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Civil Rights Update

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Qualified Immunity for Violating a "Class of One" Equal Protection Rights:

Lunini v. Grayeb, 395 F.3d 761 (7th Cir. 2005)

Under the doctrine of qualified immunity, governmental officials are shielded from civil damages as long as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Applying the doctrine of qualified immunity in a case that alleges a violation of equal protection rights under the so-called "class of one theory" is particularly difficult, largely due to the inability of the courts to precisely define the contours of a class of one equal protection claim. The lingering uncertainty regarding the legal standards applicable to "class of one" equal protection claims was acknowledged in the recent Seventh Circuit Court of Appeals opinion of *Lunini v. Grayeb*, 395 F.3d 761 (7th Cir. 2005), *reh'g en banc denied*, Mar. 3, 2005.

In that case, Joseph Lunini, a Peoria, Illinois, resident, alleged that certain Peoria police officers violated his equal protection rights when they refused to arrest Charles Grayeb, Lunini's former boyfriend, after an alleged dispute. Defendant Grayeb, a member of the Peoria City Council, and Lunini met and began a personal relationship in 1995. The two moved into a single-family home in 1997 on High Street in Peoria that Grayeb owned. During the first half of 2000, Lunini and Grayeb started to have major difficulties in their relationship. Later that year, and after a City Council meeting, Grayeb met with John Stenson, the Peoria Chief of Police, to discuss his problems with Lunini, and asked Stenson how he might have Lunini removed from the residence. After hearing of this conversation, Lunini made plans to move out of the house.

On June 30, 2000, Lunini and Grayeb allegedly had a confrontation at the house, and, according to Lunini, Grayeb slapped him and punched him in the face. Lunini called the police and reported that he had been assaulted. Two Peoria police officers, Stuart Barden and Jeffrey Kice, were dispatched to the home. According to Lunini, the officers laughed and "made faces" when Lunini mentioned his relationship with Grayeb. Lunini also claimed that Grayeb called the police chief, who thereafter called Barden and Kice and told them that if there was insufficient evidence of a crime and for an arrest, they should take statements from Grayeb and Lunini and escort Lunini off the property.

Lunini filed a lawsuit alleging that the Peoria police officers refused to arrest Grayeb due to his position on the Peoria City Council and that Lunini was therefore, being denied equal protection of the laws. In denying the defendant officers' motion for summary judgment on Lunini's equal protection claim, the district court rejected the officer's request for qualified immunity, ruling that Lunini's equal protection right to be free from deliberate withdrawal of police protection for purely personal reasons was "clearly established." The defendants appealed the narrow issue of whether Lunini's equal

protection rights were "clearly established" for qualified immunity purposes at the time of the incident in question, June 30, 2000.

Judge Cudahy, with Chief Judge Flaum and Circuit Judge Posner joining, wrote the opinion, and concluded that the equal protection rights alleged to have been violated were not "clearly established" at the time of the incident and, therefore, reversed the district court ruling. To implement the qualified immunity inquiry, a court must first determine whether the alleged conduct violated a constitutional or statutory right in the first place; second, the court must determine whether the right in question was "clearly established" at the time of the alleged incident. In its opinion, the court of appeals acknowledged that a "class of one" equal protection claim may be advanced when: (1) the plaintiff alleges that she has been intentionally treated differently from others similarly situated; and (2) there is no rational basis for the difference in treatment or the cause of the differential treatment is a "totally illegitimate animus" toward the plaintiff by the defendant. *See McDonald v. Village of Winnegka*, 371 F.3d 992, 101 (7th Cir. 2004) and *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Even though the court believed the right in question was not clearly established at the time of the incident, the court elected to address Lunini's allegation that the alleged conduct violated Lunini's equal protection right. The court found it difficult to discern any equal protection violation under the circumstances since Lunini had not demonstrated that he suffered unequal treatment, the essence of an equal protection violation. It noted that a "class of one" claim must fail where the plaintiff fails to identify someone who, although similarly situated, was intentionally treated differently than the plaintiff. Based on the record presented, the court of appeals found there was no evidence that the Peoria Police Department *always* arrested an alleged assailant when responding to domestic violence incidents. Thus, the court viewed the Lunini/Grayeb altercation as simply an incident that involved the ordinary exercise of police discretion. The court also refused to conclude that the officer's failure to arrest Grayeb amounted to a withdrawal of physical protection in any meaningful sense.

The court observed that, even if assuming that Lunini's allegation stated a cognizable "class of one" equal protection claim, Lunini nevertheless could not prevail because the law on that particular subject was not clearly established at the time of the incident on June 30, 2000. The court then examined its three "class of one" equal protection cases that had been decided prior to June 2000: *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995); *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998); and *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir. 2000). *Hilton*, the most analogous of the cases, involved an allegation that the police were unfair in responding to complaints among neighbors. Specifically, the plaintiff alleged that the local police arrested him on several occasions in response to complaints from his neighbors, but they also did not respond similarly to his own report about those neighbors. The court of appeals concluded that the plaintiff in *Hilton* failed to present a valid equal protection claim since he had presented no evidence of improper police animus against him, but merely alleged uneven enforcement of local laws. However, unlike *Hilton*, where it was clear that the plaintiff was being treated differently from his neighbors, it was unclear that that occurred in the *Lunini* case. The *Lunini* court found that it would be difficult to charge the defendant police officer with notice of a "clearly established" constitutional right based upon the open-ended pronouncements in those three cases arising under largely distinguishable facts.

Judge Cudahy's opinion emphasized that the contours of the right at issue were not sufficiently clear such that a reasonable official would understand that what he did violated the arrestee's rights. Judge Cudahy questioned the clarity of the legal standard applicable to "class of one" cases and acknowledged that it continued to "elude some of this circuit's most capable judges." The court concluded that the equal protection rights alleged to have been violated by the officers were not clearly established at that time of the incident. The court felt uncomfortable imposing a duty upon police officers to comprehend a legal standard that was still in its developing stage. Given these findings, the court felt that the officers should be entitled to qualified immunity protection.

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