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Lisa Cournoyer Roberts

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COMMENTS

QUALIFIED IMMUNITY AS A DEFENSE TO THE FIRING OF COURT EMPLOYEES BY JUDGES

I. INTRODUCTION

Judicial immunity is a relatively recent doctrine that has grown and expanded considerably since it was first articulated in *Randall v. Brigham*¹ in 1868 and further developed in *Bradley v. Fisher*² in 1871. The main purpose behind the immunity principle is the protection of judges from lawsuits “when they have erred”⁸ in their de-

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¹ 74 U.S. (7 Wall.) 523 (1868). In this case, a justice of the Superior Court of Massachusetts removed an attorney from the bar of that state. Plaintiff brought an action alleging that the justice acted under unlawful authority. The court considered the general principle that judicial officers are not liable in a civil action. Judges of limited or inferior authority were protected only when they acted within their jurisdiction. However, there was no such limitation with respect to judges of superior or general authority who were protected even when they acted in excess of their jurisdiction.

² 80 U.S. (13 Wall.) 335 (1871). *Bradley* was the first case to clearly set out the traditional judicial immunity standard and to distinguish between a judicial act and a non-judicial act. A judicial act warranted the protection of immunity and came to be defined, at that time, as any act or decision made by a judge within his judicial authority. The issue arose following a trial for the murder of Abraham Lincoln in which Bradley was the defense attorney. Fisher, one of the justices on the court, directed that Bradley’s name be stricken from the roll of attorneys practicing in that court. The justice claimed that Bradley was rude and disrespectful toward him in court. The United States Supreme Court found that the lower court had erred in not first citing Bradley before striking his name. The Court conceded that though the lower court’s jurisdiction was erroneously exercised, it did not affect the validity of the act and, therefore, did not make the act any less judicial nor subject Fisher to damages.

³ *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 533 (1868). *See also* *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 348, (1871), which states that it is also well established that judges are immune from liability for judicial acts even when they act “maliciously or corruptly.” *Id.* The rationale behind this doctrine is the need for judges to be free to make controversial decisions and act upon their convictions without fear of personal liability. The *Bradley* Court stated that, “[t]his provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences.” *Id.* at 349-50 (quoting *Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868)).
cision-making. The doctrine introduced the notion that absolute immunity\textsuperscript{4} is essential to the independence of the judiciary and consequently to the administration of justice\textsuperscript{5} in order to safeguard principled and fearless decision-making.\textsuperscript{6}

The majority of suits against judges are instigated by either actual litigants or individuals with a close identification or interest in the business before the court.\textsuperscript{7} In these actions, the defense of absolute immunity is well-established and soundly justified. As Justice White stated in \textit{Butz v. Economou}:\textsuperscript{8}

\begin{quote}
[Safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges.]
\end{quote}

Recently, however, the United States Supreme Court has chipped away at the absolute privilege against liability held by judges. The limitation came in the area of employment decision-making in the case of \textit{Forrester v. White}.\textsuperscript{10} The Court held that judges are barred from asserting the defense of absolute immunity against claims of discriminatory demotion or discharge.

Thus, the absolute immunity doctrine is only a safe haven for judges when they are involved in case-related actions or other duties performed that are arguably "judicial"\textsuperscript{11} in nature. Auxiliary duties, such as employment decisions, are often characterized as ministerial or administrative functions. Although employment decisions are au-

\begin{itemize}
\item \textsuperscript{4} Absolute immunity means that the individual has a complete defense to a cause of action against him. It does not depend on proper motives or whether he has acted maliciously, corruptly, or arbitrarily. For the judiciary, it is also referred to as judicial immunity.
\item \textsuperscript{5} \textit{Randall}, 74 U.S. (7 Wall.) at 536.
\item \textsuperscript{6} \textit{Pierson v. Ray}, 386 U.S. 547, 554 (1967).
\item \textsuperscript{7} \textit{Forrester v. White}, 792 F.2d 647, 653 (7th Cir. 1986) (Posner, J., dissenting). In other words, these are people who deal with the judge in his judicial capacity in the courtroom. As Judge Posner notes in his circuit court dissent in \textit{Forrester}: "The business of a judge is to rule against people. Every contested case has a loser, often a sore one. A significant fraction of the losers would sue the judges if they could do so (some sue us despite our absolute immunity)."
\item \textsuperscript{8} \textit{Butz v. Economou}, 438 U.S. 478 (1978).
\item \textsuperscript{9} \textit{Id.} at 512.
\item \textsuperscript{10} 108 S. Ct. 538 (1988).
\item \textsuperscript{11} A judicial act has been defined as follows: (1) an act normally performed by a judge and to the expectations of the parties; and (2) a situation in which the parties deal with the judge in his or her judicial capacity. \textit{Stump v. Sparkman}, 435 U.S. 349, 362 (1978).
\end{itemize}
torized duties of the judge, such decisions do not necessarily require the discretion that is used in judicial decisions.

This comment addresses the roots of judicial immunity and traces its development to the recent Forrester case. It discusses the attributes of qualified immunity and also examines cases in which immunity was denied for judges when selecting or dismissing their court personnel. When the United States Supreme Court denied judges the defense of absolute immunity for such decisions in Forrester, it left open the question of whether judges might still be protected by qualified immunity when making employment decisions. A balancing approach is used to weigh the policy considerations that surround the judicial immunity controversy and to find a feasible alternative to the absolute immunity doctrine.

This comment focuses on the arguments and implications of the qualified immunity doctrine as a defense to a judge’s act of discharging court employees when his or her motives contravene the United States Constitution or established law. Judge Posner’s lengthy dissent in the Seventh Circuit’s decision in Forrester sets the stage for the arguments establishing the use of qualified immunity when making employment decisions. Ultimately, this comment determines that qualified immunity is justified in the employment context. It also advocates the extension of the qualified immunity defense to all acts of a judge within his or her general administrative capacity, not exclusively in employment situations.

II. BACKGROUND

A. Historical Roots of Judicial Immunity

Judicial immunity is solely a creature of common law, developed by judges from a pure liability doctrine. The first case to address judicial immunity was Randall v. Brigham. The central questions considered were whether the act performed was judicial

13. Qualified immunity is only a partial defense. The individual’s conduct must be based on good faith to be protected from a cause of action. An act in knowing violation of the law, conduct that is malicious, or conduct in reckless disregard of a statute is not protected by qualified immunity.
14. 792 F.2d at 654.
15. Feinman & Cohen, Suing Judges: History and Theory, 31 S.C.L. Rev. 201 (1980). Judges were not always immune from suit for their judicial acts. The doctrine of judicial immunity developed only recently. For most of the history of the common law, judges have been protected by very little or no immunity. Id.
16. 74 U.S. (7 Wall.) 523 (1868).
and whether the act was within the judge's jurisdiction.\(^1\) If the act was not considered judicial, then there was no immunity or exemption by virtue of the judge's office, "for if he has acted without jurisdiction, he has ceased to be a judge."\(^18\) However erroneous the act may have been, and however injurious its consequences to the plaintiff, if the order is a judicial act within the court's jurisdiction, then the judge may not be held to answer in civil damages.\(^19\) Thus, at times, the doctrine is harsh in individual cases because it leaves unredressed the wrongs committed by dishonest officers. However, in order to protect judges from retaliation for their decisions in case-related actions, some instances of injustice are unfortunately inevitable.\(^20\)

Since Randall, absolute immunity has been extended to federal hearings examiners and administrative law judges because their role "is 'functionally comparable' to that of a judge."\(^21\) In addition, state and federal prosecutors have full immunity when they are prosecuting in the courtroom,\(^22\) as do witnesses when testifying in a judicial proceeding.\(^23\) Grand jurors have been equally shielded from personal liability.\(^24\) In addition, such court personnel as probation officers\(^25\) and court reporters\(^26\) have been granted derivative judicial immunity\(^27\) based on their function within the judicial process.

Though many cases have developed and expanded the immunity

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17. Id. at 531.
18. Id.
19. See supra note 3.
20. Stump, 435 U.S. at 363. A young woman sought to hold a circuit court judge liable for her involuntary sterilization which he had approved at her mother's request when the woman was fifteen years old. Her claim alleged various constitutional violations including the violation of due process. The Supreme Court determined that the judge had jurisdiction over the subject matter before him. The Court relied on the fact that there was no statute or case law prohibiting the action taken by the judge. The Supreme Court held that only if a judicial officer acted in a clear absence of jurisdiction or the act was not considered a "judicial act," then immunity would not protect him from the consequences of his actions.
21. Butz v. Economou, 438 U.S. 478, 513 (1978). "Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." Id. at 511.
27. Derivative immunity is immunity that has been extended to certain others who perform functions closely associated with the judicial process. Immunity became necessary to protect those individuals who exposed themselves to the same liabilities that confronted judges.
doctrine to quasi-judicial officers of the court, absolute immunity has almost exclusively been confined to the activities of the judge within the courtroom. Until *Forrester*, there was some ambiguity as to the extent of immunity enjoyed by judges when performing duties characterized as executive, legislative, or ministerial. Two factually similar cases, decided within days of one another by the Seventh Circuit, illustrate the disparity that had previously existed in the case law regarding the level of immunity for judges when making employment decisions.

B. Seventh Circuit Contradictory Cases

The two recent Seventh Circuit cases, *Forrester* and *McMillan v. Svetanoff*, prompted the United States Supreme Court to review whether the doctrine of absolute judicial immunity should be applied to shield a judge from liability for damages caused by the firing of court employees. The decisions, decided one week apart, reached opposite conclusions.

The first case decided was *Forrester*. In *Forrester*, a discharged probation officer brought a civil rights action against a state court judge alleging sex discrimination. Under Illinois law, the judge in question was found to have possessed the authority to hire and dismiss probation officers at his pleasure, seemingly without regard to federal discrimination laws.

The court found that Forrester, in her capacity as a probation officer, was dealing with the judge in a judicial capacity because she

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29. The following cases illustrate opinions which have found that employment decisions are integral to the judge's performance of his duties and, therefore, qualify as a judicial act warranting absolute immunity. Blackwell v. Cook, 570 F. Supp. 474 (N.D. Ind. 1983) (dismissal of a probation officer was a judicial act protected by immunity for an employment decision); Pruitt v. Kimbrough, 536 F. Supp. 764 (N.D. Ind. 1982) (the importance of independence was essential; therefore, the judge was protected by immunity), *aff'd mem.*, 705 F.2d 462 (7th Cir. 1983). *See also* other cases that have reached the opposite conclusion and found that such employment decisions are merely administrative or ministerial acts: Shore v. Howard, 414 F. Supp. 379 (N.D. Tex. 1976) (the act was one that did not have to be performed by a judge; therefore, it was ministerial and there was no immunity for the judge); Marafino v. St. Louis County Circuit, 537 F. Supp. 206 (E.D. Mo. 1982) (staff attorney was not immediate advisor to judge, and was therefore not protected by judicial immunity), *aff'd on other grounds*, 707 F.2d at 1005 (8th Cir. 1983); Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983) (not a judicial act to decide not to reappoint a magistrate), *aff'd*, 734 F.2d 1000 (4th Cir. 1984), *different results on reh'g en banc*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 474 U.S. 902 (1985).
32. 792 F.2d 647 at 650.
was rendering advice and recommendations to him for the disposition of cases directly affecting the judge's discretionary judgment. Because the relationship is founded on trust and confidentiality, the court feared that a judge could not render just judgments without the aid of a trustworthy probation officer unless protected by absolute immunity. In addition, the judge would be more hesitant to discharge a probation officer for cause because of the threat of litigation. This would have a detrimental effect on the public.

The Forrester court focused primarily on the relationship between the judge and the probation officer, rather than the act of the judge in making an employment decision. However, just five days later in McMillan, the court again emphasized the judge-employee relationship and how it could impact the court. There, however, the court reached the opposite conclusion.

In McMillan, the Seventh Circuit Court of Appeals, while following the reasoning in Forrester, denied the judge's defense of judicial immunity for the dismissal of a court reporter based on the reporter's race and political affiliation. The court determined that the firing of an employee involved a decision of a personal nature rather than an impartial nature. The judge was not called upon to utilize his education, training, or experience in the law to make the employment decision. Furthermore, the court found that the need to protect the constitutional rights of public employees overrides the need to shield judges from personal liability in hiring and firing decisions.

The court noted that absolute "immunity should not be extended lightly or merely because the actor is a judge." Immunity can only be justified by the special nature of an official's responsibili-

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33. Id. at 657.
34. Id. at 658.
35. Id. at 656-58.
37. The court recognized that the judge's act must be characterized in relation to the overall scheme of the judicial process. The court attempted to distinguish the act of making an employment decision from the judge's other duties. This comment argues that there should be a uniform standard to characterize the acts as either judicial or ministerial and grant absolute immunity to the former and qualified immunity to the latter.
38. Id. at 154. The court further acknowledged a statement made by the Supreme Court in Ex Parte Virginia, 100 U.S. 339 (1879), in which a judge was charged with failing to select black citizens of the county as jurors even though they possessed all the qualifications prescribed by law:

    Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge.

Id. at 348.
ties that expose him to constant liability, not by his position within the government. The act of an administrative or ministerial officer does not become judicial simply because it was performed by a judge or because it involves some discretionary judgment. When the United States Supreme Court granted certiorari in *Forrester*, it overruled the decision of the Seventh Circuit in *Forrester* and its decision was consistent with the other Seventh Circuit case—*McMillan*. The damage suit was brought under title 42, section 1983 of the Civil Rights Act. Absolute immunity was held to be unavailable in protecting a judge from liability for his decision to demote and dismiss a court employee. The Court acknowledged the fact that the threat of personal liability can inhibit government officials in the proper performance of their duties, but indicated that the threat of liability might also have the salutary effect of encouraging officials to perform their duties in a lawful and appropriate manner. The Court based its decision on the “functional analysis” approach developed in *Butz v. Economou*. The Court stated that “immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches.”

As noted earlier, until the United States Supreme Court spoke on the issue of judicial immunity for employment decisions, there was confusion in the law as to whether absolute immunity should

39. Richardson v. Koshiba, 693 F.2d 911 (9th Cir. 1982).
41. 108 S. Ct. at 538.
42. 42 U.S.C. § 1983 (1976) reads:
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.
44. The “functional analysis” approach outlined in *Butz* focused the application of judicial immunity on *only* acts of a judicial nature. This case involved federal executive officials and their general qualified immunity status. Traditionally, the executive branch has only been entitled to qualified immunity. However, *Butz* acknowledged that absolute immunity was not necessarily confined to acts performed by the judiciary; therefore, it was possible for a member of the executive branch to be protected by absolute immunity. The Court stated that it was not the judge who compelled immunity but rather the special duties conferred upon him that required immunity. Therefore, all public officers or advocates, whether members of the executive, legislative or judicial branch, who are intimately associated with the judicial process and are subject to the same restraints of the adjudicatory function, are protected by absolute immunity. *Butz*, 438 U.S. at 508.
apply. Now that absolute immunity has been formally rejected, cases following the no immunity principle will be examined to see if this is the appropriate doctrine to be adopted by the Court. These cases demonstrate that the Court should consider the qualified immunity doctrine.

C. The No Immunity Principle

Judges without immunity will be personally liable to pay damages in a civil action for firing an employee in violation of the employee's constitutional rights. Currently, case law has not allowed a plaintiff to recover compensatory damages from a judge when acting within his authority. It was not until recently that judges lost their protection from injunctive or declaratory relief. It has been clearly established that "[a]lthough injunctive relief against a judge rarely is awarded . . . judicial immunity does not bar such relief." Judge Posner stated in his dissent in the Seventh Circuit decision of Forrester that, "[a] probation officer fired on grounds of race or sex has no right to appeal but does have administrative and judicial causes of action against the employing agency (i.e., the court rather than the judge)." He went on to say that the remedy is limited to equitable relief of reinstatement with back pay only.

Judicial exposure to injunctive and declaratory relief under section 1983 was first addressed in Supreme Court of Virginia v. Consumers Union. The Court in Consumers Union found judges immune from equitable claims against them in their decision-making capacity, but not in their enforcement capacity. The Virginia Supreme Court had the inherent and statutory authority to regulate and discipline the attorneys practicing in the state. The plaintiff, who was involved in compiling a legal services directory, sued because attorneys refused to give information for the directory for fear of violating the state's Code of Professional Responsibility prohibiting advertising. The plaintiff claimed the Code violated his constit-

48. Pulliam, 466 U.S. at 528.
49. Forrester, 792 F.2d at 662.
50. Id.
51. 446 U.S. 719 (1980). Originally, when the Court was confronted with 42 U.S.C. § 1983 and judicial immunity, it believed that the Legislature did not intend to abolish judicial immunity by enacting § 1983. Pierson v. Ray, 386 U.S. 547 (1967). The Pierson Court stated that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities" in enacting § 1983. Id. at 554.
52. 446 U.S. at 734.
tional right to gather, publish, and receive factual information regarding legal services. Because the Virginia Supreme Court was acting in its legislative capacity in promulgating the Code, it was immune from liability. However, based on its enforcement capacity, it was liable and could be enjoined from enforcing the Code.

The controversial case of *Pulliam v. Allen* further extended liability for injunctive relief when a judge was involved in judicial misconduct. In *Pulliam*, the Court sustained the claim for injunctive relief based on section 1983 and also granted attorney's fees against the magistrate involved. Pulliam was said to be acting in his judicial capacity when he incarcerated individuals unable to post bond for misdemeanor offenses not involving jail time. Since the Court upheld the denial of judicial immunity for injunctive relief, the Court further stated that the section 1988 attorney's fees provision is proper when such relief is awarded under section 1983.

The *Pulliam* decision does indicate that the Court is willing to expose judges to monetary damages. Although attorney's fees are usually not as large as compensatory damages, they can still be substantial. The Court stated that: "We never have had a rule of absolute judicial immunity from prospective relief, and there is no evidence that the absence of that immunity has had a chilling effect on judicial independence." The Court indicated that this type of remedy is available when it is "necessary to prevent irreparable injury to a petitioner's constitutional rights. . . ." The loss of immunity for injunctive or declaratory relief is some indication of the weakening of the judicial immunity doctrine.

All the cases that have denied judges immunity for employment decisions have found that those decisions are merely administrative or ministerial acts rather than judicial acts. Based on that reasoning,

53. *Id.*
54. *Id.* at 736.
55. 466 U.S. at 522.
56. *Id.* at 525.
57. *Id.* at 544.
58. *Id.* at 536.
59. *Id.* at 537.

For the most part, injunctive relief against a judge raises concerns different from those addressed by the protection of judges from damages awards. The limitations already imposed by the requirements for obtaining equitable relief against any defendant—showing of an inadequate remedy at law and of a serious risk of irreparable harm . . . severely curtail the risk that judges will be harassed and their independence compromised by the threat of having to defend themselves against suits by disgruntled litigants.

*Id.* at 537-38.
the courts determined that no immunity was available for the judges' acts in the former. Just as there were many cases denying immunity for personnel decisions, many cases granted immunity in the same types of decisions. In the latter cases, they were labeled judicial acts. There was no obvious difference in the reasoning employed by the various courts in making the judicial versus ministerial distinction. The cases had remarkably similar fact patterns and circumstances. The policies and justifications cited by the courts illustrated that their concerns were basically the same in all the cases. They balanced the need to protect judges from frivolous lawsuits against the need for plaintiffs to have a proper redress for their grievances. The courts denying immunity considered the availability of an adequate remedy as paramount.

D. The Doctrine of Qualified Immunity

Qualified immunity is distinguished from absolute immunity by the fact that absolute immunity "defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." To be within the scope of the immunity, the official must have significant discretion that requires protection from retaliation for his decisions that would otherwise undermine his duties. Based on the functional analysis approach developed in Butz, the Court has come to recognize qualified immunity as an appropriate alternative to the doctrine of absolute immunity when judges perform ministerial acts.

The need to "qualify" the immunity arose in an action against the Governor of Ohio who, while acting as head of the state militia, was responsible for the death of four college students at Kent State University in Scheuer v. Rhodes. Unlike absolute immunity, qualified immunity protects officials only from liability for their actions, not from exposure to lawsuits. The Scheuer Court stated:

"Qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence

60. See supra note 29.
62. 438 U.S. at 512; see also supra note 40.
63. Id. at 478.
of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity. . . .

Qualified immunity was originally construed as having an objective and subjective standard in *Wood v. Strickland.* The Court noted that "[t]he official himself must be acting sincerely and with a belief that he is doing right, but an act violating . . . constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law . . . than by the presence of actual malice." The *Wood* Court stated that the subjective element requires the denial of immunity to an official if he knew or should have known that his actions violated the Constitution or if his actions were motivated by a malicious intent to deprive the individual of his or her constitutional rights. In terms of the objective test, damages would only be appropriate if the official acted in disregard of a clearly established constitutional right. Only the latter standard has survived.

Since *Harlow v. Fitzgerald,* qualified immunity has become more objective. The Court eliminated the subjective elements of the doctrine and stated, instead, that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." By eliminating the subjective element, the Court held that the plaintiff could not defeat a qualified immunity defense by bare allegations of malice. "[T]he Court [also] intended to further the goals of judicial economy and avoid meritless litigation against federal officials since questions of subjective intent are inherently questions of fact and thus can rarely be decided by summary judgment."

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65. *Id.* at 247-48.
67. *Id.* at 321.
68. 457 U.S. 800 (1982). In this case, the Court considered the question of whether presidential aides are entitled to a blanket protection of absolute immunity as an incident of their offices. The Court found that the importance of loyal and efficient subordinates to the President was insufficient to justify absolute immunity. Therefore, relying on *Butz,* the Court held that presidential aides are generally entitled only to qualified immunity. *Id.* at 809.
69. *Id.* at 818 (emphasis added).
70. Note, *In Light of Harlow? National Black Police Assoc. v. Velde: The Doctrine of Qualified Immunity in Modern Bivens Litigation,* 8 GEORGE MASON U.L. REV. 435, 436 (1986). The problem with having a subjective element in the test is that it requires the court to analyze the judge's state of mind which defeats the immunity's essential purpose—avoidance of litigation. Also, the Court in *Harlow* stated that: "Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including
Thus, the Harlow decision is recognized as the right not to stand trial and face the burdens of litigation under certain circumstances. However, the entitlement is conditioned upon whether the conduct of the judge violated clearly established law. The two-part analysis stated in Wade v. Hegner must be applied: “Does the alleged conduct set out a constitutional violation? and . . . Were the constitutional standards clearly established at the time in question?” The Harlow Court held that “[i]f the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.” If these allegations cannot be proven, the case is dismissed prior to discovery. If the plaintiff gets over that hurdle, the defendant judge is still entitled to a summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant committed the acts of which the plaintiff complains.

Thus, the standard to be met under qualified immunity is good faith knowledge as to the current state of the law. Once confronted by a claim alleging a breach of the duty of good faith, the defendant asserts the qualified immunity affirmative defense. At this point, the burden shifts to the plaintiff to rebut. The plaintiff must establish that the defendant judge intentionally denied or recklessly disregarded a federally protected right. In essence, the plaintiff must show that at the time the judge acted, he or she violated clearly established law of which a reasonable person would have had knowledge.

McDonald v. Krajewski is a recent case which rejected absolute and qualified immunity as a defense to the firing of a clerk-secretary. The court applied the two-step approach delineated in Wade and determined that the plaintiff successfully met the initial

an official's professional colleagues. Inquiry of this kind can be particularly disruptive of effective government.” Harlow, 457 U.S. at 817.
71. 804 F.2d 67, 70 (7th Cir. 1986).
72. Id. at 70. Discovery is not allowed until these threshold inquiries are resolved.
73. 457 U.S. at 818.
74. Mitchell, 472 U.S. at 526.
76. “Government officials performing discretionary functions are shielded from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights.” Id. at 1163-64 (quoting Harlow, 457 U.S. at 818).
burden by establishing a prima facie case of a constitutional violation. The second step was also satisfied because the judge's dismissal was found to be in direct violation of clearly established law.

On the other hand, in *Atcherson v. Siebenmann* the judge was granted qualified immunity because he did not know that his actions violated the plaintiff's clearly established constitutional rights. The state of the law was unsettled as to whether an employer could dismiss an employee based upon accusations of misconduct against co-employees, if it was likely to cause serious disharmony. The judge relied upon statements made by a senior subordinate without conducting his own investigation. Though the subordinate proved to be unreliable, the court held the judge only to the standard of "reasonableness in light of the circumstances." The judgment was vacated to the extent that it required the judge to pay damages and attorney's fees.

III. ANALYSIS

To determine whether a judge is entitled to qualified immunity or whether he should receive no immunity in the case of personnel decisions, we must look to the public policy concerns which support judicial immunity for judges. Though the policy reasons frequently raised are in response to the judge's special role in the courtroom, some are equally applicable to employment and other ministerial situations.

A. *Policy-Balancing Approach*

Various policy reasons have been advanced in support of the traditional absolute immunity doctrine. The rationales most often cited are: the need to protect the public's interest in the free and independent exercise of judicial discretion; the need to preserve the dignity and respect of the judicial system as a whole; and the difficulty in attracting persons of the highest character and ability to judicial positions without judicial immunity. These considerations, although worthy of protection, are only justifiable when other reme-

78. 605 F.2d 1058 (8th Cir. 1979).
79. The decision came down before *Harlow*. Therefore, it contains the subjective prong of the qualified immunity test. However, that was not relevant to the outcome of the decision because the court deemed that element satisfied. *Id.* at 1065.
80. *Id.* at 1063.
81. See *supra* note 13 for a definition of qualified immunity.
82. *Forrester*, 792 F.2d at 647.
dies are available to vindicate individual rights. As the United States Supreme Court noted in Forrester, "[m]ost judicial mistakes or wrongs are open to correction through ordinary mechanisms of review, which are largely free of the harmful side-effects inevitably associated with exposing judges to personal liability."

Each major opinion that has developed the traditional immunity doctrine has attempted to balance carefully the policy concerns justifying judicial immunity against the interests of the public in proper redress. However, difficulties arise in fulfilling these policy objectives when court personnel are unjustly discharged. Historically, the rights of the individual have been sacrificed for the greater good of the system. This sacrifice has been condoned because alternative remedies for the litigant existed. However, this concept breaks down in an employment discrimination situation because there are no adequate alternative remedies. Whereas victims of a wrongful ruling have a remedy in a higher court, victims of unconstitutional firing have no right to appeal after dismissal. They only have an equitable remedy against the court, not the judge. They are not eligible for monetary compensation, although damages have been sanctioned for the invasion of a personal liberty interest.

The first policy reason asserted in support of judicial immunity

83. 108 S. Ct. at 544. It is contended that the "judicial process is self-correcting: procedural rules, appeals, and possibility of collateral challenges obviate the need for damages action to prevent unjust results." See generally Briscoe, 663 F.2d at 713. However, this is not true in discriminatory employment situations. Probation officers, court reporters, and other related court personnel do not have the same protections afforded to a litigant. Whereas a litigant who has been denied due process in an adversarial proceeding may appeal the case to a higher court for review, an at-will court employee who questions the motives of a judge's employment decision, due to the absence of adequate procedural safeguards, must file a civil rights suit. McMillan, 793 F.2d at 155.

84. Id. at 544. One major argument against full judicial immunity in the employment area is that there is a serious lack of accountability. Judges who are malicious, corrupt, or arbitrary in their employment practices may not necessarily be subject to the usual remedies such as suspension, impeachment, or removal from office. See Note, Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability, 20 Ariz. L. Rev. 549, 578 (1978).

85. Note, Stump v. Sparkman: Judicial Immunity or Imperial Judiciary, 47 UMKC L. Rev. 81, 92 (1978). In order to maintain the independence of the judiciary and protect judges from civil suits against them, the immunity doctrine forecloses a damages remedy to those litigants who have a grievance against a judge.

86. Normally, an individual faced with an adverse judgment has the opportunity for appellate review. There also exist safeguards such as procedural rules, collateral challenges as well as safeguards that are inherent in the adversarial nature of the proceedings.

87. Forrester, 792 F.2d at 662.

88. Id. The fired employee has no right to appeal and is limited to reinstatement with back pay, but common law damages for discriminatory dismissal is not allowed.

JUDICIAL IMMUNITY

focuses on the public’s interest in an independent judiciary. The courts are perceived as being non-political and free from governmental influences. The judicial system is based on fairness and impartiality—ideals upon which the public relies. However, the judiciary should not be so independent in every respect that judges are above the law. As one author notes, “[j]udges, endowed with great power and subject to very little control, occupy an unusual place in society. Federal judges are appointed for life or good behavior and are very seldom impeached . . . [S]ome limitations must exist to control absolute power. . . .”90 Qualified immunity could be an appropriate limitation when judges are performing ministerial duties. This compromise does not entirely exempt them from liability, but it does afford judges some of the needed protections.91

The second public policy concern behind the immunity doctrine is the preservation of the dignity and respect of the judiciary. Judges must not be constantly confronted with groundless suits, and their discretion must not be questioned by every disgruntled litigant. However, to maintain that dignity, judges must earn the public’s respect and confidence by faithful execution of unbiased decisions in all phases of their duties, including employment decisions. Exposure to unfounded suits from losing parties in litigation is far more worthy of absolute immunity protection than actions as a result of employment discrimination.92 However, liability to answer to every aggrieved litigant would be inconsistent with an independent judiciary. Thus, the use of a qualified immunity defense could help to recognize and to guard against insubstantial lawsuits, enabling a quick disposition of the claim so that “federal officials are not harassed by frivolous lawsuits”93 or expensive pretrial discovery.

The third major policy advanced in support of judicial immunity is the strong interest in maintaining integrity in the judiciary, ensuring that judges are free to exercise their judicial functions without fear of personal consequences. Responsible people in judicial positions are unlikely to be willing to risk their time and financial resources defending lawsuits against litigants offended by adverse

90. See Note, Judicial Immunity, supra note 84, at 585.
91. See Forrester, 792 F.2d at 660.
92. See Way, A Call for Limits to Judicial Immunity: Must Judges Be Kings in Their Courts?, 64 JUDICATURE 390, 392 (1981). Way constructed a chart derived from the Eighth Decennial Digest (West 1979) that plotted the “Origins of suits and actions against judges, 1966-1978.” A total of 163 lawsuits were filed and published—118 federal cases and forty-five state cases. Only nineteen of the total of 163 were filed against judges in their administrative/ministerial role.
decisions or disgruntled former employees.\textsuperscript{94} However, there are people with less immunity who serve in positions that are subject to broader liability.\textsuperscript{95} The majority of the officers and employees within the executive branch as well as those in powerful positions in private industry are shielded only by qualified immunity.

The fourth policy reason in favor of judicial immunity is the prevention of distractions caused by the threat of civil actions against judges. Such a threat could have an inhibiting effect on their work by diverting their attention from the business of the court.\textsuperscript{96} If judges were required to dedicate a great deal of time to the documentation of personnel problems in case their actions were later challenged, this would pose a serious danger of creating an even greater backlog in the court system.\textsuperscript{97}

Lastly, there is the fear that it would be unfair to impose liability on a judicial officer for actions taken in good faith. To penalize a judge for an honest judicial error when the judge is acting within the scope of his authority would only serve to intimidate him and make him more hesitant to act. The integrity of the judicial system, which consists of staff selected primarily by judges, depends upon both the existence of a remedy for discriminatory employment practices and protection for the judges.

There is a strong public interest in and need for the protection of judges since they are required by the obligations of their positions to make discretionary decisions. To maintain high judicial standards of conduct, to reduce the threat of liability, and to preserve the inde-

\textsuperscript{94} See Note, Judicial Immunity, supra note 84, at 583. The threat of suit is likely to make qualified people unwilling to serve as judges. Taxpayers will not be able to raise judicial salaries high enough for judges to accept the risk of litigation initiated by a party to an action before the court who loses and wants to blame the presiding judge.

\textsuperscript{95} Way, supra note 92, at 396. "[Executive officers'] discretion may be less predictable and arguably more hazardous than judicial discretion." Judges work in a more certain environment.

\textsuperscript{96} See Forrester, 792 F.2d at 660.

\textsuperscript{97} See Bradley, 80 U.S. (13 Wall.) at 349.

If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, . . . he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned . . . that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden. . . .

\textit{Id.} Originally, the argument was asserted to justify absolute immunity for judicial acts. However, it is still a viable argument to support qualified immunity over no immunity at all. Judges may still need to use wasteful and distracting devices to guard against possible future liability.
pendence and respect of the judiciary requires qualified judicial immunity. Employees legitimately injured by a judge’s discriminatory employment decision should be entitled to proper redress. A look at other government officials and the protection they are afforded under the same circumstances illustrates that judges are not significantly different.

B. Comparison with Other Branches of Government

A comparison of legislative and executive immunity standards is useful in establishing boundaries for judicial immunity in employment termination cases. The judiciary is very much like the executive branch, and the judiciary should follow the same qualified immunity standard used to protect executive officers.

1. The Legislative Branch

Legislative immunity is the only immunity mentioned in the Constitution. All Congressional action, including employment decisions, is constitutionally limited by the reach of the speech or debate clause of the Constitution.98 The clause states, in part that:

Senators and Representatives, shall be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same, in all cases, except treason, felony, and breach of peace; and for any speech or debate in either House, they shall not be questioned in any other place.99

The purpose for this constitutional declaration is to protect the members of Congress in conduct that is necessary to the performance of their duties and to insure the independence of legislators.100 The immunity applies to the speeches given by legislators when involved in legislative matters such as debates and votes. However, legislators can be civilly or criminally liable for political acts which are not considered legislative activities.101 In addition, since legislators are accountable to their constituents, they are subject to checks which help prevent abuses of authority.

Employment appointments and terminations, however, often escape political scrutiny. A clear distinction has not been made within

98. U.S. CONST. art. 1, § 6, cl. 1.
99. Id.
the legislative branch as to whether legislators have immunity to fire employees in violation of the Constitution. The cases suggest that absolute immunity might be more appropriate in the legislative branch because of the politics involved and the special need for loyalty.

In *Davis v. Passman*, a congressional staff member alleged that she was terminated as a result of sexual discrimination in violation of the United States Constitution. The Court found that the Congressman was not shielded by the speech and debate clause and applied the principle that "legislators ought ... generally to be bound by (the law) as are ordinary persons."

Another case, *Browning v. Clerk*, was decided differently. *Browning* involved a former United States House of Representative Official Reporter who alleged that her termination was motivated by racial discrimination. Immunity was contingent on whether the activity was "an integral part of the deliberative and communicative processes [of Congress]." The Court found that the employee directly assisted members of Congress, and therefore, the termination was legislative in nature and protected by the clause. Even in the legislative branch, immunity for employment decisions is uncertain. For the most part, however, legislators, like prosecutors, only have absolute immunity when they are actually legislating or prosecuting respectively.

2. The Executive Branch

Executive immunity grew out of the common law much the same as judicial immunity and has no textual, constitutional basis. It would be inconsistent for executive officials to enjoy qualified immunity from damages for executive misconduct while refusing judges the same degree of protection for similar acts.

The President of the United States in *Nixon v. Fitzgerald* was granted absolute immunity from damages for conduct arising out of official acts which included personnel decisions. The Court based its decision on the importance of the President's freedom to choose loyal and trustworthy aides and subordinates in executing the

102. 442 U.S. 228 (1979).
103. Id. at 246 (quoting *Gravel v. United States*, 408 U.S. 606, 615 (1972)).
104. 789 F.2d 923 (7th Cir. 1986).
105. Id. at 928 (citations omitted).
106. *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541 (8th Cir. 1984).
duties of his office. Considerable deference is also given to matters of national security and internal consultations and deliberations. However, absolute immunity is the exception rather than the rule. Generally speaking, executive officers receive only qualified immunity. It is acknowledged that there are exceptional circumstances when absolute immunity is essential to the conduct of public business.

3. The Judiciary

Judicial immunity is also based on common law. There is no explicit constitutional right to absolute immunity for the judiciary, when compared with the Legislature. Judges are not significantly different nor are their reasons distinguishable from members of the executive branch which must comply with constitutional hiring and firing procedures. Executive officials are liable for their knowingly unconstitutional acts. Since judges are sworn to uphold the Constitution in trial proceedings, they should be held accountable outside the courtroom. It would be inconsistent to apply a different standard than that used for the executive branch since all swear to uphold the Constitution of the United States in their oaths of office. Judge Posner claims that a judge is no more likely to be sued for employment discrimination than other public or private employers. It can be concluded, then, that for employment decisions, a judge need only be protected by qualified immunity, as are executive officials, when performing their official functions.

IV. Proposal

As has been stated, the immunity doctrine was developed to address decisions made by judges with regard to cases or controversies in the courtroom. It was not designed to cover all duties performed by a judge, nor should it. Judges are not acting in their judicial capacity when executing employment decisions. Judges do need some level of immunity in order to perform their administrative duties effectively. Limited protection is appropriate in situations where a

108. Id. at 744-58.
109. Id. at 750.
111. Id. at 507. Traditionally, absolute immunity has been extended to executive officers only when they are engaged in adjudicative functions.
112. Id.
113. Id. at 662-64.
properly motivated judge would be reluctant to act for fear of a civil damage action and when that reluctance would undermine the integrity of the general process of judicial administration.\textsuperscript{114}

There is a way to ease the tension between these two competing interests. It is generally agreed that plaintiffs deserve some sort of compensation for the violation of their constitutional rights by a judicial officer, but the public also demands that judges be shielded from civil liability. The theories and reasoning gleaned from the leading cases have provided a basis for applying qualified immunity in an employment situation. Qualified immunity for judges in their ministerial duties such as the hiring and firing of court personnel is the best alternative to the now rejected absolute immunity doctrine. According to \textit{Mitchell v. Forsyth},\textsuperscript{118} qualified immunity is "immunity from suit rather than a mere defense to liability."\textsuperscript{118} There has already been some erosion of the doctrine in this area as evidenced by the conflicting assortment of cases discussed earlier.\textsuperscript{117} As one commentator suggests,\textsuperscript{118} the changes in the doctrine are inevitable. He advises that the judiciary take control of and guide future development and limitations on the use of absolute immunity.

Limiting immunity for judges in their role as personnel administrators, while still allowing absolute immunity in their roles as adjudicators, seems to be a logical boundary for the judicial immunity doctrine. As indicated above, the strong public policy reasons supporting judicial immunity in the case or controversy situation are still relevant when applied to a judge's employment decisions. Judges, when making employment decisions, are similar to officials in the two other branches of government and, therefore, should be treated similarly.

There are four basic reasons that qualified immunity is proposed in favor of no immunity at all. First, qualified immunity provides some protection from the exposure to liability that now faces judges for their employment decisions. It avoids the unfair punishment of judges for performing a duty that is authorized, and in some instances required, by law. The \textit{Wood} Court advocated good-faith fulfillment of one's responsibilities:

Public officials . . . who fail to make decisions when they are

\textsuperscript{114} See \textit{Bradley}, 80 U.S. (13 Wall.) 335 (1871).
\textsuperscript{115} 472 U.S. 511 (1985).
\textsuperscript{116} \textit{Id.} at 526.
\textsuperscript{117} See supra note 29 and accompanying text.
needed, or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.\textsuperscript{119}

Second, much time and energy is required to defend a lawsuit, whether it is valid or not. If judges are not provided any immunity, the number of lawsuits is likely to increase dramatically. Judges will be burdened by litigation concerning their ministerial decisions—a burden likely to affect their adjudicative decision-making role as well. Disruption of their courtroom functions is the primary reason that judges were originally afforded judicial immunity. Qualified immunity would eliminate frivolous lawsuits from the start through pre-trial procedures.\textsuperscript{120}

Third, denying any measure of immunity would serve only to intimidate judges to be hesitant in making decisions which are necessary to the proper functioning of the court. As stated in \textit{Wood}: "The imposition of monetary costs for mistakes which were not unreasonable in the light of all circumstances would undoubtedly deter even the most conscientious [judge] from exercising his judgment independently, forcefully and in a manner best serving the long-term interest of the [court]."\textsuperscript{121} But at the most basic level, the absence of immunity is likely to deter qualified people from entering the judiciary and aggressively serving the public's interest.

Finally, the public believes that judges hold an honored place in society which demands that judges be shielded from liability. While the public recognizes there is a need to hold judges accountable, this is true only in the areas of gross misconduct. The dignity of the judiciary is diminished when judges are forced to take the stand in their own defense. At least qualified immunity will provide the judges


\textsuperscript{120.} \textit{Butz}, 438 U.S. at 507-08:

Insustantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief ... it should not survive a motion to dismiss. Moreover, the Court recognized in \textit{Scheuer} that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. ... 

\textit{Id.}

\textsuperscript{121.} 420 U.S. at 319-20.
with an initial defense to a claim of a constitutional violation. A determination must be made as to whether, at the time the action occurred, the law was clearly established. If the law were well-settled at the time, then qualified immunity will be defeated. Qualified immunity will also prove ineffective if there is an issue of material fact which is disputed, thereby destroying a motion for summary judgment. But, in the majority of cases the qualified immunity doctrine will serve to provide judges with ample protection when they have acted within the bounds of the law.

V. Conclusion

As Chief Justice Marshall wrote, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.”

Court employees victimized by discrimination in the firing process now have some redress against a judge as a result of the elimination of the absolute judicial immunity barrier in discriminatory employment decisions. It is unclear whether qualified immunity will be extended to judges, or whether they will be without immunity. The United States Supreme Court failed to decide this issue in Forrester v. White. This deficiency should be remedied by allowing qualified immunity protection for a judge’s employment decisions as well as for other administrative acts. Then, if an employee alleges an unconstitutional dismissal, he can challenge the judge’s decision and receive damages as a remedy if the decision is determined to be in violation of the Constitution. Yet, the judge will still have qualified immunity protection to shield him from frivolous and unfounded suits relating to adjudicative acts.

Justifications asserted for the judiciary’s special protection do not persuasively distinguish the judicial function from the executive and legislative functions. In employment decisions, judges should not be denied the same level of immunity as those in comparable positions in the other branches of government. It is said that a judge who acts on his own prejudices is not acting as a judge and has been removed from the domain of judicial authority. The Court stated in Butz that “it is not unfair to hold liable the official who knows or should know he is acting outside the law, and . . . insisting on an

awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment."\textsuperscript{123}

\textit{Lisa Cournoyer Roberts}

\textsuperscript{123} \textit{Butz}, 438 U.S. at 506-07.