Stephen Masciocchi

Partner
303.295.8451
Denver
smasciocchi@hollandhart.com

Jessica Smith

Associate
303.295.8374
Denver
jjsmith@hollandhart.com

The Tenth Circuit Rejects Correctional Officer's Qualified-Immunity Defense to Alleged Sexual Abuse of Inmate

Publication — 03/25/2020

Law.com

In a recent qualified-immunity appeal, the Tenth Circuit ruled against a correctional officer who argued that he was entitled to qualified immunity for sexually harassing, abusing, and assaulting an inmate. *Ullery v. Bradley*, 2020 WL 611070, 949 F.3d 1282 (10th Cir. Feb. 10, 2020). The court held that, at the time of defendant's actions, "[t]he consensus of persuasive authority from our sister circuits" clearly established that the Eighth Amendment prohibited his conduct. Id. at *8.

Defendant Sexually Harassed, Abused and Assaulted Plaintiff

Plaintiff alleged that, while she was an inmate at the Denver Women's Correctional Center between 2014 and 2016, defendant repeatedly sexually harassed, abused, and assaulted her. After her release, plaintiff sued defendant, claiming that his sexual misconduct violated her Eighth Amendment right to be free from cruel and unusual punishment.

Among other things, defendant contended that he was entitled to qualified immunity from plaintiff's Eighth Amendment claim. Rather than arguing that he hadn't violated the Eighth Amendment, defendant argued that the constitutional prohibition against such misconduct was not clearly established at the time. The district court disagreed and denied his motion to dismiss. Defendant appealed.

Qualified-Immunity Defense for Governmental Officials

Qualified immunity is available as a defense to governmental officials who are sued for violating the constitution. After a defendant raises a qualified-immunity defense, the burden shifts to the plaintiff to establish both that (1) the defendant violated a federal statutory or constitutional right and (2) the right was clearly established at the time of the defendant's conduct. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

Qualified immunity is a difficult burden for plaintiffs to overcome, because it "protects all but the plainly incompetent or those who knowingly violate the law." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). Indeed, "[w]hen a § 1983 defendant asserts qualified immunity, this affirmative defense 'creates a presumption that [the defendant is] immune from suit.'" *Estate of Smart by Smart v. City of Wichita*, No. 18-3242, 2020 WL 913089, at *4 (10th Cir. Feb. 26, 2020) (first alteration added).

The second prong—i.e., whether the right was clearly established at the

time—can be particularly difficult for plaintiffs to prove, because the Supreme Court has "repeatedly told courts not to define clearly established law at a high level of generality." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (alterations and quotations omitted).

"Ordinarily there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Ullery*, 2020 WL 611070, at *6 (alterations omitted). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Kisela*, 138 S. Ct. at 1152 (internal quotation marks omitted). In practice, the "*particular* conduct" must itself have been already held to be a constitutional violation. *Mullenix*, 136 S. Ct. at 308 (emphasis in original).

Defendant Was Not Entitled to Qualified Immunity

Plaintiff alleged that defendant violated the Eighth Amendment—which "guarantees prisoners the right to be free from 'cruel and unusual punishments' while in custody"—by repeatedly subjecting her to sexual harassment, abuse, and assault. *Ullery*, 2020 WL 611070, at *4 (citing *Whitley v. Albers*, 475 U.S. 312, 318, (1986) (quoting U.S. Const. amend. VIII)). To defeat defendant's qualified immunity defense, plaintiff had to establish that, at the time of defendant's actions, it was clearly established that plaintiff had an Eighth Amendment right to be free from such sexual misconduct.

Defendant contended that he should succeed on the second qualified immunity prong because existing Eighth Amendment precedent did not include the specific types of sexual harassment, abuse, and assault suffered by plaintiff. Defendant was correct that he was entitled to qualified immunity unless similar types of sexual misconduct had been held unlawful by the Supreme Court, by the Tenth Circuit, or at the very least, under the weight of authority from other circuits. Id. at *6. Because there was no existing Supreme Court or Tenth Circuit precedent establishing plaintiff's constitutional right to be free from sexual misconduct by an officer, the Tenth Circuit had to look to other circuits.

In fact, in recent years, other circuits have concluded that prisoners have an Eighth Amendment right to be free from sexual harassment, abuse, and assault by correctional officers. The Tenth Circuit explained that "[t]he Second, Seventh, Eighth, and Ninth Circuits have all held—in published decisions involving materially analogous facts—sexual abuse of the nature alleged here violates the Eighth Amendment. Even more, the Third and Sixth Circuits have recognized an inmate's right to be free from sexual abuse under the Eighth Amendment was clearly established at the time of defendant's unlawful conduct." Id. at *8.

Contemporary Standards of Decency Guide the Eighth Amendment

Critical to the Tenth Circuit's analysis was *Crawford v. Cuomo*, 796 F.3d 252 (2d Cir. 2015). There, the Second Circuit overruled an earlier Second Circuit case, *Boddie v. Schnieder*, 105 F.3d 857 (2d Cir. 1997). In *Boddie*,

the Second Circuit had held that a "small number of incidents" where the plaintiff "allegedly was verbally harassed, touched, and pressed against without … consent were not objectively sufficiently serious to state a cognizable claim" under the Eighth Amendment. 105 F.3d at 861.

"Eighteen years later—on August 11, 2015—the Second Circuit reevaluated its opinion in *Boddie* in light of evolved, contemporary standards of decency" in place when it announced *Crawford*. *Ullery*, 2020 WL 611070, at *9. *Crawford* "clarified" that "[a] corrections officer's intentional contact with an inmate's genitalia or other intimate area, which serves no penological purpose and is undertaken with the intent to gratify the officer's sexual desire or to humiliate the inmate, violates the Eighth Amendment." Id.

At the time of *Boddie*, sexual misconduct against prisoners was not uniformly prohibited, nor was the severity of the problem recognized. Between *Boddie* and *Crawford*, changes in state and federal law "reflect the deep moral indignation that has replaced what had been society's passive acceptance of the problem of sexual abuse in prison. They make it clear that the sexual abuse of prisoners, once overlooked as a distasteful blight on the prison system, offends our most basic principles of just punishment." *Crawford*, 796 F.3d at 260.

In *Ullery*, the Tenth Circuit held that, after *Crawford*, "no reasonable corrections officer, looking at the entire legal landscape at the time of the alleged sexual misconduct, could have interpreted the law as permitting defendant's actions." 2020 WL 611070, at *11 (alterations and quotations omitted). The court added that the allegations in *Crawford* and the other cases around the country were "materially analogous to defendant's alleged actions" in *Ullery*. Id. at *9.

When comparing plaintiff's allegations to those in other cases, the court was particularly graphic and necessarily so. The Court explained, "We recognize our parsing of the relevant case law and time period may appear unduly formalistic considering the despicable nature of defendant's alleged misconduct. But this is the task required of us under the qualified-immunity precedents we are obligated to follow." Id. at *13.

Ultimately, the Tenth Circuit held that defendant was not entitled to dismissal based on qualified immunity because "[i]f defendant did not 'knowingly violate the law' when he sexually abused plaintiff, which we doubt is the case here, then he is 'plainly incompetent.' Either way, qualified immunity affords defendant no shelter for the alleged constitutional violations he committed after" *Crawford*. Id. at *11.

In a perfect illustration of the breadth of qualified immunity, the Tenth Circuit applied its holding only to actions that occurred *after* the decision in *Crawford* on Aug. 15, 2015. Defendant would have been entitled to qualified immunity for any misconduct that occurred before *Crawford*'s explanation of "the deep moral indignation that … replaced passive acceptance" of the sexual abuse of prisoners. *Crawford*, 796 F.3d at 260. But because the court had already concluded that any constitutional violations before April 10, 2016 were time barred, the date restriction for

whether the right was “clearly established” wasn't dispositive for the plaintiff in *Ullery*.

Stephen Masciocchi *and* **Jessica Smith** *are attorneys at Holland & Hart specializing in complex commercial litigation. Steve assists clients with federal and state appeals and class actions in high-stakes trial and appellate litigation. Jessica has substantial appellate experience and leads the firm's religious institutions and First Amendment practice.*