UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10520
Summary Calendar

LINDA LARGENT, ET AL.,

Plaintiffs-Appellees,

versus

CITY OF DALLAS, TX and
GORDON HAGER, Dallas
Police Officer,

Defendants,

GORDON HAGER, Dallas
Police Officer,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(3:92-CV-2322-R)

(January 3, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

PER CURIAM:

Defendant-appellant Gordon Hager (Hager) appeals the district

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court's order permitting plaintiffs-appellees to take his deposition. We dismiss the appeal.

Facts and Proceedings Below

At 10:00 a.m. on April 13, 1991, Hager, an off-duty Dallas police officer, was directing traffic at an intersection during the Azalea 10K, a foot race. On this rainy morning, Hager was wearing his police uniform as well as an orange reflective traffic vest with the word "Police" written on a yellow stripe. Both parties agree that a Volkswagen Jetta driven by plaintiffs' decedent Stanley Poynor (Poynor) approached the intersection where Hager was directing traffic. At this point, the parties' account of the events diverge, but both agree that Hager shot Poynor and that Poynor died as a result.

Hager alleges that he motioned for Poynor to stop in order to permit an approaching runner to cross the intersection. Although Hager initially thought Poynor was going to stop, he claims that Poynor proceeded into the intersection, struck his right leg, and knocked him onto the hood of the car. Hager allegedly grabbed a windshield wiper and remained on the hood as Poynor began to accelerate. Attempting to get the driver to stop, Hager pounded on the windshield with his right hand as he held onto the windshield wiper with his left hand. Hager asserts that Poynor did not slow down but swerved in an effort to throw him from the hood. At this point, Hager, fearing for his life, pulled out his pistol and fired several shots through the windshield. After the car came to a halt, Hager got off the hood and asked a bystander to call the police.

Plaintiffs allege that Poynor approached the intersection, and Hager motioned to him to stop. Poynor then signalled to Hager that he was turning left into the entrance to his apartment complex and started to turn left in order to get out of the way of another car. As Poynor was turning left into his apartment complex's entrance, Hager started shaking his finger and placed his leg on Poynor's car. Then Hager allegedly climbed on the hood of the car and shot Poynor through the windshield.[1]

On October 13, 1992, Linda Largent and Iris Esparza (Plaintiffs), Poynor's mother and sister, filed suit against Hager and the City of Dallas (Defendants) in Texas state court, seeking recovery under 42 U.S.C. § 1983 and under Texas law. After removing the case to federal court, Defendants moved for summary judgment on the ground that Hager was entitled to qualified immunity and for a protective order staying discovery pending the disposition of the summary judgment motion. In support of the motion for summary judgment, Defendants attached the affidavits of Hager and two witnesses.

In their opposition to summary judgment, Plaintiffs attached the transcript of a private investigator's interview with Brian Blakley (Blakley), a witness who allegedly observed the incident from his second-floor apartment located at the intersection where Hager was directing traffic. Although Blakley stated that he did not see the actual shooting, he said that he saw Hager climb on the hood of the car and that the car very slowly drifted ten feet with

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[1] According to the autopsy, Poynor was shot seven times.

Hager on the hood. This transcript was accompanied by a notarized certificate signed by Blakley attesting that the transcript contained "a true record of [his] statement given at [the] interview."

On April 13, 1993, the magistrate judge granted Defendants' request for a stay of discovery pending the disposition of the summary judgment motion but did permit Plaintiffs to depose Blakley, who was suffering from a terminal illness.[2] On January 4, 1994, the district court vacated the order staying discovery. Defendants moved for reconsideration, and on February 16, 1994, the district court again stayed discovery until the resolution of Defendants' motion for summary judgment. On May 2, 1994, the district court vacated its previous order to allow Plaintiffs to depose Hager and delayed ruling on Defendants' motion for summary judgment pending the completion and transmittal to the court of Hager's deposition. Defendants moved for reconsideration, and on May 19, 1994, the district court denied the motion, stating that "genuine issues of material facts concerning whether or not the defendant Gordon Hager performed his duties as a police officer in good faith" would preclude summary judgment on grounds of qualified immunity. Hager appeals the district court's May 2 and May 19 orders.

Discussion

Ordinarily, discovery orders are interlocutory and not appealable under the final judgment rule of 28 U.S.C. § 1291.

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[2] The parties' briefs state that Plaintiffs have never taken Blakley's deposition.

Gaines v. Davis, 928 F.2d 705, 706 (5th Cir. 1991). The Supreme Court, however, has held that immediate appeal may be taken from interlocutory orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 69 S.Ct. 1221, 1225-26 (1949).

In *Mitchell v. Forsyth*, 105 S.Ct. 2806, 2817 (1985), the Supreme Court held that orders denying a substantial claim of qualified immunity are immediately appealable under the collateral order doctrine. Government officials serving in a discretionary capacity are entitled to qualified immunity as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982). A defendant entitled to qualified immunity is shielded from the burdens of broad discovery. *See Mitchell*, 105 S.Ct. at 2815 (stating that qualified immunity provides "an entitlement not to stand trial or face the other burdens of litigation"); *Harlow*, 102 S.Ct. at 2738 ("Until this threshold immunity question is resolved, discovery should not be allowed."). Therefore, this Circuit has held that immediate appeal by defendants asserting qualified immunity is available for certain discovery orders that are either avoidable or overly broad. *Gaines v. Davis*, 928 F.2d 705, 707 (5th Cir. 1991); *Lion Boulos v. Wilson*, 834 F.2d 504, 507-08 (5th Cir. 1987).

In *Lion Boulos v. Wilson*, the defendant appealed the district court's order compelling limited discovery before ruling on the qualified immunity issue, arguing that qualified immunity guarantees government officials immunity from all pretrial discovery. This Court dismissed the defendant's appeal and held that "qualified immunity does not shield government officials from all discovery but only from discovery which is either avoidable or overly broad." *Lion Boulos*, 834 F.2d at 507.

We identified two categories of discovery in *Lion Boulos*. First, we reasoned that "[d]iscovery designed to flesh out the merits of a plaintiff's claim before a ruling on the immunity defense or discovery permitted in cases where the defendant is clearly entitled to immunity" would be overly broad and avoidable, and thus immediately appealable. *Id.* Second, we stated that "[d]iscovery orders entered when the defendant's immunity claim turns at least partially on a factual question; when the district court is unable to rule on the immunity defense without further clarification of the facts; and which are narrowly tailored to uncover only those facts needed to rule on the immunity claim are neither avoidable nor overly broad." *Id.* at 507-08. *See also Gaines*, 928 F.2d at 707 (reversing district court's discovery order compelling the depositions of the defendants as "overly broad because it failed to limit the scope of the depositions to the issue of qualified immunity"); *Maxey v. Fulton*, 890 F.2d 279 (10th Cir. 1989) (remanding district court's discovery order on the ground that it did not adequately limit discovery to the issue of qualified immunity).

Hager argues that *Siegert v. Gilley*, 111 S.Ct. 1789 (1991), overrules these cases by holding that qualified immunity shields a government official from all discovery until the district court rules on a defendant's qualified immunity claim. We disagree. In *Siegert*, the Supreme Court posited the framework for analyzing a claim of qualified immunity. Under the holding in *Siegert*, the threshold inquiry is whether the plaintiff has alleged "the violation of a clearly established constitutional right." *Id.* at 1793. Stated another way, if a plaintiff does not allege the violation of a clearly established constitutional right, the holding in *Siegert* dictates that the suit must be dismissed without discovery.

However, we do not interpret the holding in *Siegert* to preclude narrowly tailored discovery aimed at uncovering facts essential to a district court's ruling on the qualified immunity claim. We are in substantial agreement with the Tenth Circuit's interpretation of the effect of *Siegert* on discovery in qualified immunity cases:

> "Discovery should not be allowed until the court resolves the threshold question whether the law was clearly established at the time the allegedly unlawful action occurred. The question is purely legal, and a court cannot avoid answering the question by framing it as factual. The court must first determine whether the actions defendants took are `actions that a reasonable [person] could have believed lawful.' If the actions are those that a reasonable person could have believed were lawful, defendants are entitled to dismissal before discovery. If the actions are not those that a reasonable person could have believed were lawful, then discovery may be necessary before a motion for summary judgment on qualified immunity grounds can be resolved. However, any such discovery must be tailored specifically to the immunity question." *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992)(citations omitted).

Because Plaintiffs have alleged the violation of a clearly established constitutional right, we hold that *Siegert* does not prevent the district court from postponing ruling on Hager's qualified immunity defense pending his deposition. The parties have presented two very different versions of the events surrounding Poynor's death, and therefore, we agree with the district court that Hager's deposition is appropriate in order to resolve Hager's qualified immunity claim.

We note that the district court erroneously incorporated a subjective standard into its qualified immunity analysis when it stated that genuine issues of material facts existed concerning whether Hager acted in good faith.[3] It is well established that an objective standard governs the good faith determination under the qualified immunity principles enunciated by the Supreme Court. *Harlow*, 102 S.Ct. at 2738 (holding that objective reasonableness standard governs good faith element of qualified immunity analysis under federal law); *see also Anderson v. Creighton*, 107 S.Ct. 3034, 3038 (1987). The Texas Supreme Court recently adopted a similar objective good faith standard for a government official's claim of qualified immunity under Texas law. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 655-57 (Tex. 1994). Accordingly, Hager's subjective good faith is not relevant to the resolution of his claim of qualified immunity.[4]

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[3] The district court cited an unpublished decision of this Court in support of this statement. *Hoffman v. Sheffield*, No. 93-1747 (5th Cir. April 28, 1994)(unpublished).

[4] Our statement to the contrary (respecting Texas law claims) in *Hoffman*, rendered before the Texas Supreme Court's decision in

Having rejected Hager's argument that a claim of qualified immunity inevitably shields a government official from all pretrial discovery, we turn to the discovery ordered by the district court, namely the deposition of Hager. Even though qualified immunity does not protect Hager from all pretrial discovery, it shields him from overly broad or avoidable discovery. *See, e.g Lion Boulos*, 834 F.2d 504. Although we recognize that, in theory, the district court's discovery order compelling the deposition of Hager might permit discovery of some facts beyond the limited scope of the qualified immunity issue, Hager does not point out any such areas in his brief.

More importantly, our review of the record indicates that Hager never sought below to limit the scope of his deposition to facts essential to his qualified immunity defense; rather, he consistently maintained that his claim of qualified immunity required a stay of all pretrial discovery until the district court ruled on his motion for summary judgment. Because Hager never sought to restrict the scope of his deposition, he has waived any complaint on this attempted appeal that the district court's discovery order was not tailored sufficiently narrowly.

Conclusion

For the foregoing reasons, the appeal is

DISMISSED.

Chambers, is no longer an accurate statement of the Texas law of qualified immunity. *Hoffman* does not say subjective good faith is relevant to qualified immunity from federal claims.