Connecticut Bar Association Policing Task Force ("CBAPTF") Draft Recommendation Subject to Approval of the CBA Regarding Section 41 of Bill 6004

Disclaimer: Draft recommendations have in no way been endorsed by the Connecticut Bar Association. They are being shared with the Logistics Subcommittee to help facilitate our discussion and consideration of potential recommendations.

Draft Recommendation

The CBAPTF recommends that the one-year statute of limitations for bringing an action pursuant to Section 41 be extended to three years.

Rationale:

Section 41(g) provides: "A civil action brought pursuant to this section shall be commenced not later than one year after the date on which the cause of action accrues."

Three reasons support extending the statute of limitations to three years.

First, the rationale for the one-year limitations period is tied to the period of time police departments are required by statute to keep body camera video. At first blush this seems logical. However, our research shows that as a matter of custom and policy, police departments retain body camera video that involves an incident involving the use of force for up to four years. Moreover, an aggrieved citizen contemplating a lawsuit can put the department on notice and request that the department retain its body camera footage beyond the one-year statutory floor.

Second, the one-year statute is very short. On the one hand, the quick time limit could act as a premature bar for legitimate cases and, on the other hand, it could force plaintiff's counsel to file lawsuits prematurely to avoid exceeding the limitations period.

Third, the limitations period established in Section 41(g) will likely become the limitations period followed by the federal district court in civil rights suits brought pursuant to 42 U.S.C. § 1983. Currently, plaintiffs have three years to file a federal civil right claim in the District of Connecticut. "Since Congress did not enact a statute of limitations governing actions brought under § 1983, the courts must borrow a state statute of limitations." *Lounsbury v. Jeffries*, 25 F.3d 131, 133 (2d Cir. 1994). "In Connecticut, the three-year limitations period set forth in Conn. Gen. Stat. § 52–577 is applicable to claims asserted under section 1983." *Harnage v. Shari*, No. 3:16CV1576 (AWT), 2020 WL 5300913, at *3 (D. Conn. Sept. 4, 2020).

Issue re: Interlocutory Appeal

Section 41(d) explicitly prohibits interlocutory appeals of denials of the governmental immunity defense.

Discussion:

Under Connecticut common law, interlocutory appeals are the exception and not the rule. In *State v. Curcio*, 191 Conn. 27 (1983), the Supreme Court held that an interlocutory appeal is allowable only when the trial court's order: (1) terminates a separate and distinct proceeding, and (2) so concludes the rights of the parties that further proceedings cannot affect them. These circumstances are rarely met. Section 41(d) precludes interlocutory appeals in those few situations where they might be warranted.

Like Connecticut appellate courts, the federal courts similarly frown upon interlocutory appeals. However, the federal courts allow for interlocutory appeals from the denial of a qualified immunity defense in limited circumstances where the district court's ruling turns on an issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806 (1985). By contrast, where there remains a genuine factual dispute, a federal appellate court lacks jurisdiction to review the district court's denial of qualified immunity. *See Reyes v. Fischer,* 934 F.3d 97, 106–07 (2d Cir. 2019) (dismissing interlocutory appeal for lack of jurisdiction because "[f]actual questions that are crucial to the disposition of the defendants' qualified immunity defense remain[.]"); *Brown v. Halpin*, 885 F.3d 111, 117 (2d Cir. 2018) (per curiam) (concluding "that we lack jurisdiction to consider the qualified immunity defense at this time . . . because it depends on the resolution of factual disputes"); *Ellington v. Whiting*, 807 F. App'x 67, 69 (2d Cir. 2020) (summary order) (concluding that the district court's resolution of the qualified immunity determination "depends on disputed matters of fact and thus we lack jurisdiction").

Federal defendants wishing to obtain immediate review of a denial of qualified immunity can do so by accepting, for purposes of the appeal only, the plaintiff's version of the disputed facts. *See Tooly v. Schwaller*, 919 F.3d 165, 172 (2d Cir. 2019). At that point, the appellate court is in position to determine the application of the law to the agreed upon facts.

There should be consideration given to whether Connecticut's appellate courts should be allowed to serve as the gatekeeper to determine if an interlocutory appeal is based on undisputed facts, and if so, leaving the court to apply the law to those facts. This model will allow for appeals in a limited set of circumstances involving legal – as opposed to factual – disputes and save the parties litigation expense and attendant costs.