

CIVIL RIGHTS PLAINTIFFS CAN DEFEAT QUALIFIED  
IMMUNITY DEFENSES AND GET FRIVOLOUS APPEAL  
SANCTIONS: THEY SHOULD TRY MORE OFTEN!

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INTRODUCTION

This article is about recent United States Supreme Court and Courts of Appeal decisions that offer civil rights Plaintiffs new tools in dealing with what had been a growing problem of interlocutory appeals from district court decisions refusing early termination of their lawsuits.

Plaintiffs who sue under 42 U.S.C. §1983 for violation of their federal rights bear extraordinary burdens.<sup>1</sup> There is one small ray of hope. If a Section 1983 claim is legally well founded, the federal courts – including the Supreme Court – have become fed up with defendants who improperly delay proceedings. Certain kinds of interlocutory appeals from trial court decisions denying immunity from suit under Section 1983 can be dismissed before briefing. In some of those cases, substantial frivolous appeal sanctions can be collected. This article is a short primer on how to set up such dismissals and sanctions.

THE PROBLEM

Substantively, many federal rights appear ever to be shrinking. Chief Justice Rehnquist and Justices Scalia and Thomas would limit the scope of Section 1983

jurisdiction (and the rights protected pursuant to it) almost to the vanishing point.<sup>2</sup>

Procedurally, the deck is also stacked against plaintiffs.

As pertinent here, the Supreme Court has held that government employees and officials who are sued in their personal capacities for damages for violating a person's civil rights may terminate the lawsuit early on grounds of absolute or qualified immunity. "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery."<sup>3</sup> Defendant may raise the qualified (or absolute) immunity defense at almost any time in the lawsuit; and may do so repeatedly. Immunity may be asserted as an affirmative defense with the answer, in a motion to dismiss for failure to state a claim on which relief can be granted, in summary judgment motions, and in motions for directed verdict during or after trial.

Unfortunately, assertion of an immunity claim provides civil rights defendants with extraordinary opportunities for trial delay, even when the defense fails. "The denial of a substantial claim of absolute [or qualified] immunity" is an order that is subject to interlocutory appeal before final judgment.<sup>4</sup> A non-frivolous interlocutory appeal will stay virtually all trial court proceedings.<sup>5</sup> Such delay usually benefits defendant, not plaintiff.

Issues of qualified immunity often are difficult, as they involve subtle legal and factual components. To oversimplify a bit, a government employee or official

enjoys qualified immunity if his or her conduct was objectively “reasonable” as measured by reference to clearly established law.<sup>6</sup> To defeat a claim of qualified immunity, civil rights plaintiffs must show that, if proven, the challenged conduct violated a federal right that was “clearly” established at the time of the conduct, and that defendants knew or should have known that their acts would violate plaintiffs’ right.<sup>7</sup>

Qualified immunity thus has two elements, both of which plaintiff must satisfy. First, plaintiff must demonstrate that the federal right claimed to have been violated was clearly established when the defendant acted. This is almost a pure legal question. Second, plaintiff must establish both that defendant acted in a manner that injured plaintiff and that, under the circumstances in which defendant acted, he or she knew or should have known that his or her actions would violate plaintiff’s federal rights. These are highly factual issues.<sup>8</sup>

### THE RAY OF HOPE

Fortunately, even the present Supreme Court has figured out that not all prejudgment denials of the qualified immunity defense should be the subject of an interlocutory appeal. In 1995, the Supreme Court held that the Courts of Appeals have jurisdiction over interlocutory appeals from summary judgment orders denying a defendant qualified immunity, only when the immunity determination turns on the legal issue whether the plaintiff’s federal right was clearly established.<sup>9</sup> The Courts of Appeals have no interlocutory appellate jurisdiction to

determine whether genuine issues of material fact exist, as to whether wrongful conduct took place and usually as to whether that conduct violated a federal right (assuming the right was clearly established).<sup>10</sup> Most likely the Supreme Court was motivated to protect the already overburdened federal appellate courts from a flood of fact-intensive appeals.

The Courts of Appeals have responded by dismissing interlocutory appeals from prejudgment orders denying claims of qualified immunity, where there are material issues of fact and no questions of law as to the existence of a clearly established right.<sup>11</sup>

In 1998 the Sixth Circuit held that: “In the future, a defendant who wishes to file such an appeal after being denied qualified immunity should be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the case. Such a defendant will have a solid jurisdictional position if the defendant claims the plaintiff cannot show a violation of clearly established law even assuming everything alleged is true. Once a defendant’s argument drifts from the purely legal into the factual realm and begins contesting what really happened, our jurisdiction ends and the case should proceed to trial.”<sup>12</sup>

In 1995, the Fifth Circuit took a large and encouraging additional step. It held that: “Because there are disputed issues of material fact, concerning the qualified immunity defense, we lack jurisdiction to consider the interlocutory appeal. Accordingly, we dismiss. In addition, because counsel for appellant has

multiplied these proceedings unreasonably and vexatiously, we impose sanctions against counsel pursuant to 28 U.S.C. § 1927.”<sup>13</sup> The court awarded as sanctions the full amount of fees and costs claimed for work on the appeal by plaintiff’s counsel, i.e., \$20,643.75.<sup>14</sup>

Recently, Elden Rosenthal (of Portland, Oregon) and I got a similar result in the Ninth Circuit. A motions panel of the Ninth Circuit granted our early motion to dismiss as frivolous two defendant police officers’ interlocutory appeals from denial of summary judgment based on defendants’ claims of qualified immunity.<sup>15</sup> The court also awarded sanctions to be measured by double costs (against both individual police officers including one who had dismissed his appeal) and reasonable attorneys’ fees (against the officer who had not dismissed his appeal). The size of the sanctions was referred to the Ninth Circuit’s Commissioner, who awarded \$41,407.11, using full market rates, including premium out-of-district San Francisco rates.<sup>16</sup>

The interlocutory appeal caused no delay in the trial schedule. The appeal was dismissed within a few months of being filed. No briefs were prepared on the merits. Our work involved a motion to certify the appeal as frivolous in the district court, the motion to dismiss the appeal in the Ninth Circuit, which was promptly made after the appeal was docketed, reply papers, and the fee application and reply. Full payment, including statutory interest was made promptly.

The case, Boots and Proctor, involved a malicious prosecution claim. Plaintiffs had been imprisoned for more than eight years until they were released as innocent. It settled, just before trial, four months after the sanctions award, for \$2,000,000 (in addition to the sanctions). One suspects, but it is impossible to know, that plaintiffs' interim success in securing appellate sanctions played some part in the favorable resolution of the case.

### HOW TO SET UP DISMISSAL AND FRIVOLOUS APPEAL SANCTIONS

Now we get back to the crux of this article. Every time a civil rights defendant files an interlocutory appeal, plaintiff's counsel must consider filing a motion to dismiss and for sanctions. Well before the motion or even the appeal is filed, plaintiffs' counsel should be considering this option and preparing for it. Think positively, but be realistic. The road map laid out here will not work in most cases. It will work in some. Be ready and on the lookout for those cases.

Setting up the motion to dismiss, and especially the motion for sanctions, involves several steps, similar to setting up Rule 11 sanctions. First, you must adequately have pled the requisite facts that negate the immunity defense. Second, you must collect and marshal the relevant facts that rebut the defense. Third, you must make sure that plaintiff's evidence at least creates material factual disputes as to whether the wrongful conduct occurred and whether that conduct violates a clearly established federal right. Fourth, and often hardest, you must prepare to

demonstrate that the federal right in question was clearly established at the time of the wrongful conduct. Here you may have to be exhaustive and often very creative.

The touchstone of the clearly established federal right requirement is fair warning, namely whether the defendant could reasonably have anticipated that his or her conduct might give rise to liability.<sup>17</sup> Reference to Supreme Court decisions and those from all the United States Circuit Courts of Appeals is appropriate in determining whether a right was clearly established at the time of the wrongful act.<sup>18</sup> The very act at issue in the case being litigated need not have been previously held unlawful.<sup>19</sup> Plaintiff does not have to identify a case directly on point.<sup>20</sup> Even closely analogous pre-existing case law is not required to show that the right is clearly established.<sup>21</sup> Plaintiff need only show that the contours of the federal right were sufficiently clear that a reasonable person would understand that his or her conduct might violate that right.<sup>22</sup>

It follows that plaintiff's lawyer should research all pertinent appellate (and legislative) jurisprudence, civil and criminal, to determine the earliest date on which the contours of the federal right became sufficiently clear to provide reasonable notice. If, initially, you find only recent decisions articulating the federal right that post-date the wrongful act, read all cases cited by those decisions on the relevant point and those cited in those earlier decisions, and so on.<sup>23</sup>

The date of the first appellate decision recognizing the federal right (or its contours) is not the most important date in the “clearly established right” exercise. Review the Supreme Court and Courts of Appeals decisions, and the district court decisions from which the appeals were taken, to determine the date of the wrongful acts being reviewed in the appellate decisions. If an appellate court held that the right (or its contours) was clearly established, especially in a section 1983 context, it must mean it was clearly established at the time the act occurred, i.e., well before the date of the appellate decision.<sup>24</sup> When you write your brief, reverse the usual approach. Start with your oldest and strongest authorities, not newest and strongest.

Let us skip ahead, and assume that plaintiff has defeated defendant’s summary judgment motion, with the district court holding that there are material issues of fact as to whether defendant violated plaintiff’s clearly established federal rights. Now the sanctions set up work begins.

As soon as plaintiff’s counsel has the order denying summary judgment in hand, he or she should write a careful letter to defendant’s counsel. Inform counsel that the order is not appealable, because the federal rights involved (or their contours) were clearly established at the time of the wrongful conduct. Citing the Supreme Court’s decisions in Johnson and Behrens (see endnote 12), inform counsel that no interlocutory appeal will lie from the district court’s decision that there are material issues of fact. Finally, inform counsel of the Sixth Circuit’s rule



that defendant must concede plaintiff's version of the facts, and of the Fifth Circuit's decision awarding frivolous appeal sanctions (see endnotes 14 and 15).

If defendant files a notice of appeal, send another warning letter, announcing that you promptly will be filing a motion in the district court to certify the appeal as frivolous and a motion in the Court of Appeals to dismiss the appeal and for sanctions. Ask defendant to dismiss the appeal in order to avoid unnecessary work in the trial and appellate courts for which plaintiff will seek compensation in the Court of Appeals, as frivolous appeal sanctions. In response to defendant's appellate docketing statement, inform the Court of Appeals that defendant's appeal is frivolous, and that plaintiff intends promptly to file a motion to dismiss the appeal as frivolous and for sanctions. (Check the Court of Appeals Rules concerning the timing of such motions.)

Promptly file a motion in the district court to certify the appeal as frivolous. You need to do this in any event to avoid having the trial court proceedings automatically stayed. If the district court certifies the appeal as frivolous, it retains jurisdiction and the case will proceed toward trial.<sup>25</sup>

If the district court certifies the appeal as frivolous, plaintiff's counsel should write defendant's counsel one last warning letter. As promptly as possible thereafter, plaintiff should file a motion in the Court of Appeals, to dismiss the appeal and for sanctions. (If necessary, you can even file your motion while you

await the district court's decision on your Motion to certify that the appeal is frivolous. But that is risky.)

You may file a motion to dismiss and for sanctions, even if the district court does not certify the appeal as frivolous. Plaintiff's likelihood of securing sanctions, of course, is greatly limited in these circumstances. However, you still may get the appeal dismissed. The scenario in such a case may involve filing the motion to dismiss, followed by an order that the motion is referred to the merits panel. After full briefing of all issues, that panel may then dismiss the appeal possibly without oral argument.

Any motion to dismiss and for sanctions should lay out the relevant procedural history, including the warnings sent to defendant's counsel. Attach the pertinent correspondence to an Affidavit. Recite the facts with plaintiff's slant, but calmly and reasonably objectively. Clearly and fully set out the bases for showing that the federal rights were clearly established at the time of the wrongful acts. A specific request should be made for dismissal of the appeal and (if appropriate) for frivolous appeal sanctions, citing all appropriate statutes and rules and the Fifth Circuit sanctions decision. Reply to defendant's opposition papers aggressively.

Plaintiff's counsel probably should request that the amount of any sanctions be determined after the appeal is dismissed. (The Circuit's local rules and practice should guide plaintiff on this.) Whenever that claim is submitted to the court, prove it in the fashion you would prove up any appellate fees application, complete

with contemporaneous time records and sponsoring and billing rates declarations and other appropriate evidence.

### CONCLUSION

The overburdened federal appellate courts are fed up with frivolous appeals.<sup>26</sup> If an interlocutory appeal in fact is frivolous, and plaintiff's counsel have set the stage right, it is reasonably likely in the current legal climate that the appeal will be dismissed early. It is also reasonably possible defendants or their counsel will be sanctioned. Review of the pertinent cases, some of which are cited above, and personal experience suggest that even judges who are very conservative about substantive civil rights law are becoming increasingly fed up with unjustified delay and churning. In fact, I have heard several federal judges complain that too few civil rights plaintiffs even make the effort to certify interlocutory appeals as frivolous, or to seek early dismissal of and sanctions for filing such appeals. Lawyers for civil rights should consider doing so more frequently.

## ENDNOTES

<sup>1</sup> Section 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

<sup>2</sup> See, e.g., DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989); Crawford-El v. Britton, 523 U.S. \_\_\_, 140 L.Ed.2d 759, 787 (Scalia and Thomas, J.J., dissenting).

<sup>3</sup> See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

<sup>4</sup> Mitchell v. Forsyth, 472 U.S. at 525 et seq. (emphasis added). Whether such interlocutory appeals are available in state court section 1983 lawsuits is strictly a matter of state appellate procedure. See Marian v. Fankell, 520 U.S. \_\_\_, 138 L.Ed.2d 108 (1997).

<sup>5</sup> See, e.g., Chuman v. Wright, 960 F.2d 104 (9th Cir. 1992).

<sup>6</sup> See, e.g., Davis v. Scherer, 468 U.S. 183, 190 (1984).

<sup>7</sup> See, e.g., Act Up! /Portland v. Bagley, 988 F.2d 868, 871 (9<sup>th</sup> Cir. 1993).

<sup>8</sup> A government employee or official is absolutely immune from suit for damages, for example, if he or she acted as a judicial officer, a prosecutor or a legislator. See, e.g., Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980); Pierson v. Ray, 386 U.S. 547 (1967). The civil rights defendant who pleads absolute immunity bears the burden of demonstrating that he or she enjoys that immunity rather than the more limited “qualified” immunity.

See Cleavinger v. Saxner, 474 U.S. 193 (1985). The absolute immunity issue involves whether the wrongful act was performed within an immune status. Although figuring this out can be difficult, in most instances it is not. See e.g., Buckley v. Fitzsimmons, 509 U.S. 259 (1993).

<sup>9</sup> Johnson v. Jones, 515 U.S. 304, 317 (1995); Behrens v. Pelletier, 516 U.S. 299, 313 (1996).

<sup>10</sup> If a district court denies a claim of absolute immunity because it finds that defendant was not acting in his or her immune capacity, or there are triable issues of fact on that issue, it follows that there can be no interlocutory appeal from such an order for the same reasons stated in the text above.

<sup>11</sup> See, e.g., Harding v. Vilmer, 72 F.3d 91 (8<sup>th</sup> Cir. 1995) (*per curiam*); Rambo v. Daley, 68 F.3d 203 (7<sup>th</sup> Cir. 1995); Sevier v. City of Lawrence, Kan., 60 F.3d 695 (10<sup>th</sup> Cir. 1995).

<sup>12</sup> Berryman v. Rieger, 150 F.3d 561, 564 (6<sup>th</sup> Cir. 1998).

<sup>13</sup> Baulch v. Johns, 70 F.3d 814 (5<sup>th</sup> Cir. 1995) (emphasis added).

<sup>14</sup> Id. at 818.

<sup>15</sup> Boots and Proctor v. Bond and Smith, 9<sup>th</sup> Cir. Nos. 97-35601 and 97-35641 (Unpublished Order, dated Sept. 26, 1997). (The case arose in the District of Oregon, (DC Civ. 95-06408-HO).)

<sup>16</sup> Unpublished Order, dated January 14, 1998.

<sup>17</sup> See, e.g., United States v. Lanier, 520 U.S. 259 (1997) (applying section 1983 qualified immunity analysis to analogous civil rights criminal statute).

<sup>18</sup> See, e.g., Ward v. County of San Diego, 791 F.2d 1329, 1332 (9<sup>th</sup> Cir. 1986), cert. denied, 483 U.S. 1020 (1987).

<sup>19</sup> Anderson v. Creighton, 483 U.S. 635, 639-40 (1987).

<sup>20</sup> Allen v. City of Honolulu, 39 F.3d 936, 939 (9<sup>th</sup> Cir. 1994).

<sup>21</sup> Mendoza v. Block, 27 F. 3d 1357, 1361 (9<sup>th</sup> Cir. 1994).

<sup>22</sup> Browning v. Vernon, 44 F.3d 818, 823 (9<sup>th</sup> Cir. 1995).

<sup>23</sup> See, e.g., Goodwin v. Metts, 885 F.2d 157 (4<sup>th</sup> Cir. 1989), cert denied, 494 U.S. 1081 (1990) (involving police misconduct in 1983 and building on Clark v. Montgomery Ward, 298 F.2d 346, 348 (4<sup>th</sup> Cir. 1962). Metts was recently overruled in an unpublished decision on other grounds by Osbourne v. Rose, 133 F.3d 916 (Table Unpublished Disposition) 1998 WL 17044 (4<sup>th</sup> Cir. Jan. 28, 1998).

<sup>24</sup> See, e.g., Jean v. Collins, 107 F.3d 1111, 1115-17 (4<sup>th</sup> Cir. 1997) (involving police misconduct in 1982); Gates v. Fortenberry, 849 F.2d 1550, 1559 (5<sup>th</sup> Cir. 1988) (involving police misconduct in 1982).

<sup>25</sup> See, e.g., Chuman v. Wright, 960 F.2d 104 (9<sup>th</sup> Cir. 1992).

<sup>26</sup> See, e.g., In re Amendment to Rule 39 of The Supreme Court Rules, 500 U.S. 13 (1991); In re Eileen Vey, 520 U.S. \_\_\_, 137 L.Ed.2d 510 (1997); see also Rule 11, Fed. Rules of Civ. Proc.