Litigating a Claim Against a Government Official after Denial of a Dispositive Motion Raising Qualified Immunity

By Mary A. Cox and J. Richard Caldwell Jr.

Qualified immunity protects government officials performing discretionary functions from suit in their individual capacities. Government officials lose the defense of qualified immunity when their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald* 457 U.S. 800, 818 (1982). When a district court finds that a government official's conduct violates clearly established statutory or constitutional rights, the protection afforded by qualified immunity is lost and a plaintiff is allowed to proceed with his or her suit against the government official. *Griffin Industries, Inc. v. Irvin* 496 F.3d 1189, 1200 (11th Cir. 2007). This article will address two issues encountered when a government official is denied the defense of qualified immunity: whether an order denying qualified immunity is immediately appealable, and whether a plaintiff's case can proceed in the district court while the appellate court considers the denial of a dispositive motion.

To ensure that qualified immunity is not lost when a court erroneously denies a defendant's dispositive motion, the U.S. Supreme Court held that an order denying qualified immunity is immediately appealable even though it is interlocutory. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The reason behind the rule allowing an interlocutory appeal is that qualified immunity is *immunity from suit.* Immunity from suit is lost if a court erroneously permits a case to go to trial.

In *Mitchell v. Forsyth*, a citizen whose conversations had been wiretapped with the permission of the attorney general sued the attorney general of the United States in his individual capacity. The attorney general argued that he was immune from suit under either the Absolute Immunity Doctrine granted to prosecutors, or the Qualified Immunity Doctrine granted to public officials. After holding that the attorney general was not protected by the Absolute Immunity Doctrine, the U.S. Supreme Court held that the attorney general would still be entitled to qualified immunity. Comparing qualified immunity to absolute immunity, the Supreme Court penned the following famous phrase: The entitlement is one of immunity from suit rather than a mere defense to liability.

The rule set forth by the Supreme Court 25 years ago is easy to understand as a general concept. Proper application of the rule to particular cases, however, has proved to be far more difficult.

Mary A. Cox is an associate and J. Richard Caldwell Jr. is of counsel at Rumberger, Kirk & Caldwell.

Immediately Appealable Orders

In *Mitchell v. Forsyth*, the Supreme Court restricted the category of immediately appealable denials of qualified immunity, emphasizing that the appealable issue is purely a legal one: whether the facts alleged support a claim of violation of clearly established law. The availability of an interlocutory appeal depends upon whether the appellate court is being asked to decide a question of fact or a question of law. Unfortunately, as many practitioners have come to realize, the line between law and fact often is difficult to determine.

What is clear is that questions of fact alone are not immediately appealable. For example, in *Johnson v. Jones*, 515 U.S. 304 (1995), the Supreme Court held that where an order resolved a fact-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial, a denial of qualified immunity was not immediately appealable. In *Johnson*, Illinois police officers arrested a diabetic man who was having an insulin seizure, under the wrongful assumption that he was drunk. Mr. Jones brought a constitutional tort against the five officers. Three officers moved for summary judgment arguing that Mr. Jones offered no evidence that these three particular officers used excessive force.

The district court denied the three officers' summary-judgment motion. The three officers immediately appealed arguing that the denial was erroneous because the record contained "not a scintilla of evidence. . . ." Eventually the Supreme Court granted certiorari and concluded that questions of evidence insufficiency are not immediately appealable.

With the "easy" application of the rule out of the way, the Supreme Court went a step further in the last part of *Johnson* to clarify two common questions facing practitioners who are contemplating appeal. First, what happens if a district court's order makes both a factual determination that a defendant may have done "X" and a legal determination that "X" violates clearly established law? Second, what if a district court's order denying a defendant qualified immunity fails to state the facts upon which the ruling is based?

As to the first question, the Supreme Court clarified that when a district court's order contains a legal determination that "X" violates clearly established law, immediate appeal is available. The Supreme Court emphasized, however, that the appellate court reviewing a question of law does not have to exercise pendent jurisdiction to review the underlying question of fact. Rather, the appellate court can take as true the facts assumed by the district court. By so doing, the appellate court focuses on the order drafted by the district court and not

necessarily a question craftily raised by petitioners to create appellate jurisdiction where it might not otherwise exist.

As to the second question, the Supreme Court instructed that when a district court does not state the facts it assumed when it denied the defendant's dispositive motion, the appellate court must undertake a detailed review of the record. Specifically, the Supreme Court instructed appellate courts to review the record to determine what facts the district court, in the light most favorable to the nonmoving party, *likely* assumed.

In essence, *Johnson* addressed four categories of appeals. In the first category are district-court orders finding solely that the record raised a genuine issue of material fact concerning an officer's conduct for qualified-immunity purposes. These orders are not immediately appealable. In the second category are district court orders that make both a factual determination and a legal determination. The second category of orders is immediately appealable. But, the appellate court can choose not to exercise pendent jurisdiction over disputed issues of fact. In the third category are district-court orders that find that a defendant's undisputed conduct violated clearly established law. The third category of orders is immediately appealable. In the fourth category are district court orders that do not state a basis for the ruling. The fourth category of orders is immediately appealable, and appellate courts must complete a detailed, cumbersome review of the record to determine the facts the district court *likely* assumed.

Following the Supreme Court's holding in *Johnson*, defendants seeking immediate review of a district court's denial of qualified immunity would be wise to make clear to the court: (1) that they take as given the facts that the district court assumed when it denied summary judgment; and (2) that the appellate court is being asked to determine whether those facts are sufficient to state a claim under clearly established law.

In the Eleventh Circuit, defendants seeking an immediate review may have even more leeway. In *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996), the Eleventh Circuit held that an appellate court could consider challenges to a district court's factual determinations as to the conduct the defendant engaged in, where the core issue being appealed was qualified immunity. In *McMillian*, a prisoner sued prison guards he claimed had conspired to mistreat him. On a motion for summary judgment, the district court concluded that a genuine issue of a fact existed as to whether the guards conspired to detain the prisoner. The guards appealed the denial. In response, the prisoner contended that the appeal raised issues of factual dispute.

The Eleventh Circuit conceded that while the prisoner's argument found some support in *Johnson v. Jones*, "this circuit has not construed *Johnson* to bar immediate appellate review of fact-based rulings in all circumstances." 88 F.3d at 1563. The court went on to rule that an appellate court may address the factual issues of the type of conduct the defendants engaged in, because the issue is a necessary part of the core qualified-immunity analysis of whether the defendant's conduct violated clearly established law. The Eleventh Circuit decision in *McMillian v. Johnson* further opened the court's door for defendants seeking immediate review of a question of fact accompanying a question of law. *Keating v. City of Miami*, No. 07-23005-CV-JEM (11th Cir. Mar. 2, 2010) (noting that "interlocutory appeal is available when the denial of qualified immunity is only partially based on an issue of law.").

Stay Pending Appeal

Finally, if an appellate court does take an immediate appeal, a defendant should be quick to seek a stay of proceedings in the district court. The question of whether a district court has discretion to deny a defendant's motion to stay pending appeal is intertwined with the question of whether or not an appeal concerns a matter of law or a matter of fact. Where an appeal concerns a matter of fact, a plaintiff may argue that there is no legal basis for interlocutory appeal. As such, the district court has discretion to deny a motion to stay. *Grawey v. Saad*, 2008 W.L. 125183 (E.D. Mich.). However, when an appeal is based on an issue of law and the appeal is non-frivolous, the denial of qualified immunity divests the district court of jurisdiction. *Owens v. Ala. Dep't of Mental Health and Mental Retardation*, 2008 W.L. 4722038 (M.D. Ala); *See also Blinco v. Green Tree Servicing, LLC* 366 F.3d 1249, 1253 (11th Cir. 2004).

A defendant's entitlement to qualified immunity is a question for the court. When a district court denies a defendant the protection afforded qualified immunity, the reason behind the ruling matters. Therefore, practitioners should argue with an eye toward appeal, knowing that an order addressing a legal question, even in part, is a defendant's best chance to preserve his or her protection from suit after denial of a dispositve motion.

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