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# Tenth Circuit Rejects Qualified Immunity Defense in Section 1983 Suit Arising out of George Floyd Protests

**Insight — December 14, 2023**

**Law.com**

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In an interlocutory appeal involving alleged excessive force by police during protests over the murder of George Floyd, *Packard v. Budaj*,— F.4th —, 2023 U.S. App. LEXIS 30189 (Nov. 14, 2023), the U.S. Court of Appeals for the Tenth Circuit rejected three police officers' qualified immunity defenses. The court determined it was clearly established that police cannot shoot nonlethal projectiles at protesters who committed no serious crime, were not a threat, and were not attempting to flee.

## **Factual Background**

On the evening of May 31, protesters gathered in downtown Denver in the wake of George Floyd's murder. Police threw a tear gas cannister near one plaintiff, Zachary Packard, who kicked it away from himself and toward the line of officers. Almost immediately, he was hit in the head with a canon-fired beanbag round, which knocked him unconscious and caused major injuries. In a second incident nearby, plaintiff Jonathon Duran was shot with a foam baton round while wearing a “media” hat and filming the protest. The officers who allegedly shot the rounds that injured the plaintiffs worked for the Aurora Police Department, which had responded to the Denver mayor's request for mutual aid.

## **The District Court Rejects the Qualified Immunity Defense**

The district court rejected the officers' qualified immunity defenses at the summary judgment stage. The court ruled there were genuine issues of material fact whether the three officers in question shot the projectiles that injured the plaintiffs. Viewing the evidence in the light most favorable to the plaintiffs, the court concluded that neither plaintiff was committing a crime, attempting to flee, or posed any threat to the officers or others. Importantly, it ruled that under these circumstances, the law was clearly established that an officer cannot shoot a protester with less-lethal munitions. The officers appealed.

## **The Tenth Circuit Exercises Jurisdiction Under the Collateral Order Doctrine**

Noting that its jurisdiction typically extends only to review of final decisions of district courts, the Tenth Circuit discussed and applied a limited exception: the collateral order doctrine. This doctrine permits interlocutory appeals of orders deemed final because they dispose of “a matter separable from, and collateral to the merits of the main proceeding,” and too important and independent to be deferred “until the whole case is adjudicated.” The court confirmed that orders denying qualified immunity are collateral orders subject to interlocutory review. This review, however, is circumscribed. Unlike an ordinary appeal from a summary judgment ruling, when considering an interlocutory appeal from the denial of qualified immunity, the court reviews only “abstract questions of law” and doesn't review de novo the district court factual conclusions.

### **The Circuit Court Affirms on the Merits**

To overcome a qualified-immunity defense, plaintiffs must establish that “the officers' alleged conduct violated a constitutional [or statutory] right, and [the right] was clearly established at the time of the violation, such that every reasonable official would have understood, that such conduct constituted a violation of that right.” The circuit court addressed each of these two prongs.

On the first prong, the plaintiffs claimed that the officers used excessive force. In the similar context of an arrest or investigatory stop, the court observed, this claim is properly categorized as one arising under the Fourth Amendment. To make out this claim, “plaintiffs must show the defendants' use of force was objectively unreasonable under the circumstances.” To determine objective reasonableness, the court evaluated the three factors set forth in *Graham v. Connor*, 490 U.S. 386, 396 (1989): “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.”

Applying these factors, the court had no trouble concluding that the plaintiffs had alleged a constitutional violation. First, the defendants identified no crime committed, law breached, or ordinance broken by the plaintiffs. Second, addressing the most important factor, the court opined that, viewing the facts in the light most favorable to the plaintiffs, the trial court didn't err in ruling neither plaintiff posed a threat to the officers or others. Finally, the court affirmed the trial court's finding that there was no evidence the plaintiffs were resisting arrest or attempting to flee.

Turning to the second prong of the qualified immunity test, the circuit court agreed with the district court that the constitutional right at issue was “clearly established” at the time of the conduct in question. The plaintiffs' burden here was to “identify 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.” But a plaintiff need not cite a case “precisely on point.” Rather, “the rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”

Plaintiffs and the district court relied on *Fogarty v. Gallegos*, 523 F.3d 1147

(10th Cir. 2008), and *Buck v. City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008). Each involved a protest against the war in Iraq. In *Fogarty*, an officer shot a protester with a projectile—a pepper ball or other nonlethal munition—and in *Buck*, the protester was sprayed with tear gas and shot repeatedly with pepper ball rounds. In each case, the Tenth Circuit applied the *Graham* factors and affirmed the denials of qualified immunity.

The circuit court agreed with the district court that *Fogarty* and *Buck* had “clearly established” that officers can’t shoot projectiles at protestors who committed no crime more serious than a misdemeanor, were not threatening anyone, and weren’t attempting to flee. Though the facts of those cases weren’t “identical” to the present facts, they didn’t need to be. The cases provided sufficient notice that as of May 2020, deploying “less-lethal munitions on an unthreatening protester who is neither committing a serious offense nor seeking to flee is unconstitutionally excessive force.” The court therefore affirmed the district court’s order denying the officers’ summary judgment motion.

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