IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8394

Summary Calendar

BILLIE KAY HARVEY,

Plaintiff-Appellee,

versus

YSLETA INDEPENDENT SCHOOL DISTRICT, MAURO REYNA, Individually and as Superintendent of Ysleta Independent School District, and FERNANDO PENA, Individually and as a Member of the Ysleta Independent School Board,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(EP-92-CA-347-B)

(April 14, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

The defendants filed a notice of appeal from the district court's "Notice of Scheduling Case for Trial of May 20, 1993, establishing this cause for trial without ruling on their qualified

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

immunity defense." Appellants argue that this Court has appellate jurisdiction under Helton v. Clements, 787 F.2d 1016 (5th Cir. 1986), because they raised qualified immunity as a defense in their answer and the district court set the case for trial without ruling on qualified immunity.

In Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), the Supreme Court held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." In Helton v. Clements, this Court extended the rule of Mitchell to apply to a district court's refusal to rule on a claim of qualified immunity until trial. 787 F.2d at 1017. This Court reasoned that similar to an explicit denial of a claim of qualified immunity, the refusal to rule on a claim of immunity until trial was "'effectively unreviewable on appeal from a final judgment.'" Id. (quoting Mitchell, 472 U.S. at 527). Like an explicit denial of qualified immunity, a refusal to rule on a claim of qualified immunity conclusively determines the defendant's claim of the right not to stand trial. Id.

In this case, the district court did not refuse to rule on the defendants' claim of qualified immunity. The defendants never placed the issue of qualified immunity before the district court to give the court an opportunity to rule on it. They raised the defense of qualified immunity in their answer. Although they prayed in their answer that the court grant their motion to dismiss

and grant them qualified immunity, they never filed a separate motion to dismiss under Fed. R. Civ. P. 12(b)(6) or motion for summary judgment under Fed. R. Civ. P. 56 raising the defense of qualified immunity. The district court was not required and cannot be expected to rule on qualified immunity simply because it was raised in the answer.

Because there was no motion pending, there has been no "explicit denial" of a claim of qualified immunity nor a "refusal to rule" on a motion raising qualified immunity. See Edwards v. Cass County, Tex., 919 F.2d 273, 275 (5th Cir. 1990). The district court's notice scheduling trial is not a final judgment constituting a refusal to rule on the defendants' claim of qualified immunity.

DISMISSED.