FOURTH CIRCUIT GRANTS IMMUNITY TO OFFICERS WHO SHOOT UNARMED MAN

December 2016

Article Source: http://www.llrmi.com/articles/legal_update/2016_holloman_v_markowski.shtml

On October 7, 2016, the Fourth Circuit Court of Appeals decided the *Holloman v. Markowski et al.*[i], in which the court examined the issue of whether law enforcement officers violated the Fourth Amendment when they shot an unarmed man who was physically attacking an officer. The relevant facts of *Holloman*, taken directly from the case, are as follows:

> On the afternoon of May 19, 2012, Holloman hosted a birthday party for her granddaughter. During the party, Johnson, who had previously been diagnosed with bipolar disorder, came to Holloman's house, where he also lived.
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> Holloman first noticed that Johnson had returned when she heard the sound of breaking glass coming from Johnson's upstairs bedroom. Johnson then broke the forty-two-inch television and the mirror in his room. Holloman went upstairs to ask her son to stop, explaining that after the party ended she would take him to the hospital to receive psychiatric treatment. Johnson told her that she would have to get the police to take him to the hospital because he would not go willingly. Holloman and her daughter decided to remove the children from the house.
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> Johnson continued to destroy property. He smashed Holloman's television and threw his mattress onto the front lawn, where he ripped it apart. While Johnson was outside, Holloman and her daughter locked him out of the house and Holloman called 911. In the process of trying to re-enter the house, Johnson kicked the front door and, announcing that he was "coming in," pulled the back screen door off its hinges.
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> At this point, Officer Paul Markowski arrived, followed shortly by Officer Gregory Bragg. Holloman told the officers that Johnson had psychiatric issues and would not stop his destructive behavior. She asked them not to shoot him, but suggested that they employ a Taser.

> The officers opened the back door and asked Johnson to calm down. The officers attempted to restrain Johnson, at which point he lunged at them, pinned Officer Markowski to the ground with his knees, and fought with him. Officer Bragg tried, but failed, to pull Johnson off Officer Markowski. Holloman heard Officer Bragg fire at least two gun shots, wounding Johnson, who later died from his injuries. Holloman alleges that the entire altercation lasted at most one minute.[ii]

Holloman filed suit against the officers and the City of Baltimore on behalf of her deceased son and alleged that the officers violated her son's Fourth Amendment right to be free from excessive force when they shot him. The district court granted summary judgment for the city and officers and dismissed the suit. Holloman appealed to the Fourth Circuit Court of Appeals.

The court first examined the issue of whether the City of Baltimore had liability for the shooting of Johnson. The plaintiff alleged that the city was liable because it failed to train and supervise its officers to handle interactions with mentally ill persons and had a general policy, custom or practice of failing to discipline officers for misconduct which had the effect of sanctioning their misconduct.

The court examined the legal standard that the plaintiff must prove to prevent summary judgment on this type of claim. The court stated

> **To prevail on a Monell claim, Holloman "must point to a 'persistent and widespread practice[] of municipal officials,' the 'duration and frequency' of which indicate that policymakers (1) had actual or constructive knowledge of the conduct, and (2) failed to correct it due to their 'deliberate indifference**.'" Owens v. Baltimore City State's Attorney's Office, 767 F.3d 379, 402 (4th Cir. 2014) (quoting Spell v. McDaniel, 824 F.2d 1380, 1386-91 (4th Cir. 1987)) (alteration in Owens). **While we can infer both knowledge and deliberate indifference "from the extent of employees' misconduct[, s]poradic or isolated violations of rights will not give rise to Monell liability; only widespread or flagrant violations will.**" Id. at 402-03 (internal citations and quotations omitted).[iii] [emphasis added]

The only facts that the plaintiff stated in support of her claim against the city were four specific instances of police officers killing suspects, a claim that ten persons had been shot by officers that current year (2012), and that some of them had been mentally ill. The plaintiff did not allege any facts to support whether any of her listed incidents were constitutional violations or whether the city failed to discipline in those instances. Based upon the lack of evidence provided to support plaintiff's claim, the Fourth Circuit affirmed the district courts grant of summary judgment for the city.

The court next examined the issue of whether the officers were liable for shooting Johnson, who was unarmed but physically attacking an officer. The court first noted the legal principles that apply to police officer's use of force. The court stated

> **We analyze excessive force claims "under the Fourth Amendment's 'objective reasonableness' standard**," Graham v. Connor, 490 U.S. 386, 388 (1989), **and evaluate an officer's particular use of force "from the perspective of a reasonable officer on the scene,**" id. at 396. **Three guiding factors in the reasonableness calculus are the severity of the relevant crime, the immediate threat the suspect**

> **poses, and the intensity of the suspect's resistance to arrest.** Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 899 (4th Cir. 2016).[iv] [emphasis added]

Thus, three factors the court will consider when determining whether an officer used reasonable force under the Fourth Amendment are (1) the severity of the crime at issue, (2) the immediate threat the suspect posed, and (3) the intensity of the suspect's resistance to arrest.

Next, the court examined the legal standard to determine when an officer is entitled to qualified immunity from suit. The court stated

> **A government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct**." Carroll v. Carmon, 135 S. Ct. 348, 350 (2014). **A plaintiff seeking to avoid an officer's qualified immunity defense must demonstrate both that (1) "the facts, viewed in the light most favorable to the plaintiff, show that the officer's conduct violated a federal right," and (2) this "right was clearly established at the time the violation occurred such that a reasonable person would have known that his conduct was unconstitutional.**" Smith v. Ray, 781 F.3d 95, 100 (4th Cir. 2015).[v] [emphasis added]

Thus, typically in a case such as this, to determine whether an officer is entitled to qualified immunity, they will first examine whether the officer violated a person's constitutional rights. If the court determines the officers did not violate the plaintiff's rights, then the officer receives summary judgment and the case is dismissed. If the court determines the officer did violate the person's rights, then the court examines whether the law was clearly established such that a reasonable officer in the same situation would have known that his conduct was unlawful. Clearly established law is generally case law from the United States Supreme Court, the Fourth Circuit Court of Appeals, or the highest court in the state (MD), that is sufficient to put the officer on notice. This means the case must be similar factually, although not identical. If the court finds that the law was not clearly established, then the officer is granted qualified immunity and the suit is dismissed. If the law was clearly established, the court will deny qualified immunity and the case goes to trial.

The court is not required, however, to first determine whether the officer violated the plaintiff's rights. The court is allowed to skip that step and proceed directly to determine if the law as clearly established such that a reasonable officer would be on notice that the conduct at issue in the case at hand was unlawful. This is what the court did in this case.

The court then set out to determine whether, as of May 19, 2012 (the date of this incident), the law was clearly established such as to put a reasonable officer on notice that it was unconstitutional to use deadly force against an "unarmed but physically resistance suspect, who has destroyed property, attacked an officer, and given no indication that he will yield."[vi] The court stated that there is no such court precedent.

The plaintiff pointed to the Fourth Circuit case of *Clem v. Corbeau*[vii], in which an officer shot a mentally disabled man who was obviously unarmed, confused, stumbling toward a bathroom in his house, and

had pepper spray in his eyes. The court noted that he was unable to threaten anyone at the point he was shot. In Clem, the court denied summary judgment or immunity for the officer.

The Fourth Circuit noted that *Clem* is very different from the facts of Holloman's case where the mother had told officers that Johnson (her son, the deceased) had destroyed property and likely would not stop. Further, despite being unarmed, Johnson attacked Officer Markowski and dragged him to the ground. He held the officer down and physically fought with him, and was able to resist Officer Bragg's efforts to pull him off Officer Markowski. No facts of *Clem* were similar to these aspects of Holloman's case. As such, the Fourth Circuit held that the law was not clearly established and the officers were entitled to qualified immunity.

Therefore, the Fourth Circuit affirmed the district court's decision of summary judgment for the city and qualified immunity for the officers in this case.

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[i] No. 15-1878 (4th Cir. Decided October 7, 2016 Unpublished)
[ii] Id. at 3-4
[iii] Id. at 6
[iv] Id. at 7-8
[v] Id. at 8
[vi] Id. at 9
[vii] 284 F.3d 543 (4th Cir. 2002)