired Cox on grounds of irresponsibility and poor managerial judgment.

After Cox was fired, a newspaper made a "public records request" for the county's letter terminating Cox. The county released the letter from Cox's personnel file, as it was required to do under Washington law.

Cox then brought an action under 42 U.S.C. section 1983 against numerous defendants, among them several county officials in their individual capacities. He asserted a variety of causes of action, including "deprivation of liberty interest in Cox's good name." The District Court ruled that the individual defendants were not entitled to qualified immunity, and they appealed that ruling to the 9th Circuit.

Writing for the majority, Judge Johnnie B. Rawlinson affirmed the decision of the District Court, because "the law was clearly established that publication of stigmatizing information without a name-clearing hearing violates due process." However, the court's analysis raises serious doubts about this conclusion.

The U.S. Supreme Court redefined the standard for qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Before that decision, most administrative officials sued for damages arising from the performance of discretionary functions had to establish both "objective" and "subjective" elements to establish the defense of qualified immunity.

As the *Harlow* court explained it, "The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.' The subjective component refers to 'permissible intentions.' Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury."

Harlow noted that application of the subjective test had often interfered with the normal

and efficient functioning of government agencies: "The judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government."

The Supreme Court therefore discarded the subjective element, and ruled in *Harlow* that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

The majority in *Cox* observed that the Supreme Court had decided in *Board of Regents v. Roth*, 408 U.S. 564 (1972), that "a terminated [government] employee has a constitutionally based liberty interest in clearing his name when stigmatizing information regarding the reasons for the termination is publicly disclosed." The issue in *Cox* was whether the placement of the letter of termination in Cox's personnel file constituted public disclosure, and if so, whether the law on that issue had been "clearly established" when the defendants had put it there.

The court noted there is a "current circuit split as to whether an employer can satisfy the publication prong by maintaining stigmatizing information in its personnel files." To determine if resolution of the issue was "clearly established" within the 9th Circuit, it examined two of its earlier decisions: *Mustafa v. Clark County School District*, 157 F.3d 1169 (9th Cir. 1998), and *Llamas v. Butte Community College District*, 238 F.3d 1123 (9th Cir. 2001).

As described in *Cox*, neither of these earlier cases had resolved the issue.

In *Mustafa*, "we expressly declined to resolve the issue of whether placement of the discharge documents in Mustafa's personnel file constituted publication for purposes of Mustafa's liberty interest claim[, although we] did note that 'the district court's finding that the charges were not publicized may be problematical.'"

Likewise, in *Llamas*, there had been "no occasion to directly confront the issue we now address."

Nevertheless, on the basis of these two precedents, as well as a single decision of another circuit (although the circuits disagree on this issue), the *Cox* majority concluded that the law was sufficiently "clearly established" for the defense of qualified immunity not to apply: "The clear implication of our rulings in *Mustafa* and *Llamas* is that, absent expungement, placement of stigmatizing information in an employee's personnel file constitutes publication when the governing state law classifies an employee's personnel file as a public record."

The court's own justification for its ruling impeaches its conclusion: "*Mustafa*, decided in September, 1998, gave officials 'fair warning' that placement of stigmatizing charges in an

employee's personnel file *may* constitute publication for purposes of assessing the asserted deprivation of a liberty interest" (emphasis added), and that the *Mustafa* decision had "served notice that the district court's finding of no publication was 'problematical.'"

The court's ruling, that qualified immunity does not apply if a defendant might intuit a forthcoming clarification of the law, is a novel reinterpretation of the doctrine, inconsistent with *Harlow* and the long line of cases following it.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Supreme Court recently addressed the proper standard for evaluating the defense of qualified immunity in this context: "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

Thus, the constitutional standard as articulated by the Supreme Court demands substantial certainty in the state of the law, and not the mere "problematic" possibility that there "may" be a constitutional violation.

Judge Cynthia Holcomb Hall dissented in *Cox* on this ground, finding the majority opinion "disquieting." She wrote that "A reasonable public official can not be expected to contemplate a significant shift in precedent, such as this Circuit choosing sides on an issue upon which other circuits have manifestly disagreed, and we have explicitly refrained from addressing, based on one line of dictum."

Judge Hall elaborated: "It is unfathomable that a reasonable public official should be aware of the unlawfulness of his conduct based on a three-word aside, which was expressly qualified by an accompanying footnote, cautioning that a lower court's decision concluding to the contrary 'may be problematical.' We should not equate 'clearly established' law with rules which are arrived at through extremely intuitive and analytical parsing of the dicta of two of our own cases, and the similar fact pattern of one case from a sister circuit, which stands in direct opposition to the decisions rendered by other circuits. To do so unfairly collapses the qualified immunity inquiry beyond recognition."

One must hope that the 9th Circuit will reverse the *Cox* decision *en banc* or in a subsequent case. Administrative officials need a clear understanding of when qualified immunity applies so they can exercise their offices without continual anxiety about being sued in their personal capacities over official acts that seemed lawful at the time they were made.

As the Supreme Court recognized in *Harlow*, without some certainty as to the limits of personal liability, "fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties."