

## **Qualified Immunity: The Judiciary's "End Run" to Civil Rights**

Qualified immunity is used as both a sword and a shield by university administrators (state actors) sued by faculty who think they have been wronged. In any lawsuit filed against the State of Texas, or an official of the State of Texas (including university administrators), the first serious obstacle that the litigant must overcome is a doctrine known as qualified immunity.

This concept was initially invented by the judiciary (the courts vs. the legislatures) as protection for public officials when the law was still developing. In other words, as the courts found that certain actions did, in fact, violate an individual's constitutional rights, it seemed unfair to hold an individual official responsible when that official could not have known for certain that his or her actions were violating someone's constitutional rights. Thus the courts developed this doctrine of qualified immunity to protect the supposedly unwary official.

The way that it works, in theory, is that when an official is sued, the court is to determine as a threshold issue whether or not the official's conduct, as alleged by the suing individual, would violate a clearly established constitutional right of the suing individual. A clearly established right is a right which has been recognized by the courts or by statute. For example, the sudden termination of a tenured professor without any notice has been found to violate that professor's due process rights. Consequently, a professor who sues alleging that he was fired without notice should survive the offending official's assertion of qualified immunity. In fact, the official should not even assert it where the pleaded facts show a violation of a clearly established right. Unfortunately, in practice, the official will almost always assert qualified immunity because the courts (particularly the United States Fifth Circuit Court of Appeals in New Orleans) appear to use qualified immunity as a tool to preemptively dispose of cases that they do not like.

In the Fifth Circuit (Texas, Louisiana, and Mississippi), qualified immunity seems to be a "get out of jail free" card for state officials, particularly university administrators. It seems that the Fifth Circuit does not fully believe in the Civil Rights Act, and certainly does not believe that the federal courts should interfere with campus operations. Thus, they appear to use qualified immunity to dispose of cases at an early stage. This has had a resulting chilling effect on faculty seeking redress for wrongs committed against them by the administration. Beyond qualified immunity, there are several other preliminary hurdles to clear before getting a case to a jury. Thus, the addition of the first, and perhaps, as applied, insurmountable obstacle of qualified immunity is sufficient to deter an otherwise meritorious lawsuit. Additionally, the trial court's determination that the officials do not have qualified immunity is immediately subject to review by the appellate courts—the Fifth Circuit in the case of Texas cases.

The most frustrating aspect for a wronged faculty member is that the courts will even go so far as to disregard what he or she has alleged and instead determine that a university administrator is immune based on factual assertions raised by the administrator. Of course this means there is a good likelihood the administrator gets out of it by simply claiming that he or she did not do what has been alleged. It is rare for an administrator to admit their wrongdoing. Because the attorneys who represent university administrators are aware of the state of the law in the Fifth Circuit, they will invariably raise the issue of qualified immunity and invariably argue factual defenses, which unfortunately are more increasingly being accepted by the courts. This fact-based determination is

far from the original intent of protecting officials from violating newly found rights. The result is that a genuinely wronged faculty member who has had his or her rights trampled upon may never get his or her day in court because of the twisting of the doctrine of qualified immunity into almost absolute immunity for the university administrator.

So, if you are a university administrator, get out your sword and shield called Qualified Immunity when you are being blamed for perpetrating some terrible act. Your actions will likely never be reviewed by a jury of your peers because your sword is swift (qualified immunity determinations happen early in the case) and your shield is nearly impenetrable. If you are the wronged faculty member, choose your stones carefully, for, to slay the giant who wronged you, you must escape his sword and penetrate his shield. A task not only herculean in proportion but if successful it will be worthy of comparison to another giant slaying: David vs. Goliath!

*Gaines West is a shareholder in West, Webb, Allbritton, Gentry & Rife, P.C., 1515 Emerald Plaza, College Station, Texas 77845, (979) 694-7000, [gwest@tca.net](mailto:gwest@tca.net). Mr. West's practice is almost exclusively limited to higher education employment law. Mr. West is Not Certified by the Texas Board of Legal Specialization.*