

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 94-60329  
Summary Calendar

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OTTIS KENNEDY, ET AL.,

Plaintiffs-Appellees,

VERSUS

DANNY RILEY, ET AL.,

Defendants,

DANNY RILEY, GLENN MOORE and  
JOHN ANGLIN,

Defendants-Appellants.

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Appeal from the United States District Court  
for the Northern District of Mississippi

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(1:92-CV-324-S-D)

(November 15, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:<sup>1</sup>

Appellants, employees of the Weight Division of the Mississippi Department of Transportation, appeal the district court's order allowing Kennedy to take limited discovery on appellants' qualified immunity defense.

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<sup>1</sup> 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Ottis Kennedy, Byron Kennedy, and Mike Mask<sup>2</sup> filed this civil rights action under 42 U.S.C. § 1983 against appellants, Danny Riley, John Angle, and Glenn Moore, who are employees of the Mississippi State Department of Transportation.<sup>3</sup> Kennedy alleged that these defendants were part of a scheme to shut down their dirt-hauling business by selective enforcement of county-road weight limits without due process. This scheme was allegedly concocted in retaliation for the plaintiffs' criticism of the Pontotoc County Sheriff Department's lack of enforcement of drug-trafficking laws.

In their Answers, Riley, Angle and Moore claimed qualified immunity on the ground that they acted with a reasonable good faith belief that their acts comported with state and federal constitutional and statutory requirements. They then moved to dismiss the suit on this basis. In their supporting affidavits, Riley, Angle and Moore alleged that they were merely acting under the instruction of their superiors and that they had no personal knowledge of any controversy between the plaintiffs and any county officials.

Although it stayed discovery on all other issues, the district court affirmed a magistrate's order allowing limited discovery on the issue of qualified immunity. The defendants now challenge this order. They argue that conducting discovery before their immunity

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<sup>2</sup> Collectively referred to as "Kennedy" in this opinion.

<sup>3</sup> Kennedy also sued various other state and local officials of Mississippi who are not parties to this appeal.

has been decided constitutes a matter-of-fact denial of the qualified immunity defense. Appellees argue that this Court lacks jurisdiction because the discovery order is not an appealable final judgment.

Discovery orders are ordinarily not appealable under the final judgment rule, but in cases involving the qualified immunity defense "immediate appeal is available for discovery orders which are either avoidable or overly broad." **Gaines v. Davis**, 928 F.2d 705, 707 (5th Cir. 1991) (citing **Lion Boulos v. Wilson**, 834 F.2d 504, 507-08 (5th Cir. 1987)). Because the district court did not first address whether Kennedy stated a claim for violation of a clearly established statutory or constitutional right, we conclude that this discovery order is premature and may be avoidable.

The Supreme Court has established a logical order in which qualified or "good faith" immunity claims must be assessed:

[I]t should first be determined whether the actions the [plaintiffs] allege [the defendants] to have taken are actions that a reasonable officer could have believed lawful. If they are, then [the defendant] is entitled to dismissal prior to discovery. If they are not, and the actions [the defendant] claims he took are different from those the [plaintiffs] allege . . . then discovery may be necessary before [the defendant's] motion for summary judgment on qualified immunity grounds can be resolved.

**Anderson v. Creighton**, 483 U.S. 635, 646 n.6, 97 L.Ed.2d 523, 535 n.6 (1987) (internal citation omitted).

Thus, a court must initially decide whether the plaintiff has alleged a violation of a clearly established statutory or constitutional right of which a reasonable person would have known. **Mitchell v. Forsyth**, 472 U.S. 511, 86 L.Ed.2d 411, 425 (1985)

(citing **Harlow v. Fitzgerald**, 457 U.S. 800 (1982)). At this threshold point, a court assumes that the plaintiff's account of the facts is true and considers only the state of the law at the time of the alleged events. **Id.** at 426; **Anderson** at 535 n.6. A court conducts this purely legal analysis before turning its attention to any dispute over what really happened. **Id.**; **Siegert v. Gilley**, 114 L.Ed.2d 277, 287 (1991); **Mitchell** at 426.

After the complaint clears this first hurdle, the court can permit discovery on whatever factual issues it needs to clear up before it decides on qualified immunity. **Anderson** at 535 n.6; **Presley v. City of Benbrook**, 4 F.3d 405, 409-10 (5th Cir. 1993). If discovery fails to uncover sufficient evidence to create a genuine issue as to whether the defendants committed the alleged acts, the defendants are then owed summary judgment on the basis of qualified immunity. **Mitchell** at 425.

Here, the district court omitted the essential first step in assessing this claim of qualified immunity. Kennedy contends that his rights to free speech, due process and equal protection have been violated. Without deciding whether Kennedy has stated a violation of any or all of these rights, the district court may have ordered discovery on claims that it will later have to dismiss. Consequently, we remand this case to the district court to determine whether Kennedy has stated a claim for the violation of a constitutional right. The district court can then reconsider the discovery motion in light of that decision.

Accordingly, the discovery order is VACATED and the case is REMANDED for further proceedings.