



New Mexico CRIMINAL DEFENSE LAWYERS ASSOCIATION

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The New Mexico Criminal Defense Lawyers Association writes this letter in support of legislation creating a New Mexico civil rights claim, including provisions for attorney's fees and punitive damages and against the defense of qualified immunity. This legislation is needed to counteract the devastating effect federal qualified immunity has had on New Mexicans' ability to protect and enforce their constitutional rights under the federal civil rights law.

Except for declaratory actions, there is no direct access to redress for damages under New Mexico's Constitution. For the majority of rights issues, a New Mexican's options are either a claim under the New Mexico Tort Claim Act ("TCA") or under the enabling statute to the United States Constitution, 42 U.S.C. 1983. The TCA's limitations are that it has only select waivers for government liability, primarily for law enforcement officers – and then, only for enumerated torts – and premises liability, and all liability is statutorily capped. The TCA leaves large gaps in accountability for government agents under state law, for example all agents of the New Mexico Corrections Department are immune from suit, which includes all prison corrections officers, as well as probation and parole officers. Lawsuits like the *Rayos* suit, 2014-NMCA-103, 336 P.3d 428, underscore the absurdity of this construction. In *Rayos*, parole officers knew a sex offender parolee had violated parole on several occasions, including officers picking him up from jail, but did not violate him, and he eventually kidnapped a young girl for several days, molesting and raping her continuously throughout. The officers were found to be immune for any part they played in allow the convicted sex offender to roam the streets while still technically incarcerated for his sex offense conviction.

Likewise, the federal schema has systematic issues. Trying to bring cases under §1983 brings a host of issues, the Iqbal/Twombly pleading standard, the Prison Litigation Reform Act, and in that vein, Eighth Amendment case law in general, but none more daunting and pervasive than the court-made doctrine of qualified immunity. A recent opinion out of Mississippi, while dismissing the case on qualified immunity grounds, also repudiated it throughout the opinion. That opinion, *Jamison v. McClendon*, is among a host of other literature on the issue and is worth this Committee's time to review and consider. Judge Reeves noted in his opinion that cases have shielded via qualified immunity:

a police officer who shot a child while the officer was attempting to shoot the family dog; prison guards who forced a prisoner to sleep in cells "covered in feces" for days; police officers who stole over \$225,000 worth of property ... an officer who seriously burned a woman after detonating a "flashbang" device in the bedroom where she was sleeping ... the doctrine now protects all officers, no matter how egregious their conduct, if the law they broke was not "clearly established."

The doctrine of qualified immunity disproportionately effects persons of color, protects agents, most often law enforcement officers, from shocking behavior and generally shields officers from any consequences for actions taken, even when found to be unconstitutional, while harming citizens. These are not simply generalized concerns, but the outcomes New

Mexico's attorneys, including New Mexico Criminal Defense Lawyer Association members, who seek justice for their clients. NMCDLA's own Margaret Strickland's experience with qualified immunity bears sharing with the Community.

Last year, in the case of A.L. (child) v. Dona Ana, a New Mexico child's case for a violation of his constitutional rights was dismissed in federal court.

That child had been arrested for a curfew violation. While in the detention center, jailers allowed other inmates to unlock the child's cell door and attack him. He later learned that these kinds of attacks, where jailers allowed inmates to access the control panel and unlock a victim's door, had occurred multiple times in the past. He also found the guards were not trained to lock the control panel to keep that from happening. In fact, video of the case shows the jailers watching television while the inmate opened the victim's door to start the attack.

After viewing this damning evidence, the federal court wrote "We expect corrections officers to protect those under their supervision—especially children. The officers here—more attuned to a television show than the juveniles in their charge—allowed violent inmates to brutally assault A.L. I find their failure to protect A.L. inexcusable." Despite this, the court dismissed the child's case based on qualified immunity. Because there were no cases putting the guards on notice that they had to ensure inmates did have the ability to unlock each other's door, qualified immunity protected them from a lawsuit.

New Mexican's are put in jeopardy when qualified immunity forces a judge that finds behavior "inexcusable" to then turn around and dismiss a case. This undermines New Mexican's rights and faith in the justice system.

New Mexico will not be the first state to abolish qualified immunity for its citizens. Earlier this year Colorado enacted its own civil rights bill which specifically abolished the defense of qualified immunity. In 2002 Montana's Supreme Court outright rejected qualified immunity calling it "inconsistent with the constitutional requirement that courts of justice afford a speedy remedy for those claims recognized by law for injury of person, property or character."

Rather than relying on federal courts and law to fix the qualified immunity problem, we can follow the lead of state like Colorado and Montana and protect New Mexicans like A.L. with our own legislation.

If New Mexico follows the federal statute's language, it is also noteworthy that the standard to succeed in civil rights violations will be higher than that under the TCA. Under §1983, mere negligence is not enough to succeed – thus officers need not worry about their conduct that is either constitutionally sound, or that is done mistakenly. However, when their conduct is willful and wanton, and violates a New Mexican's civil rights under this state's constitution, NMCDLA believes in, and supports a statute that fully provides for, justice for our citizens.

Therefore, NMCLDA encourages this Commission to craft the language for, and enact, a statute that enables suits under New Mexico's constitution, provides for attorney's fees separate and apart from a successful plaintiff's award of damages, allows for punitive damages when the situation is so egregious, and most importantly, which expressly disallows the defense of qualified immunity.