



WEEKLY LAW RESUME™  
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September 15, 2011

## Qualified Immunity Does Not Apply Where Officer Mistakenly Pulls Gun Instead of Taser

*Maria Torres, et al. v. City of Madera, et al.*  
Ninth Circuit Court of Appeals (August 22, 2011)

This case is an important progression in stun-gun-related police liability law, establishing how mistaken-draw cases should be judged and whether or not officers who mistakenly draw are entitled to qualified immunity.

On October 27, 2002, Madera City police officers arrested Everado Torres, handcuffed him, and put him in the back of a patrol car. Approximately 30-45 minutes later (after falling asleep), Torres awoke and began yelling and kicking the rear door from the inside. One of the officers on-scene, Marcy Noriega, walked over to the door and opened it, intending to tase Torres in order to prevent him from injuring himself (in case he kicked through the glass window). Upon opening the door Noriega accidentally pulled her gun instead of her Taser and fired one bullet into Torres. He died later that evening.

Torres' family sued in federal court pursuant to 42 U.S.C. § 1983, alleging violation of Torres' Fourth Amendment rights. Upon grant of Defendant's summary judgment motion, the Torres family filed an interlocutory appeal.

In its decision on that appeal (*Torres I*), the Ninth Circuit found that Torres was seized within the meaning of the Fourth Amendment, and it established a five-factor test for whether Noriega's mistaken draw was objectively reasonable. The five-factor test is as follows: (1) nature of the training the officer received to prevent similar incidents; (2) whether the officer acted in accordance with that training; (3) whether adherence to that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training.

The Ninth Circuit remanded to the district court. Upon remand, the district court again granted Defendant's summary judgment motion. The Torres family then appealed that final judgment.



The Ninth Circuit panel addressed two questions on this appeal (*Torres II*): (1) whether Plaintiffs alleged a constitutional violation; and (2) whether Noriega was entitled to qualified immunity. Within the first question, the Court also addressed whether Noriega's use of deadly force (her mistaken draw) was objectively reasonable under the Fourth Amendment.

Utilizing the five-factor test it developed, the Court found that a reasonable jury could conclude her mistaken draw was not objectively reasonable. A reasonable jury could find: (1) that her nine months of self-training where Noriega practiced drawing her gun and her Taser were designed to avoid just this incident; (2) that she did not act in accordance with that training; (3) that Torres' conduct had not escalated Noriega's sense of danger; and (4) that Noriega's own poor judgment and lack of conduct caused her to act with undue haste.

After also considering the undisputed evidence that Torres had committed no serious offense and that he did not pose an immediate threat to Noriega or anyone else, the Court concluded a jury could reasonably find violation of Torres' Fourth Amendment rights.

The Court then rejected Noriega's qualified immunity claim. Noting she would only be entitled to such immunity if she reasonably believed the actual force she used (deadly force) was lawful, the Court stated there could be no reasonable mistake here: Noriega used deadly force against an unarmed, non-dangerous suspect. The Court also rejected the contention that Noriega be entitled to qualified immunity because at the time of the incident (2002) the law had not clearly established that mistaken use of force violated the Fourth Amendment. Because a pair of earlier cases held that force resulting from mistaken identity violated the Fourth Amendment, the Court held that Noriega was on notice that a mistaken use of deadly force also violated it. The Court rejected any attempt to distinguish Noriega's fact pattern from those earlier cases.

## COMMENT

In cases for employment-related discrimination, harassment, retaliation, and wrongful termination of employment (based on discrimination or retaliation), the employer's intent or state of mind is central to both the plaintiff's and defense's case. *Pantoja* supports the admissibility of "me too" evidence to support the inference that if the employer also behaved in a certain way toward another member of a protected class, then the employer must have had similar intentions with the plaintiff. Plaintiff-employees will likely cite this case to support the admission of "me too" evidence. To oppose, the defense/employer-side must be prepared to demonstrate why the "me too" evidence is not relevant to prove intent by, for example, arguing that the employer's conduct is not probative of the particular type of bias at issue (e.g., gender, race, age, etc.).



*Torres I* and *Torres II* are important developments in stun-gun-related police liability law. These cases will guide future courts in determining whether or not a mistaken draw is reasonable. They also appear to foreclose the possibility of claiming qualified immunity based upon mistaken draw.

For a copy of the complete decision see:

[HTTP://WWW.CA9.USCOURTS.GOV/DATASTORE/OPINIONS/2011/08/22/09-16573.PDF](http://www.ca9.uscourts.gov/datastore/opinions/2011/08/22/09-16573.pdf)

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