

Sixth Circuit Redefines Qualified Immunity for Police Officers *By Lynnette Pisone Ballato*

Friends and colleagues told her not to get her hopes up as local attorney, Lynnette Pisone Ballato, prepared to file the first writ of certiorari to the United States Supreme Court of her career. In fact, comments like “not a snowball’s chance...” reverberated from the walls of her firm, Subashi, Wildermuth & Ballato. Ever the optimist, Ms. Ballato signed the final draft and sent it off for review without hesitation.

Six years earlier, two Xenia police officers, the City of Xenia, its mayor and council members, had been sued for an arrest that took place during the investigation of a violent juvenile crime. The case was before the Honorable Walter H. Rice, of the Southern District of Ohio. Upon receipt of the case, Ms. Ballato discovered that both officers had done nothing more than one would expect police officers in those circumstances to do. It was clear in her mind that any reasonable jury would find on behalf of her clients and that, as public officials, neither officer should be forced to undergo a trial as if they, themselves, were the criminals.

The plaintiff was the juvenile offender’s mother, who refused to allow female officer, Christine Keith, to ask her daughter basic questions, such as her name. Officer Keith was obligated to cite the juvenile or take her into custody, but she was unable to do the former without basic information. The plaintiff became irate. Officer Keith was forced to call for emergency backup. Her partner, Officer Matthew Foubert, ran to her aid. He took the plaintiff to the ground and placed her in handcuffs. The plaintiff received no serious injury.

After discovery, Ms. Ballato moved for summary judgment on all claims for all defendants. While most of the claims were dismissed, the district court ruled some claims against both officers would have to proceed to trial. Because immunity existed to protect both officers, Ms. Ballato took an immediate appeal to the Sixth Circuit Court of Appeals.

Ballato argued on her clients’ behalf that qualified immunity should always protect police officers from suit unless they violate an obvious constitutional right. Two of the three-member panel agreed that Officer Keith was entitled to qualified immunity and reversed that portion of the district court’s ruling. Two of the three disagreed,

however, as to whether Officer Foubert violated a constitutional right when he responded to his partner's back up call.

This split of opinion was a curiosity. How could three very highly educated jurists disagree about the reasonableness of an officer's actions, yet find that the law surrounding his conduct, providing back-up to his partner, was so clearly established that he should have known his conduct was unlawful?

The Sixth Circuit's opinion raised a number of important public policy questions. And, the opinion had the potential for creating a deeper split amongst the Circuit Courts on the applicability of qualified immunity in use of force cases. In essence, this case called into question an officer's basic ability to respond to back-up calls. If Officer Foubert were to be denied immunity in this case, police officers everywhere would have to stand trial each time one acted to protect his or her partner by using any amount of force to subdue a suspect. In the best interest of her clients and other Ohio police officers, Ms. Ballato decided to seek resolution by the highest court of the numerous legal and practical concerns raised by the Sixth Circuit's decision.

Coincidentally, the attorneys on a case out of the Ninth Circuit, *Haugen v. Brosseau*, which involved the use of deadly force but addressed the same qualified immunity concerns, had also sought review by the Supreme Court. On December 13, 2004, the Supreme Court accepted both cases for review. More surprisingly, the Court vacated both circuit court decisions in rare summary proceedings. This means both cases were accepted, reviewed, and decided on the writs alone - no briefs submitted, no oral argument conducted.

The Court wrote a full opinion on the *Brosseau* case, reiterating its position that police officers should be presumed to be immune from suit in cases involving discretionary actions taken in the course of their law enforcement activities. The Court held immunity should only be denied when the officer's conduct was obviously unconstitutional or when there was legal authority squarely governing the facts of the particular case that would have placed any reasonable officer on notice that the conduct was unlawful.

The Supreme Court remanded Officer Foubert's case to the Sixth Circuit for reconsideration in light of the *Brosseau* decision. Newly appointed Sixth Circuit Judge Jeffrey S. Sutton, wrote the opinion of the Court. Judge Sutton, of course, had originally

dissented from his court's denial of immunity to Officer Foubert and had opined that Officer Foubert's actions were reasonable as a matter of law. Upon remand, he wrote a lengthy opinion applying the *Brosseau* decision to the facts of Officer Foubert's case. This published decision now sets the threshold for applying qualified immunity for police officers in the Sixth Circuit. And, the decision is cited approvingly by the Second Circuit Court of Appeals in *Jaegly v. Couch*, No. 05-2191-CV (2nd Cir. NY Feb. 24, 2006) and the Seventh Circuit in *Robbins v. Lappin*, No. 05-2569 (7th Cir. Ind. February 17, 2006).

Ms. Ballato's success in this case can be largely credited to the support of the members of her firm and, in particular, associate attorney Tabitha Justice, who was instrumental with the preparation of the appellate briefing; her clients, who stood the test of time and invested the resources in this case to obtain justice; the State Solicitor of Ohio, Douglas R. Cole, and Ohio Assistant Attorney General Robert C. Maier, who agreed to support Xenia's officers by authoring an *Amici Curiae* brief to the United States Supreme Court; and the Attorneys General from Alabama, Delaware, Illinois, Louisiana, Massachusetts, Nebraska, Oklahoma, Oregon, South Dakota, Utah, and West Virginia, who agreed to support the interest of their own police officers in the important questions raised by this case. The net result of all these efforts is the creation of sound law that ensures police officers are not unreasonably restricted in performing their duty and service to protect all.