

for monitoring and enforcing abstinence, courts would have likely been less inclined to provide opportunities to defendants to remain in the community with conditions related to substance-use treatment. In sum, the opinion in this case validated the drug-free condition but recognized the judge's role in considering multiple factors to devise an individual plan without criminalizing substance use.

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Qualified Immunity in a State Hospital

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Private Employees Working in a State Hospital May Assert the Defense of Qualified Immunity

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In *Perniciaro v. Lea*, 901 F.3d 241 (5th Cir. 2018), the Fifth Circuit Court of Appeals agreed with the district court for the middle district of Louisiana in holding that privately employed employees providing services for a state psychiatric hospital are entitled to assert the qualified immunity defense. Moreover, the court reversed a denial of summary judgment asserted by defendant employees, holding that the plaintiff had failed to establish that defendants engaged in conduct that was objectively unreasonable or violated his clearly established rights.

Facts of the Case

In 2013, Dominik Perniciaro was committed to the Eastern Louisiana Mental Health System (ELMHS) to restore his competence to stand trial. In 2014, he was discharged to prison after being found competent but was later found incompetent to stand trial again. He was readmitted to ELMHS, found restored to competence, and discharged a second time that same year. After standing trial, he was found not guilty by reason of insanity and recommi-

ted for treatment in 2015. Throughout these hospitalizations, he received psychiatric treatment for schizophrenia from Dr. Jeffrey Nicholl, who was in turn overseen by Dr. John Thompson, the chief of staff. Both were employees of Tulane University, which provided services to ELMHS under a contract with the state. Dr. Thompson reported to the chief executive officer, Dr. Steve Lea, who was a state employee and oversaw operations and safety policies at ELMHS.

During his 2013 hospitalization, Mr. Perniciaro engaged in multiple physical altercations that he often initiated. As a result, he was monitored on arm's-length observation and "close-visual observation" for almost the entirety of this commitment. Soon after his recommitment in 2014, he was assaulted by a patient whom he had assaulted during his prior commitment. Due to the assault, Mr. Perniciaro required outside hospitalization and surgery to repair his jaw. After his return to ELMHS, he engaged in additional physical altercations in which he was identified as the aggressor. Later that year, he alleged that ELMHS guards had attacked him and left bruises on his body. Although the bruises were attributed to manual holds occurring during the response to physical altercations, his allegations were reported to Adult Protection Services. Additionally, a report generated by the Office of Aging and Adult Services was reviewed by an investigative review committee and Dr. Lea, who collectively found the allegations of abuse to be unsubstantiated.

Around that time, Mr. Perniciaro also complained of a shoulder injury after slipping and falling on the ground. After this complaint, a variety of health care providers (i.e., Dr. Lea, other medical doctors, a physical therapist, and an orthopedic specialist) examined his case. The results of the examinations found signs of displacement and separation of the acromioclavicular joint. The recommended treatment was analgesics as needed. Mr. Perniciaro's father filed an official complaint regarding the quality of medical care to the Total Quality Management department at ELMHS. The response was that Dr. Lea had already addressed these concerns and that they would continue to be investigated.

By that time, Mr. Perniciaro had started on a new medication and showed remarkable improvements. A few months prior to his 2015 adjudication of not guilty by reason of insanity, he filed a lawsuit alleging that Drs. Nicholl, Thompson, and Lea had failed to

maintain reasonably safe conditions and that his medical care was insufficient. Additionally, Mr. Perniciaro stated that Drs. Thompson and Lea were liable because they had failed to train and supervise Dr. Nicholl and the guards of the unit. The defendants filed cross-motions for summary judgment on the basis of qualified immunity. Mr. Perniciaro argued that Drs. Nicholl and Thompson were not entitled to assert qualified immunity because they were not state employees. The district court held that, although the defendants were entitled to assert qualified immunity, a dispute of the facts of the case did not allow the court to grant summary judgment on that defense. The defendants appealed to the U.S. Court of Appeals for the Fifth Circuit.

Ruling and Reasoning

The Court of Appeals for the Fifth Circuit held that Drs. Thompson and Nicholl, the Tulane University employees, were entitled to assert qualified immunity because their circumstances were comparable to those of typical state employees. That is, they worked in a state facility, worked alongside state employees, and were overseen by a state employee. The court cited *Filarsky v. Delia*, 566 U.S. 377 (2012), in which the Supreme Court did not draw a distinction between public and private employees in relation to qualified immunity when they engaged in public service. Additionally, in *Richardson v. McKnight*, 521 U.S. 399 (1997), it was stated that qualified immunity prevents “unwarranted timidity,” referring to decline in job performance in the public sector resulting in part from the threat of liability. Indeed, the court noted that the salaries of Drs. Nicholl and Thompson were contingent on other roles at Tulane University (e.g., teaching, research) and not entirely on their duties at ELMHS. Therefore, they were vulnerable to unwarranted timid care in ELMHS. Furthermore, providing qualified immunity ensures that highly skilled employees (who could work exclusively in the private sector) are not discouraged from working in the public sector because they are not entitled to the same immunity as their counterpart public employees. Finally, qualified immunity protects employees and their jobs from the distraction of litigation. Indeed, it was stated in *Filarsky* that, when private and public employees work together, immunity should be extended because a lawsuit against one would affect the other. Certainly, in state hospitals, a variety of public and contracted

professionals commonly work in interdisciplinary teams toward the same goal (e.g., the wellbeing of patients). This constant and close interaction may facilitate potential litigation, distraction, and decline in their performance as a group when one member is negatively affected. Given all these factors, the court affirmed that Drs. Nicholl and Thompson could assert qualified immunity. This matter did not apply to Dr. Lea, as he was a state employee.

Having decided that all three defendants were entitled to assert qualified immunity, the court addressed whether they were entitled to its protection. The court said that Mr. Perniciaro failed to demonstrate that the defendants’ conduct violated clearly established statutory or constitutional rights that a reasonable person would have to recognize (citing *Mullenix v. Luna*, 136 S. Ct. 305 (2015)). The court analyzed the defendants’ conduct under the constitutional standard of deliberate indifference (i.e., knowing of the risk of harm and disregarding this risk by failing to take reasonable measures to prevent the potential harm, citing *Farmer v. Brennan*, 511 U.S. 825 (1994)). The court also reviewed the professional judgment standard (i.e., when the conduct departs from standard care and violates the patients’ rights). Moreover, the court stated that Mr. Perniciaro failed to demonstrate that the defendants had taken objectively unreasonable measures to provide proper medical care (e.g., referrals to other medical experts, review of his medical records and incident reports) and to prevent harm (e.g., medication adjustment, close observation orders, clinical seclusion).

In response to the district court’s denial of Dr. Nicholl’s motion for summary judgment based on a factual dispute regarding other reasonable alternative treatments available but not provided, the court held that disagreement related to specific treatment is a matter of medical judgment and is insufficient to support a deliberate indifference claim. Regarding the denial of summary judgment for Drs. Thompson and Lea based on allegations that they failed to train Dr. Nicholl and the guards of the unit, the court held that Dr. Nicholl and the guards did not demonstrate a deficiency in their training. Therefore, the court found no violation of rights or supervisory vicarious liability. Thus, the court reversed the denial of summary judgment and rendered judgment in favor of the defendants.

Discussion

In this case, the Fifth Circuit Court of Appeals ruled that privately contracted doctors working in a public sector setting are eligible to assert qualified immunity when they perform with public employees and under similar circumstances. As a result, these clinicians are protected as they perform their duties. Additionally, in this case, the immunity was warranted due to a lack of evidence indicating that the defendants had violated clearly established rights. Because Mr. Perniciaro failed to demonstrate that the defendants' conduct violated his rights, his lawsuit was unsuccessful. Thus, without proof of violation of rights, there was no course of action for disputing qualified immunity or supervisory liability. For professionals who work with challenging patient populations on the basis of medical complexity or behavioral challenges, this case also illustrates the importance of following the standard of care, typically aligned with the professional practice and ethics guidelines, such as engaging in consultation, making appropriate referrals, keeping and reviewing records, and making decisions to prevent potential harm.

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Youthfulness as a Mitigating Factor Justifying Exceptional Sentencing Below the Standard Range

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Offender Youthfulness is a Well-Established Sentencing Consideration and Not a Recent Change in Law

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In 2016, Kevin Light-Roth, the respondent in *In re Pers. Rest. of Light-Roth*, 422 P.3d 444 (Wash. 2018), petitioned the court of appeals seeking relief through a personal restraint petition (PRP). Mr.

Light-Roth claimed that the holding in *State v. O'Dell*, 358 P.3d 359 (Wash. 2015), that a sentencing court was allowed to consider a defendant's youthfulness as a mitigating factor in sentencing, represented a significant change in the law that entitled him to a reevaluation of his sentence. The court of appeals granted the petition and ordered a new sentencing hearing, but the Washington Supreme Court reversed this decision, maintaining that the decision in *O'Dell* did not constitute a significant change in the law and that the utilization of youthfulness as a mitigating factor for sentencing was established and available to the defendant well before the *O'Dell* ruling.

Facts of the Case

On February 5, 2003, believing that Tython Bonnett stole his shotgun, Mr. Light-Roth (then 19 years-old) shot Mr. Bonnett in the chest, killing him. Mr. Light-Roth threatened a witness to the shooting, solicited the help of his roommate to dispose of Mr. Bonnett's body, and told Mr. Bonnett's girlfriend that Mr. Bonnett moved to New Mexico. Mr. Bonnett's body was discovered, and Mr. Light-Roth was charged with the murder.

On June 1, 2004, Mr. Light-Roth (then 21 years-old) was convicted of second-degree murder while armed with a firearm and unlawful possession of a firearm. The state requested the maximum sentence of 335 months, while the defense, noting Mr. Light-Roth's youth and condition of attention-deficit disorder, requested a reduced sentence. The court sentenced Mr. Light-Roth to the maximum 335-month confinement.

In 2016, after his conviction and sentence were affirmed in the court of appeals and petitions to higher courts were denied, Mr. Light-Roth filed a PRP asserting he was entitled to a resentencing in light of a recent Washington case, *State v. O'Dell*, 358 P.3d 359 (Wash. 2015).

An appellee who demonstrates an error that resulted in a miscarriage of justice can receive a review of conviction or sentence if a PRP is granted. Under Washington law, a PRP must be filed within one year of the final judgment, unless the appellee can establish that a significant and material change in the law, which applies retroactively (e.g., a new case ruling overturns existing laws or creates a new law), occurred since the time of their sentence. If an appellate court's decision settles or further establishes an exist-