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IN PRACTICE

A strike against qualified immunity

Government employees may now be liable for procuring consent to a search under threat of adverse employment action

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Constitutional Law

Fourth Amendment protection against unreasonable searches and seizures has traction both in the criminal and civil rights law, but it plays out differently in each. In both, Fourth Amendment analysis usually begins with the question of whether the government official was lawfully in the place where he or she made observations, or found evidence of illegal activity. Enforcement of the right to remain free from unreasonable searches and seizures is different depending on whether one is in a criminal or civil damages context.

Recently, the Ninth Circuit U.S. Court of Appeals decided *Delia v. City of Rialto*, 10 C.D.O.S. 11858, and attempted to fill in gaps in existing Fourth Amendment jurisprudence in the context of a civil rights damages case. In *Delia*, plaintiff, Nicholas B. Delia, a city firefighter on medical leave, sued pursuant to 42 U.S.C. §1983 for violation of his Fourth Amendment rights after defendant city officials, suspicious of his grounds for leave, conducted a departmental internal affairs investigation. Among other things, the investigation included videotaping Delia buying building supplies, interrogating him, and ultimately, his chief's order compelling him to put the building supplies on his lawn for investigators to examine under threat of disciplinary action including termination if he disobeyed the direct order.

In *Delia*, defendants lacked sufficient basis for securing a search warrant. Initially, defendants attempted to conduct a warrantless search of Delia's house by asking for his voluntary consent. When he refused to consent, defendants requested that he bring the construction materials out of his home so that investigators could examine them. Delia again refused. He then was ordered by his chief to bring the construction materials out of his home for inspection. He was told that failure to obey this order could result in charges of insubordination and possible termination of his employment. He complied with the order and later sued.

The Ninth Circuit found that Delia had been compelled by the chief's order to enter his home and retrieve the construction materials for public view, and that his compliance with the order was involuntary and coerced by the direct threat of sanctions including loss of his job. The court held that Fourth Amendment protection extends to a government employee's compliance with a superior's order when the employee knows that governmental "policy" provides that failure to comply can result in suspension or termination of employment. Accordingly, the court held Delia had been compelled to participate in a warrantless search that violated his right to be free from an unreasonable search of his home.

However, the court observed that this decision did not fit neatly into any previous category of Fourth Amendment law. It concluded that until it rendered its decision, it was not clear that Fourth Amendment protections extended to the situation where an individual was compelled to enter his own home and retrieve items to be placed in public view.

And therein lies the rub. In criminal cases, where a criminal defendant seeks to suppress unlawfully obtained evidence, it is irrelevant whether the state or its agents are on notice that their conduct violated the defendant's Fourth Amendment rights. By contrast, for a public employee to be personally liable for damages for violating a person's right, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If the right is not "clearly established," the public employee who violated the right is immune from suit for damages under 42 U.S.C. §1983.

In prior cases, the Supreme Court and the Ninth Circuit had made clear that public agencies could not impair an individual's privilege against self-incrimination by compelling incriminating answers, or by requiring a waiver of immunity. However, the only analogous Fourth Amendment decision by the Ninth Circuit was in *Los Angeles Police Protective League v. Gates*, 907 F.2d 879 (1990), where a police officer was served with an administrative warrant to search his garage. When he refused to permit the search, he was fired for insubor-

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dination. He sued under 42 U.S.C. §1983, challenging his dismissal. The court held that Gates' Fourth Amendment rights had been violated.

Chopping logic, the *Delia* court concluded that the Gates court had held only that the plaintiff "could not be disciplined when he refused to allow the appellants to violate his constitutional rights." Hence, the *Delia* court decided that because the Gates decision did not concern the legality of an actual search, or a "search" under circumstances similar to those in this case, the *Gates* decision was insufficient to put the *Delia* public employee defendants on notice that their conduct violated Delia's Fourth Amendment rights. Consequently, the court held that they had qualified immunity from Delia's suit for damages.

The Ninth Circuit recently made a similar decision concerning whether police use of a Taser constituted excessive force. In *Bryan v. MacPherson*, 608 F.3d 614 (2010), the court held that a police officer's use of a Taser or similar devices constitutes an intermediate, significant level of force that must be justified by "'a strong government interest [that] compels the employment of such force.'" However, as in *Delia*, the court also held that this right had not been clearly established prior to its decision in Bryan, and the police officer was protected by qualified immunity from suit for damages under §1983.

All was not lost for Delia. In his case, the court applied precedent that private persons who are acting for government entities do not enjoy privileges against a §1983 damages suit when they participate in violating someone's rights. Therefore, the court held that the private attorneys, hired by the government, who participated in the violation of Delia's Fourth Amendment right, did not enjoy immunity from his suit.

Here is the bottom line. Lawyers for potential civil rights plaintiffs now can rely on the *Delia* decision for bringing Fourth Amendment damages claims against public employees who may have coerced a plaintiff by a threat of discipline into permitting or participating in a warrantless search of his or her home. That right now is "clearly established," and public employees cannot successfully assert a qualified immunity defense when sued for damages pursuant to §1983. Public entities need, therefore, to be aware that they risk liability for damages if they conduct warrantless searches by coercing involuntary waivers from their employees by threatening discipline.

Under California law, public entities usually have to indemnify their employees for damages awards against their employees who act within the course and scope of their employment, and sometimes the public entity itself is directly liable for damages due to a constitutional violation. It follows that public entities need to devise other means of conducting legitimate investigations into possible employee misconduct.

Similarly, given the Ninth Circuit's earlier decision in *Bryan*, public entities will be well-advised to take appropriate training and other measures to limit circumstances in which its employees use Tasers to control people.

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