

## QUALIFIED IMMUNITY

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### **Overview**

Government officials performing discretionary functions are “shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *See Wilson v. Layne*, 526 U.S. 603, 609 (1999) quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

When considering a claim of qualified immunity, “a court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all.” *See Conn v. Gabbert*, 526 U.S. 286, 290 (1999). If there is no deprivation of a constitutional right, the inquiry is over and the claims against the officials will be precluded.

If the plaintiff has alleged a violation of a constitutional right, the court must then determine whether the officials are entitled to qualified immunity. They are entitled to qualified immunity if: (1) their conduct does not violate “clearly established” rights of which a reasonable person would have known or; (2) it was “objectively reasonable for them to believe their actions were lawful at the time.” *See Harlow*, 457 U.S. at 818.

### **Livant v. Clifton, 2008 WL 925378 (2d Cir., 2008)**

Municipal officials obtained a search warrant and conducted a search of the plaintiff’s home to confirm their belief that plaintiff was using his one family home as a three family residence and keeping debris and unregistered vehicles on the property. Following the search, plaintiff was charged with various criminal violations pursuant to the Town’s nuisance abatement law.

The Town Board subsequently met and passed a resolution requiring plaintiff to clean up his property and remove the subject debris. Notice of the resolution was sent to the plaintiff via registered mail. However, the notice was returned to the Town as unclaimed. Nonetheless, pursuant to the resolution, the Town entered the property and removed the debris.

Plaintiff subsequently brought suit against various Town officials under 42 U.S.C. § 1983, alleging violations of the Fourth Amendment (unlawful search and seizure) and Fourteenth Amendment (violation of due process).

The District Court granted the defendants' pre-answer motion to dismiss the federal claims, including those asserted against the individual defendants. The Second Circuit affirmed the District Court's decision.

With regard to the search and seizure claim, the Courts found that plaintiff failed to allege a violation of a constitutional right. In doing so, the Courts rejected plaintiff's claim that the defendant officials' entry onto his property in order to abate the alleged nuisance was unconstitutional because the second entry onto the property was done without a search warrant. Rather, the Courts found it well established that a municipality, within the exercise of its police powers, has the right to "summarily" abate a nuisance.

Further, the Court found that even had a warrant been necessary, the officials who entered and removed the property acted in an objectively reasonable manner. In this regard, they relied upon the Town's nuisance abatement law and the Board's resolution.

With regard to the due process claim, plaintiff alleged that the defendant officials failed to give him adequate notice of the nuisance abatement hearing and subsequent resolution. The Court acknowledged that the defendants did not provide notice of the Board hearing. However, they found it sufficient that the Town sent plaintiff a certified letter to his home address, notifying him of the Board's adoption of the resolution and their intention to abate it themselves if plaintiff did not take appropriate corrective action within the given time period.

Plaintiff alleged that he did not receive notice of the town Board meeting and the subject resolution as he was visiting friends in Mexico and seeking medical treatment. Thus, he contended that the certified letter to his home was inadequate, as he did not receive it.

The Court rejected this argument, citing to Second Circuit precedent holding that a certified letter, even if unclaimed, is sufficient to satisfy Due Process rights. *See Fuentes-Argueta v. INS*, 101 F.3d 867, 872 (2d Cir.1996).

However, the Court recognized that, if the defendant officials sent the letter to plaintiff by certified mail, knowing that plaintiff would not receive it, the letter would not be "reasonably calculated" to apprise plaintiff of its contents.

The Court proceeded with its analysis and found that the officials' actions were nevertheless "objectively reasonable." In this regard, plaintiff had already been put on notice that the debris on his property was illegal when the search was conducted of his home and he

received criminal zoning law violation charges “including that he unlawfully maintained dilapidated and unregistered vehicles, debris, and other items on the exterior of his house.”

Thus, the Court found that the plaintiff had adequate notice that he needed to remove the unregistered vehicles and other debris from his property before the Town was forced to do it for him. Thus, plaintiff could not avoid the situation by simply leaving town.

**Corrigan v. Smith, Docket No. 07 Civ. 2167 (S.D.N.Y. 2007, J. Brieant)** -- Copy attached.

Plaintiff, a long time member of an upstate New York County’s Sheriff’s Department resigned his position after a departmental investigation revealed that plaintiff had improperly submitted vouchers seeking financial reimbursement pursuant to a County clothing reimbursement policy.

Plaintiff proceeded to file a federal lawsuit regarding the circumstances surrounding his resignation and alleged, *inter alia*, that the Sheriff and Undersheriff were targeting him and retaliating against him for his political affiliation as well as his safety-related complaint. Thus, plaintiff alleged First Amendment claims of violation of the freedom of association and freedom of speech.

Notably, plaintiff was an outspoken supporter of the former Sheriff, who had served several terms, but was defeated in the 2001 election. As noted by the Court in its dismissal, plaintiff had no evidence of a causal connection between his 2001 political activities and the alleged retaliatory events that followed in the next five years. The Court rejected plaintiff’s sole proffered evidence of retaliation -- that certain County employees had allegedly warned plaintiff on three occasions following the 2001 election that the defendants would be “coming after him.” Further, the Court found that certain of the alleged retaliatory actions were “reasonable command choices” and would not support plaintiff’s claims.

Accordingly, the Court found it was objectively reasonable for the individual defendants to believe that their acts did not violate plaintiff’s constitutional rights.

This decision is useful as it shows the possible benefits of an early qualified immunity motion, as well as the possibility of winning such a motion in a relatively fact-intensive matter.

**Manganiello v. City of New York, 2008 WL 2358922 (S.D.N.Y., 2008).**

Plaintiff was acquitted after a criminal trial for the murder of a condominium complex security guard. The security guard was found in the basement of the building, lying face down with a fatal gunshot wound to his head

Two of the individual defendants, who were NYPD Police Officers, responded to the scene and a third NYPD defendant was assigned to the matter as the case detective in the ensuing police investigation.

After the investigation concluded, one of the individual NYPD defendants signed a felony complaint for plaintiff's arrest. An arrest warrant was issued and plaintiff was taken into custody.

All of these NYPD defendants testified before the Grand Jury, as did three civilian witnesses. The Grand Jury indicted plaintiff and charged him with two counts of Second Degree Murder. Plaintiff was ultimately acquitted of the charges following a jury trial and commenced a lawsuit under 42 U.S.C. § 1983 for malicious prosecution.

On summary judgment, the District Court found that plaintiff demonstrated issues of material fact as to these individual defendants' liability for malicious prosecution. In this regard, there was some evidence of witness coercion by certain of the NYPD defendants, as well as misrepresentations in the NYPD defendants' own testimony before the Grand Jury. Further, the search warrant at issue disappeared, along with much of the District Attorney's file in the matter. Accordingly, the Court found that qualified immunity was not available, as there were allegations of perjury and the fabrication of evidence.

The defendants also argued for the application of absolute immunity as to their Grand Jury testimony. In this regard, the Court recognized that a police officer has absolute immunity from liability under 42 U.S.C. § 1983 based on the substance of his trial testimony. *See Briscoe v. LaHue*, 460 U.S. 325 (1983). The Second Circuit has extended this protection to police officers testifying before a grand jury. *See White v. Frank*, 855 F.2d 956 (2d Cir.1988).

However, the Court recognized that there is an exception to this immunity where the testimony is of a "complaining witness." *See Malley v. Briggs*, 475 U.S. 335, 340 (1986). The Second Circuit has explained the distinction as providing absolute immunity for those whose role was limited to providing testimony, yet precluding the defense from those who play a "sufficient role" in initiating a prosecution or acting as a complaining witnesses. *See White*, 855 F.2d at 958-59.

Accordingly, the Court, in *Manganiello*, rejected the absolute immunity argument as the crux of plaintiff's claim was that the NYPD defendants were "complaining witnesses," and that they instigated or encouraged the malicious prosecution against him. Further, the Court noted that, based on the evidence in the record, a reasonable jury could have concluded that this occurred.