OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: FREDERICK A. SIEGERT, Petitioner V.

H. MELVYN GILLEY

CASE NO: 90-96

PLACE: Washington, D.C.

DATE: February 19, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

- X

FREDERICK A. SIEGERT, :

Petitioner :

v. : No. 90-96

H. MELVYN GILLEY :

- X

Washington, D.C.

Tuesday, February 19, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:12 a.m.

APPEARANCES:

NINA KRAUT, ESQ., Washington, D.C.; on behalf of the Petitioner.

MICHAEL R. LAZERWITZ, ESQ., Assistant to the Solicitor General; Department of Justice; Washington, D.C.; on behalf of the Respondent.

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PROCEEDINGS

(10:12 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 90-96, Frederick A. Siegert v. H. Melvyn Gilley.

Ms. Kraut.

ORAL ARGUMENT OF NINA KRAUT

ON BEHALF OF THE PETITIONER

MS. KRAUT: Mr. Chief Justice Rehnquist, and may it please the Court:

This is a case of malice. It's a case in which a Federal official with knowledge of false information communicated and published that false information anyway to a third person, because he was bent on ruining and destroying Frederick Siegert's reputation and good standing in his professional community.

This is a case which stays a compensable injury to a protected liberty interest. This is a case of a substantive due process claims, pure and simple and without question.

In 1966 in a case called Rosenblatt v. Bear, Justice Stewart, in his concurring opinion, stated that the right to protect one's reputation is comparable to the right to protect one's life itself. And he also stated that the right to protect one's reputation is a

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fundamental right within the concept of liberty. Fifty years earlier in a case called Adams v. Turner, a 1917 case, this Court stated something very similar when it said that when you take the property upon which my house sits, you take my house, and when you take the means whereby I live, you take my life. That is what Frederick Siegert did. That is what he was bent on doing. That is what he wanted to do premeditatively. And unfortunately for Frederick Siegert, that is what he succeeded at doing.

QUESTION: I guess all that's not true if you're a public figure however?

MS. KRAUT: I think that if Frederick Siegert were a public figure, he would be able to bring a claim of this sort, because actual malice would be shown. And by the substantive and the facts that we did allege in this case, we do think that we do meet an actual malice standard, Your Honor.

Frederick Siegert did state a -- a compensable injury as I said, stigma plus, to a protected liberty interest, the right to pursue one's calling without the malicious interference of the Government. And as stated in -- or -- and held in Paul v. Davis, in Meyer, in Doe, in Bartel, in White v. Nicholls and a few other cases, the right that was violated was so well established in October of 1985 that no reasonable public official in Gilley's

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position could possibly not have known that what he was doing was wrong.

QUESTION: Ms. Kraut, the first question presented in your petition for certiorari is the extent of discovery which you should be allowed where there's a defensive qualified immunity. That really has nothing to do with the merits of your case I would think.

MS. KRAUT: Well, we think it does, Your Honor. It's closely connected to it. The merits of the case and whether or not the allegations -- the factual allegations that Siegert alleged below was hotly and vigorously contested by the Government below. It was decided by the court below in fact that the factual allegations were insufficient to meet that heightened pleading standard. And we think that, under the rules of this Court, that it is within the general parameters of the question that was actually presented. So we think there is a very close connection to it, and we do ask the Court to answer that.

I believe it was also -- that's as far as the substantive claim is concerned. We do think that it is closely connected and it ought to be addressed.

In fact the Government hotly contested it in its briefs to this Court. And given that it did -- given that I contested it on the other side of the coin, we think that it is right for this Court to decide whether in fact,

even if the discovery rule is upheld by this Court, whether or not Siegert's allegations satisfied that standard. And of course, we think they did for many reasons.

QUESTION: You will eventually get to the question presented then?

MS. KRAUT: I will, Your Honor. But if I could -- if the Court would like me to address that right now, I'll be happy to. But what I would like to do is -- is essentially state what the factual allegations were so that when the Court looks at those factual allegations in relation to the discovery rule that's being challenged, I think it will be a slightly more complete picture.

What Siegert alleged were the following. He alleged that he had had exemplary job performance ratings for his entire time at Saint Elizabeths. He alleged that he had been hired because of his expertise in the treating -- in treating mentally retarded people, severely mentally retarded people. He alleged that he was the coordinator of the behavior modification treatment unit for the -- almost the entire time that he was employed by Saint Elizabeths.

He alleged that he trained others in the area of behavior modification treatment. He alleged that his ethics had never before been questioned. He alleged that

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he had signed a 3-year contract with the Army when he wanted to be transferred, and one can assume from that that the Army made some inquiry into his background and knew that he was an ethical -- an expert in his field.

He alleged that there had been longstanding professional and personal conflicts with Gilley. He alleged that Gilley knew almost nothing about behavior modification, and he alleged that he and others on the behavior modification treatment unit resisted Gilley's attempts in that first month to change certain aspects of the behavior modification treatment program.

QUESTION: Where is Dr. Siegert now?

MS. KRAUT: Your Honor, he -- it's not in the record, but if the Court wants it off the record, Dr. Siegert is employed in a private HMO plan -- sort of a -- I don't know exactly what they are -- but it's an HMO private institution. He is not treating mentally retarded people. He is --

QUESTION: Is he engaged in clinical psychology at all?

MS. KRAUT: He is engaged in clinical psychology. However, Your Honor, because of his training and because of the area of expertise in which he practiced, not only at Saint Elizabeths but as he alleged also at Forrest Haven and other institutions, totally and

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only in the area of treating the most severely retarded people you can imagine -- that is his expertise. It's as though someone told me that I couldn't practice the kind of law I practice and I would have to practice tax law, and all apologies to any tax lawyers in the room.

QUESTION: Well, that happened to me when I cub in an office.

(Laughter.)

MS. KRAUT: Well, I think that -- my sympathy, Your Honor.

(Laughter.)

MS. KRAUT: But I -- I guess it didn't hurt you though.

(Laughter.)

MS. KRAUT: I think that if, if a person wants to practice a certain area of law, or a person wants to practice as an -- and is trained in practicing a particular type of medicine or psychology or whatever, they ought to be able to do it. Mr. -- Dr. Siegert cannot practice his profession anymore, because the only place that he can practice it is in public institutions, and because of what happened to him as a result of Gilley's actions, he is no longer able to be hired by institutions, because, as the Stuttgart personnel said when he went there to try to work, because of what we've heard about

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you.

And it is -- that is a liberty interest that is -- that has been cut off by Gilley, and as I said, we think that he ought to be able to seek compensation.

QUESTION: May I ask right at this point, on the question whether there was a clearly established claim before, as I remember the Government's position is that the procedural due process claim was clearly established, but that the record indicates he did have a fair opportunity for a name-clearing hearing, which is all the Constitution guarantees. What's your response to that?

MS. KRAUT: Your Honor, this is not a procedural case, and there is no process that can clear his name. Let -- let me say that --

QUESTION: And it is clear that -- is it clear that if it's not a procedural case, that there was a clearly established nonprocedural right? And if so, what case established it.

MS. KRAUT: Well, Hearn, Your Honor, I think Hearn v. the City of Gainesville, which I cited. It's an Eleventh Circuit case. I think that in combination with Meyer v. Nebraska, with Paul v. Davis. There's no one --

QUESTION: Well, Paul against Davis is procedural.

MS. KRAUT: Well, it is, Your Honor, but in

terms of substantive, I think that if I could use Justice Souter's case in New Hampshire that he decided in 1988, Richardson --

QUESTION: I'm not sure you'd better do that.

(Laughter.)

MS. KRAUT: Well, Your Honor --

QUESTION: Because that was a procedural due process case.

MS. KRAUT: Your Honor, I -- that's true, but in Richardson -- in the Richardson case, Your Honor did refer to the fact that that case could have been a substantive due process claim and referred specifically to Meyer v. Nebraska and to Schware as establishing that substantive due process -- that substantive due process claim.

Now --

QUESTION: I'd better go back and give that one a second thought.

MS. KRAUT: I have it right here, Your Honor.

(Laughter.)

MS. KRAUT: In -- but what the court did in New Hampshire, what Justice Souter did in New Hampshire, was say, no, this is a procedural case, because, number one, there was a process that was in place. And secondly, the State -- the State of New Hampshire apparently acknowledged that they had violated their own procedure.

And thirdly, my recollection is that this fellow may have already been -- have already made his admission that he had -- I think already said that he had done what the State that he did. And fourthly, I don't think a substantive due process claim was ever raised in that case, directly or indirectly from what I can gather.

But I think it's -- coming back -- I think the fact that Justice Souter in that case did refer to Nebraska and to Schware is an indication that, given that the factual circumstances in the two case are so similar that at least it -- what it does is provide very strong guidance that in fact Meyer and Schware can stand for the liberty interest and the compensable injuries that are at stake here and --

QUESTION: But isn't -- isn't the point though that those cases, just as you just said, identify the interest which is subject to protection, but they don't define the manner in which the interest will be protected. And what the later cases hold and in what that case of mine that you referred to happen to hold, was that there are certain procedural due process protections, but none of them are substantive due process cases in the sense of providing an absolutely protection, let's say, in the Richardson case against libel as such. That was not thought to be the function of 1983 or of the Fourteenth

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Amendment.

MS. KRAUT: Your Honor, I think that I -- what -- what I think has to be looked at here is -- first of all, Richards -- Anderson states, I think quite explicitly, that the precise character of the right does not have to be set forth in precision. Secondly, this kind of case is comparable to, for example, a -- an Eighth Amendment claim of deliberate indifference in a prison setting for medical treatment for prisoners. That is a -- and entirely a tort action of medical malpractice but with an unconstitutional motive attached. And that turns it from a tort claim into a constitutional claim.

In the Fourth Amendment area, the battery -- the tort of battery is turned into a Fourth Amendment violation, because again, because of a -- an unconstitutional motive.

QUESTION: Ms. Kraut, you have spent half of your oral argument now on a question which you say is subsumed. You really haven't explicitly addressed either of the questions presented in your petition for certiorari. I suggest you do so.

QUESTION: I'll be happy to do that right now, Your Honor.

What the Government wants, Your Honor, on this -- on this rule that is actually presented is the

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Government wants to have its cake and eat it, too. They want a post-discovery standard -- what we view anyway as a post-discovery standard -- applied to a pre-discovery proceeding without letting the -- the plaintiff, a Bivens plaintiff or a civil rights plaintiff, have the benefit of any discovery.

And we are asking the Court today to state clearly that that may not happen, and we are proposing a rule to the Court that is, we think, more consistent with what -- what Anderson and Harlow state. It is more consistent with what Article III states. It is more consistent with what the Federal rules committees have proposed and have amended in terms of the rules of Federal civil procedure.

And that rule is -- our proposed rule is that prior to discovery and in opposition to a summary judgment motion where qualified immunity has been raised, if malice has been alleged in connection with otherwise lawful conduct, there should be some evidentiary basis of malice which would demonstrate with some plausibility that a Bivens plaintiff's opposition is justified and that he might defeat a qualified immunity claim.

Where malice is alleged as an element of already established unlawful conduct, malice may be alleged generally. Once a clearly established right has been

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determined to exist in the former by adequate allegations of malice and in the latter by the already established unlawful conduct --

QUESTION: We're talking about pleadings here? Is that right?

MS. KRAUT: Yes, I am, Your Honor.

A trial court may then order discovery prior to disposition on a summary judgment motion to determine if there are material issues generally in dispute on matters concerning qualified immunity. That is in fact what we think that Anderson and Harlow and Mitchell already imply. We think that that rule is consistent with Article III. What the --

QUESTION: Is that consistent with what the district court did here?

MS. KRAUT: This rule is -- we think what the district court did was to take all of our allegations, which I began to read but haven't finished -- all of those allegations he applied -- Judge Sporkin applied the heightened pleading standard, not this standard. He applied the circuit court's heightened pleading standard as he was bound to do, and he made a determination that on the issues of falsity and on the issues of malice that there were material facts -- that those are material facts and that they were genuinely in dispute and that the

allegations of malice and falsity were so sufficient that a reasonable jury could find that, if this case went to trial, that they would be able to find for Dr. Siegert.

QUESTION: And so he would have allowed some discovery?

MS. KRAUT: He allowed -- and what he ordered in fact was discovery on two issues, and I think it's at page 52 or 54a of the appendix -- he specifically ordered limited discovery on the issues of falseness and malice when he ordered the depositions of Siegert, of Gilley, and of Colonel Smith. I believe that he also ordered in his first order of December of 1987, I believe it was, he also ordered I think some production of some documents.

QUESTION: And under your standard, he should have ordered more?

MS. KRAUT: No, that --

QUESTION: No, that was all -- that -- what he did conformed to your standard?

MS. KRAUT: What he did conformed to the present standard that now exists to this heightened pleading standard.

QUESTION: Yes, but my question was under your standard, the one you're proposing?

MS. KRAUT: Well, absolutely, if it -- if it conformed to their --

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QUESTION: Absolutely what?

MS. KRAUT: Absolutely it conformed to our standard if it conformed to a higher standard. This standard is not --

QUESTION: So what you're saying is that he went -- he went part of the way that your standard would have required him to go but not as far?

MS. KRAUT: No. No, no, no. The D.C. Circuit's rule now imposes two things. Number one, it imposes a direct evidence -- allegations of direct evidence. He -- I don't know frankly whether Judge Sporkin made a determination whether direct evidence had been alleged, but in any event the Government has conceded that that particular aspect of the court's rule should not -- should not be upheld, because it has absolutely no legal foundation. It conflicts with Holland. It conflicts with just a whole host of cases that circumstantial evidence is not as good as direct evidence.

The second prong, however, of the district court's heightened pleading's standard is that prior to discovery a Bivens plaintiff has to allege specific facts in conformity with a post-discovery standard, specific facts showing that in fact there are material facts in dispute and that a reasonable jury could find for the nonmoving party.

QUESTION: I still don't understand your answer to my question, which was whether the district court's order in this case went as far as one -- as a district court would go applying the standard you're proposing to this Court?

MS. KRAUT: He went further, because -- he went further in terms of the findings that he made. He found that Siegert had alleged sufficient facts to conform with the heightened pleading standard.

Now, the district court's rule means that if you meet that standard, then you can have discovery. And that in fact -- that is in fact what Judge Sporkin did. He ordered discovery in conformity with the fact that Siegert met the heightened pleading standard.

QUESTION: And does that -- does that comport with the rule you're proposing?

MS. KRAUT: This rule I --

QUESTION: Can you answer that yes or no?

MS. KRAUT: Uh, no, it is a lesser -- less rigorous standard, and it is less rigorous, Your Honor, because it is a pre-discovery standard.

QUESTION: So the district judge's standard applied here was less rigorous than the one you would apply?

MS. KRAUT: The district judge's standard that

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was applied, that was actually applied in this case was more rigorous than the one that I am suggesting, Your Honor.

The --

QUESTION: What -- what did the court of appeals do with that? The court of appeals disagreed that there had been factual allegations that support malice?

MS. KRAUT: Yes, Your Honor. The district court said, number one, that we had failed to allege direct evidence of malice, and secondly, even if we -- and secondly, that whatever we did allege were too conclusory. They said that the -- the panel said that the allegations were too conclusory to comport with the heightened pleading standard.

QUESTION: And what --

MS. KRAUT: And therefore, they found that we had not met the heightened pleading standard and we were basically out of court.

The rule that we do propose, as I said, is consistent with what trial judges are supposed to do under Article III. They have discretion -- they ought to have discretion to try cases. And they are in the best position, in fact, to make determinations, because they are right there on the front lines of litigation with us. They can see. They can hear. They're eye ball to eye

ball with us.

QUESTION: But they're not -- they're not -- in summary judgment cases, they're not supposed to be resolving any questions of fact.

MS. KRAUT: But they -- what they do need to do is make some determinations as to whether or not a suit is frivolous. After all, that's what Harlow was supposed to guard against. And they are bound to keep out of court or to let suits progress beyond a certain very early point if those suits in fact are frivolous.

QUESTION: So you say there is a judgment factor there even though they're not making factual findings?

MS. KRAUT: Yes, Your Honor, there has to be a judgment factor.

QUESTION: How do you -- how do you ever stop a suit from proceeding beyond the summary judgment stage if there is an intent element, and if we follow your rule that there's no heightened pleading standard, that all the -- that all the plaintiff has to come in and say is, this was done with malice.

MS. KRAUT: No, Your Honor. What I'm saying -- let me restate the rule just -- let me clarify it for you. What I'm saying is that if you have malice attached to a claim of otherwise unlawful conduct, there have to be something beyond or above or more, more rigorous than a

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-- just a general allegation of malice.

QUESTION: So you agree with the D.C. Circuit's standard?

MS. KRAUT: We don't think that the -- that this rule is a heightened pleading standard in the same way that the D.C. Circuit's rule is.

QUESTION: It's a lower heightened pleading.

MS. KRAUT: It's a lower heightened pleading. That's right. That's exactly right. I think that --

QUESTION: But I thought your objection in principle is to a heightened pleading standard? I mean --

MS. KRAUT: Your Honor --

QUESTION: -- once, once you abandon what the rules says, it seems to me why should I prefer yours to theirs?

MS. KRAUT: Your Honor, because -- because the D.C. Circuit's rule calls for what they call direct evidence as well as -- which we think has absolutely no merit at all, as the Government agrees. And secondly, they're calling for nonconclusory allegations.

Now, it could be that a judge in viewing these pleadings in the light most favorable to a plaintiff may in fact determine that even if there are conclusory allegations that constitute malice, nevertheless the case as the -- or the allegations as a whole have some

plausibility that there is some demonstration that the plaintiff's claim has some merit.

And so -- we're talking about lawful conduct -- there is, we think, some necessity, given the policy considerations of -- of qualified immunity that a plaintiff ought to come in with something more than a general statement of malice.

QUESTION: So the Federal rules of civil procedure are inapplicable, or not inapplicable, but there's a stricter standard than is required in Rule 9(b)?

MS. KRAUT: I think that, given the qualified immunity policy considerations, Your Honor, I think that after a complaint is filed -- and I'm not -- I think --

QUESTION: Is the answer yes?

MS. KRAUT: The answer is yes, after a complaint has been filed and where unlawful -- and where lawful conduct has been alleged. If already --

QUESTION: Well, I suppose it's always after a complaint is filed that we judge whether or not it's sufficient.

MS. KRAUT: Well, that's true, Your Honor, although I've certainly read cases that get thrown out at the complaint stage because allegations -- for example, I remember one case that dealt with deliberate indifference in the medical field for prisoners where the plaintiff was

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given two or three bites of the apple and said --

QUESTION: So you don't rely on Federal Rule of Civil Procedure 9(b)?

MS. KRAUT: Only for complaints which come in -- where there is unlawful conduct alleged -- already unlawful conduct alleged and malice is a part of that. Then I think that -- that the general allegation of malice is acceptable.

Your Honor, I have about 3 minutes left, and I'd like to reserve my time for rebuttal.

QUESTION: Very well, Ms. Kraut.

Mr. Lazerwitz, we'll hear now from you.

ORAL ARGUMENT OF MICHAEL R. LAZERWITZ

ON BEHALF OF THE RESPONDENT

MR. LAZERWITZ: Thank you, Mr. Chief Justice, and may it please the Court:

In Harlow against Fitzgerald this Court held that a plaintiff in a Bivens action cannot overcome the defense of qualified immunity, and therefore, proceed with the litigation by alleging that the official acted with malice. The question presented here is whether the plaintiff may do so where malice or improper motive happens to be an element of the constitutional claim.

In our view in the face of the qualified immunity defense, general allegations of malice do not

entitle the plaintiff to proceed. Where malice or improper motive is an element of the constitutional claim, the plaintiff, in order to avoid dismissal, must allege specific facts that call into question the objective reasonableness of the official's challenged conduct.

This requirement which may be -- this so-called particularity requirement, which stems from the Court's recent immunity decisions in Harlow, Mitchell against Forsyth, and Anderson against Creighton, ensures that the defense of qualified immunity in these particular lawsuits retains its substantive scope and effect.

QUESTION: You say this is a pleading requirement, Mr. Lazerwitz?

MR. LAZERWITZ: Well, Mr. Chief Justice, in strict terms it really isn't. The -- calling it a pleading requirement I think has caused more confusion than is necessary, because under the Federal rules, a plaintiff can -- under Rule 8 and Rule 9, a plaintiff can file a rather barebones complaint and can allege -- and we don't challenge this -- can allege malice in general terms. But the landscape changes once the Federal official, if he so chooses, raises the defense of qualified immunity. And that -- that changes, in our -- in our view, how this is resolved.

Now, in this particular case, because both --

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excuse me -- the court of appeals and the district court should have and actually did consider matters that were not in the complaint, it becomes a summary judgment case. And therefore, to say that -- and some courts have suggested this but not really held it, that all this has to be in the complaint is I think misleading. Although, for practical purposes --

QUESTION: And you don't take the position that it has to be in the complaint?

MR. LAZERWITZ: No, I --

QUESTION: It can be dealt with as a summary judgment motion?

MR. LAZERWITZ: Yes, Justice O'Connor. For all practical purposes --

QUESTION: With affidavits and so forth?

MR. LAZERWITZ: Yes, if the plaintiff has this information, it would be -- it probably would behoove the plaintiff to put it in the complaint, but the plaintiff doesn't have to, because as this Court held in Gomez, the qualified immunity of defense is an affirmative defense that has to be pleaded by the defendant.

QUESTION: So how do you see a case like this evolving? The plaintiff files a complaint. The defendant Federal officer claims qualified immunity and moves for a summary judgment? Is that what happens?

MR. LAZERWITZ: This is -- this is actually a fairly representative case and -- except for the colloquy before about the claim. And I'll leave that aside for the moment. The plaintiff files a complaint, alleges that the Federal official violated my rights. The defendant here files a motion to dismiss or in the alternative for summary judgment, saying my qualified immunity defense -- I win.

Now, the plaintiff has to come up with something more to go forward. Or, of course, the plaintiff can rest on his complaint. In this particular case, in the most narrow context, the fight here is over the right to obtain additional discovery.

QUESTION: This is the way you get around the last sentence of Rule 9(b). It says malice and other condition of mind of a person may be averred generally. And tell me how you get around that?

MR. LAZERWITZ: The complaint that the plaintiff alleges it follows Rule 9(b) and alleges malice -- avers malice generally. Once the defendant has invoked his substantive protection of the qualified immunity defense and moved for dismissal, the plaintiff cannot rest simply on the complaint, because --

QUESTION: Well, you're really nullifying that last sentence then, aren't you?

MR. LAZERWITZ: No, we're not, Justice Blackmun, and this -- the problem is in a sense created by Bivens and Harlow. In Bivens the court held that there -- recognized the remedy to -- excuse me -- a cause of action to remedy the vindication of certain constitutional rights.

Harlow, years later, recognized there's a problem if a plaintiff can just walk into court and allege improper motive and then you have discovery and a trial, that was unacceptable. But the Court didn't tackle in Harlow, and what the lower courts have been tackling in the meantime, is the problem presented here. What happens when the plaintiff doesn't allege malice in order to defeat the immunity, but has to allege malice because that's part of the constitutional cause of action?

QUESTION: Well, Mr. Lazerwitz, do you take the position that in some circumstances, some limited discovery can be had by the plaintiff to deal with this question of malice?

MR. LAZERWITZ: Oh, yes, there's -- there's -- I believe the petitioner is overstating or misstating both our position and the position of the court of appeals. The court of appeals here -- and neither are we. We're not applying a post-discovery standard, pre-discovery. That's not what's going on here. Instead -- let me give

you an example.

QUESTION: Well, here in this case, the district court said the plaintiff could depose the defendant. Now, was that a permissible order in discovery?

MR. LAZERWITZ: Not at least -- not on the showing the plaintiff made. Other -- and let me give you an example. The problem here is, notwithstanding the different facts that plaintiff alleges, it's essentially conclusory. Dr. Gilley -- excuse me -- Dr. Gilley didn't like me, so he must have written this recommendation letter with malice. The problem is there's nothing to support that. It's just -- it's simply conclusory, unsupported.

But here would be an example of a plaintiff that probably would be able to get the limited discovery. Plaintiff alleges, I heard from my co-worker, Mr. Jones, that Dr. Gilley is out to get me and is going to do bad things to me. But I can't get Dr. -- Mr. Jones' affidavit. He won't give it to me.

Now, in that particular case, that wouldn't be enough to defeat summary judgment, because that's -- that would be hearsay. But it's our position that in those circumstances, the district judge would certainly be well within his discretion ordering limited discovery.

QUESTION: Well, you don't agree, do you, with

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the CADC's holding that there has to be direct evidence of malice?

MR. LAZERWITZ: As we stated in our brief, we do not read the court of appeals' judgment or opinion as requiring direct evidence as we understand it.

QUESTION: Well, if we read it that way, is that something you agree with or not?

MR. LAZERWITZ: If the Court were to read it that way, no, we do not. And we urge the Court not to read it that way, because it doesn't have to be. And that question isn't necessary to the judgment, because on the showing that petitioner made here, there just -- it really was just inference on inference, conclusion upon conclusion.

QUESTION: Was there a motion for summary judgment made in this case?

MR. LAZERWITZ: Yes, Your Honor, we -- the defendant moved for summary judgment and/or dismissal.

QUESTION: It seems to me you're on much stronger ground with a motion for summary judgment with respect to Rule 9(b) than you are -- a motion to dismiss. To say that where Rule 9(b) says you can allege malice generally and if you say you can attack that successfully by a motion to dismiss, you're talking about the pleading stage. That just does negate Rule 9(b), whereas if you

rely on a motion for summary judgment, you're at the next step really.

MR. LAZERWITZ: Well, this particular case, technically speaking, the Court doesn't have to reach the motion to dismiss at this stage, because given the way this case was handled by the lower courts and given the submissions that petitioner presented, it is a summary judgment case. But --

QUESTION: Except that then you come up with another problem in the rules. If it's at the summary judgment stage, you have to had allowed adequate cross -- adequate discovery. But you don't have to at the pleading stage.

MR. LAZERWITZ: Right. And again --d

QUESTION: So you're sort of -- you have a -- one leg in each of two boats --

MR. LAZERWITZ: Right.

QUESTION: -- and they're going in different directions.

MR. LAZERWITZ: And our -- but our position is that given the substantive defense of qualified immunity that our -- that the approach adopted by the lower courts and that we are urging the Court to accept is perfectly consistent, whether it's under Rule 12 or under Rule 56, because of the problem that the lower courts have

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identified as a result of the intersection between Bivens actions and Harlow. Because in -- although petitioner didn't make this argument to the Court this morning, it's in her -- it's in the brief.

As we read the petitioner's submission, if malice happens to be an element of the cause of action, the plaintiff is automatically entitled to discovery. And the problem with that, in our view, is that it's certainly inconsistent with what this Court said recently in Anderson against Creighton, because the immunity defense is not simply a defense to personal liability. It's a defense -- it's an entitlement to immunity from suit.

QUESTION: May I ask you -- perhaps I'm missing something fairly fundamental here. But the universe of case that we're dealing with, are those in which malice is an element of the constitutional claim, not just comes in as negating a defense of qualified immunity.

I'd like to know what sort of cases are we talking about? Are there any such cases? You deny, as I understand it, that there was such a clearly established claim at the time this occurred. And you assumed for purpose of argument that there now is such a claim. But is there anything else other than a defamation claim that you would say fits in this category?

MR. LAZERWITZ: Well, the other claims the Court

is -- has before it, the Eighth Amendment case. Now some lower courts have held that that does have an --

QUESTION: Well, where you've got the riot situation in prison.

MR. LAZERWITZ: Right.

QUESTION: That would be the one.

MR. LAZERWITZ: The other -- the most common I think would be the First Amendment context -- the whistle-blower type.

QUESTION: Well, what about a deliberate indifference allegation?

MR. LAZERWITZ: Yes, or --

QUESTION: Well, that doesn't require malice, so that's less than malice.

MR. LAZERWITZ: Well, it's -- it's not just malice. It's -- these -- the universe that we're talking about here are cases with malice or otherwise intent.

QUESTION: Any kind of subjective motivation.

MR. LAZERWITZ: So the most -- I guess the one that comes to mind most quickly is equal -- equal protection case.

QUESTION: And in any case like say a prison riot case, the prisoner who claims that there, you know, that there was this extreme subjective motivation, it would have to have direct evidence of the --

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MR. LAZERWITZ: Well, again we don't --

QUESTION: Not direct, but hearsay or direct evidence.

MR. LAZERWITZ: The way the lower courts have treated this and the way we urge the Court to look at this, the one thing you can't do is walk into court and say, he acted -- he had malice intent. You have to present something more that gives the court -- the review -- the district court some reason to question the otherwise objective reasonableness of the defendant's conduct. If, for example, another case where this would certainly come up is a racial discrimination case, where the defendant has to be charged with firing you because you're black or you're Jewish or what-not.

Now, the plaintiff just can't walk in and say, he fired me because I'm Jewish. Instead, he has to present facts, specific facts, that would call into question what the defendant is implicitly saying is, I fired you because you're a lousy worker.

For example, in this particular case, the defendant says -- excuse me -- the plaintiff says, I received terrific ratings until Dr. Gilley showed up. Well, that doesn't say anything, because that happened then. We're talking about now. What if the -- something that the plaintiff could have shown is Dr. Gilley gave

everyone else on the ward terrific recommendations but not me.

Plaintiff alleged here in his affidavit, it's my understanding that Dr. Gilley resented me. Well, what is the basis of that understanding? It's these types of things that would give the court, a district court or the court of appeals, something more to --

QUESTION: I don't see why the case would be different if he could prove -- he had the actual records that he gave everybody else an A rating and he gave this fellow an F. Maybe he thinks this is -- he's a lousy worker.

MR. LAZERWITZ: Well, I think in this particular case it's even more acute because the -- in the recommendation context, it's hard to say that a recommendation is false. Dr. Gilley thought that the man wasn't a good worker. And in this particular case it's even more unusual in the sense that the plaintiff concedes he didn't show up for work. He wasn't there for most of the year that Dr. Gilley was a supervisor. Now, yes, he alleges he wasn't there because he had an injury. But he also tells us that Dr. Gilley didn't know that.

QUESTION: (Inaudible) you say malice was part of the cause of action, what was -- the cause of action was libel?

MR. LAZERWITZ: Well, just to clarify our position, this case comes to the Court under the assumption that the cause of action was a defamation -- a libel plus stigma in violation of the due process clause. As we pointed out in our brief --

QUESTION: So what does malice got to do with it?

MR. LAZERWITZ: Well, there cannot be a cause of action without malice. There's no clearly established right --

QUESTION: Well, what are you talking about malice -- ill will or what?

MR. LAZERWITZ: Well, I think in this context it's knowing that it's false. It's --

QUESTION: So you're really talking about --

MR. LAZERWITZ: It is a -- it's a defamation-plus type case, but again, I'd like to just make sure the Court is clear on our position. We do not think that the substantive claim -- the merits of the substantive claim is before the Court, given the fact that the -- as we read the questions presented, they're not part of it.

But to the extent that petitioner is insisting reach them, we don't have any quarrel with that, because there is no -- this Court has never held that there's a substantive due process right to be free from a Government

official's defamation. There's just no such animal. And in that case, the claim should have been dismissed on that right. But --

QUESTION: Well, then you're saying -- you're saying there just wasn't even a clearly established right.

MR. LAZERWITZ: That -- that's right, Justice White, and on the due process component --

QUESTION: And level -- and even if there was, you say that you're entitled to qualified immunity if a reasonable officer would believe that he was not violating this clearly established right.

MR. LAZERWITZ: Right. Now, there's another grounds for --

QUESTION: The kind of malice you're talking about is knowledge of falsity? The actual malice of New York Times?

MR. LAZERWITZ: Well, as we -- it's not --

QUESTION: Or is just ill will?

MR. LAZERWITZ: I believe in this context it's got to be -- although as I read petitioner, it might be ill will, but it makes more sense to me to think of -- he knew it was false but he lied. He received this request and lied about Dr. Gilley.

But I just want to make one more point on the merits -- underlying merits. Even assuming that there's a

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protective liberty interest, that is, the defamation-plus stigma, on this record, there's been no denial of due process.

QUESTION: Well, why didn't you win -- did you lose on your claim or did you make the claim that this complaint didn't state the cause of action?

MR. LAZERWITZ: We -- we --

QUESTION: Did you lose on that or --

MR. LAZERWITZ: The district judge --

QUESTION: Mainly --

MR. LAZERWITZ: The district court --

QUESTION: You should have -- you should have -- if there wasn't such a right -- isn't any such right, you should have won on the --

MR. LAZERWITZ: We should have won. This case should have been over a long time ago.

QUESTION: You lost on that?

MR. LAZERWITZ: The district judge denied those claims and instead ordered this limited discovery. We then took an appeal and raised these before the court of appeals.

QUESTION: Did you claim in the court of appeals there was no such right?

MR. LAZERWITZ: Yes.

QUESTION: And you lost on that?

MR. LAZERWITZ: The court of appeals ruled that it -- the court of appeals was of the position --

QUESTION: The case would have been over if you'd won on it.

MR. LAZERWITZ: Yes, the court of appeals thought that it didn't have jurisdiction to reach the merits, and we disagree with that. There's no jurisdictional bar for the court to reach the closely related question of whether --

QUESTION: Well, but the questions we granted certiorari on did not deal with the merits.

MR. LAZERWITZ: Right. They do not. The question that you granted -- that the courts -- that's presented in the petition are two. One's the entitlement to discovery -- to the so-called pleading requirement and the second is whether the defendant is even entitled to the immunity defense. That wasn't talked about before, but let me just address that very quickly.

To the extent that petitioner contends that respondent isn't even entitled to the immunity defense, that's wrong. The qualified immunity defense is available when the official acts and the performance of so-called discretionary as opposed to ministerial functions. And here respondent's conduct is precisely the sort of discretionary decision making that qualified immunity

protects.

Petitioner's own credentials request letter asked for Saint Elizabeths and then Dr. Gilley to provide all information about job performance. And what Dr. Gilley did here, providing that sort of information -- in essence a recommendation letter -- certainly entails judgment, discretion, and what-not. And so we think that on the second question presented, there's no doubt that the defendant properly used the qualifying immunity defense.

QUESTION: Getting back for a moment to the allegations of the complaint. Would this complaint, under your theory, subject the plaintiff's counsel to sanctions under Rule 11 on the ground that the allegation is not well grounded in fact?

MR. LAZERWITZ: No, Justice Kennedy, not at all.

QUESTION: So it is well grounded in fact and yet it can't proceed?

MR. LAZERWITZ: Well, it may be well grounded in facts, but the facts aren't presented to the court. And that's the problem.

As the case comes before the --

QUESTION: Well, if under your theory, she can't even, even proceed, then why can't you say that it's not well grounded in fact?

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MR. LAZERWITZ: Because it very well might be. As the case comes before the Court, the Court --

QUESTION: Well, your -- your position is that at this point it must be dismissed.

MR. LAZERWITZ: Yes, because that's the essence of an immunity defense, that there aren't going to be cases. Now, in our view this is not -- we do not think that this is a -- that Dr. Gilley did anything wrong. But, as -- in a --

QUESTION: Well, if it were dismissed and there were subsequently motions by the defendant for Rule 11 sanctions, would discovery then be allowed that you say wouldn't be allowed on the merits?

MR. LAZERWITZ: That's a whole different ball game, but I -- again the difference is, and what shouldn't be lost on the Court, is the qualified immunity defense. That's what changes everything. Because the court has made clear that the immunity is, as I mentioned before -- it's an immunity not to be burdened by litigation. It is in a sense an immunity not to be subjected to discovery. And in this particular case, it boils down to it's an immunity not to be -- have your deposition taken.

QUESTION: Mr. Lazerwitz, may I go back just to clarify something. I go back to one of the Chief Justice's earlier questions. If the original complaint

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simply alleged malice in general terms, as I understand it, you do not claim that you would be entitled to dismissal for failure to state a claim for that purpose alone. Let's assume complaint is filed, no immunity, nothing, just a motion to dismiss for failure to state a claim. You don't, as I understand it, take the position that you would be entitled to dismissal at that point. Is that correct?

MR. LAZERWITZ: Yes.

QUESTION: All right. So it's only when the next stage arrives -- i.e., an immunity defense is raised or otherwise summary judgment is raised somehow implicating the issue of malice -- it's only at that point that you say the pleadings have got to -- in effect have got to be supplemented by some more specific fact pleading before discovery would be justified.

MR. LAZERWITZ: Yes, Your Honor.

QUESTION: Okay.

MR. LAZERWITZ: It's -- again, we concede it's a little bit funny in the sense that when you talk of pleadings, but the way the qualified immunity defense has to work, if you're going to have suits like this, is the way the lower courts have handled it.

And again, this is important. The -- there has been this problem out there, and this -- this case, as

this case comes to the Court, this is how every lower court has been handling the problem. In order to have -- not to eliminate the Bivens actions entirely, which certainly is not an implausible reading of this Court's decisions, but instead telling a plaintiff you can have your cause of action in these circumstances but, given the protection that the defendant must have under this Court's immunity decisions, you're going to have to come up with something a little bit --

QUESTION: May I ask you another question? In this case there was an alternative common law count for defamation as well, which I gather there's no Federal jurisdiction, as that's with -- that's why the whole case is dismissed. But assume there was an independent base -- say, there was a diversity as well as Federal question jurisdiction and discovery then would proceed on the malice aspects of the defamation claim. Could the results of that discovery be used by the plaintiff to defeat the qualified immunity claim or are you entitled to an initial dismissal of that?

MR. LAZERWITZ: Under our -- under our position I think your hypothetical is somewhat implausible. But assuming it would --

QUESTION: Why is it implausible? I -- if there had been jurisdiction, they surely would have taken

discovery to support the definition -- defamation claim, and it might well have revealed the facts that they're now being denied access to it.

MR. LAZERWITZ: I think to be perfectly candid with you, Justice Stevens, that the -- an immunity defense is a defense to the Federal cause of action, and he's -- and the defendant in those circumstances is entitled --

QUESTION: Even though the record after -- after the issue is raised develops sufficient factual material to show --

MR. LAZERWITZ: Sure.

QUESTION: -- that if the defense should fail?

MR. LAZERWITZ: Sure, but that's a by-product of an immunity. I mean, immunity is raised by people that might otherwise be --

QUESTION: No, no, no. But this -- these are facts which would show that you're not entitled to the immunity, not that you've committed a constitutional wrong.

MR. LAZERWITZ: No, we -- again --

QUESTION: You'd still say you can't look at those facts?

MR. LAZERWITZ: Right. Because the immunity under -- in the Federal cause of action has to mean -- has to mean something. If not, then it's not an immunity.

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QUESTION: No, but it doesn't -- in Justice Steven's hypo, it seems to me that it doesn't mean anything, because the reason for the immunity at the stage we're talking about is to prevent the litigation, not merely recovery, but to prevent litigation. And on his hypothetical, the litigation is going to go on, because you're going to have discovery on the defamation claim anyway. So the whole policy of applying the immunity doctrine at that point would be negated by your other cause of action.

MR. LAZERWITZ: Well, there -- I mean, two responses. One is and I'll repeat it. The Federal defendant has a right not to be -- not to be sued on that cause of action. The fact that he might in the hypothetical be sued under a common law cause of action is essentially beside the point.

And second, under the Westfall Act, there wouldn't be Federal -- there wouldn't be common law actions against the individual defendant. In fact, this case shows that. While the case was in the court of appeals -- was pending in the court of appeals, the United States filed a motion to substitute -- excuse me -- the United States for the common law actions, so that -- that's all been put on hold. But --

QUESTION: Mr. Lazerwitz, I have to take issue

with your statement that on a hypothetical I give you the defendant has a right not to be sued. The only thing he has -- he doesn't have such right if the facts are as I described them. He just has a rule of law that prevents the plaintiff from getting access to the facts that would show he had no right to the immunity. He has no right not to be sued if the facts are as I describe them. It's just that he couldn't prove them at the particular point in the procedural development of the case that you say is essential.

MR. LAZERWITZ: Well, with respect, Justice Stevens, I -- we take the position that it means a little bit more, that that is in essence what the immunity is all about, that you have the right -- you have the defense not to be in court. And it's our obligation to make sure that Federal defendants use that -- keep them out of court as quickly as possible. Because as the Court has recognized, subjecting Federal officials to such has some social costs: diverts their attention from their job; it might deter other people from taking positions.

And this particular case is a perfect example. The case has been going on for almost 5 years. And it's -- as Justice White mentioned before, it should have been thrown out of court way back when. And it's still here.

QUESTION: Of course, if they'd taken a

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deposition right away, it probably would have been.

MR. LAZERWITZ: Yes, but again --

(Laughter.)

MR. LAZERWITZ: -- he has the right not to have his deposition taken. And one concern that we have, and not necessarily in this case, but if you give a little bit of discovery, the district judge might say, oh, come on, you gave us something. Let's have a little bit more.

And in this particular case, the -- I differ with my opponent. Judge Sporkin did not say that this is enough to go to the jury in a summary judgment context. He said just the opposite. He said there isn't enough to go to the jury at all, but I think I'd like to have some clarification. It's our position that that sort of clarification, although it might seems innocuous in any given case, is precisely what the immunity defense is designed to foreclose.

QUESTION: Well, if, if the malice you're talking about is what you said before, namely knowledge of falsity, is the -- must the plaintiff be stuck with -- if you're making a motion for summary judgment supported by an affidavit. He says, I did not know. I did not know what I said was false at all. Now, is the plaintiff stuck with that?

MR. LAZERWITZ: Well, the plaintiff then has to

present some facts that would tend to call into question that assertion. And if the --

QUESTION: Without any discovery?

MR. LAZERWITZ: If the plaintiff can't do that, then the plaintiff has to file a Rule 56(f) affidavit, which wasn't filed in this case, and show the court why types of facts the plaintiff intends to get that would tend to undercut the immunity. And as I said before, there are cases where that will -- can be done. This isn't one of those cases.

QUESTION: So that's really all you're arguing for. Does that given you a whole lot, just to throw you back to Rule 56(f)?

MR. LAZERWITZ: Not much.

QUESTION: And that's the only thing wrong with this case, that it didn't get to the 56(f) stage?

MR. LAZERWITZ: Well, we took the case to the court of appeals to fight that discovery.

QUESTION: Gee.

MR. LAZERWITZ: But no, we are asking in the question --

QUESTION: We're not arguing about a whole lot then, really, here are we?

MR. LAZERWITZ: In --

QUESTION: All this plaintiff had to do was to

come in and say, hey, how can I possibly prove malice unless I get some discovery.

MR. LAZERWITZ: But that --

QUESTION: I think -- that's the mistake here. She didn't say that. And if she'd said that, the judge would say, you're right. Of course you can't prove it without some discovery; here, have discovery. That's what we're arguing about today?

MR. LAZERWITZ: No, that's what petitioner seems to say this morning. As we understood it in the briefs, the petitioner was contesting this so-called standard to begin with. Now, to the extent that that's no longer contested, fine. But as we understood the case as it comes to this Court, this case requires the Court to affirm that sort of standard that's been going on -- that's been applied in the lower courts. And we certainly think that that is something worth fighting about.

If there are no further questions, thank you.

QUESTION: Thank you, Mr. Lazerwitz.

Ms. Kraut, do you have rebuttal? You have 3 minutes remaining.

REBUTTAL ARGUMENT OF NINA KRAUT

ON BEHALF OF THE PETITIONER

MS. KRAUT: Thank you, Your Honor.

First, let me just say that in response to

Justice Stevens' comment if depositions has been taken, we would have been out of court. No, we would have gone to trial, Your Honor, because --

QUESTION: (Inaudible) he's right about that.

MS. KRAUT: All right, Your Honor.

Second -- let me just say -- make a quick comment about the fact that the Government insists that this is a reference in terms of our second question presented. The act that Gilley was asked to take was a ministerial act. And I say that because the term "job performance" -- all -- what the credential information request form asked for was all information on job performance and credential information. The word or the term "job performance," as I noted in our brief, is a bureaucratic term of art. It is recognized as such in 5 U.S.C. 4301 to 4315. Justice Scalia referred to it enumerable times as job performance in discussing the issues that arose in Fausto, and Gilley himself was a bureaucrat at the very least at Saint Elizabeths for something like 13 or 14 years. And any reasonable official looking at that form would have known that job performance meant job performance ratings, discreet information that were -- that was actually in Siegert's file --

QUESTION: Of course, if you're right on that

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contention, the mere writing of the letter is enough to prove malice.

MS. KRAUT: Absolutely. And the other thing that should be looked at is that because the form asked for all job performance and credential information, another very good indication of malice is --

QUESTION: Did you argue to the district court that this is sufficient to prove malice because job performance has this limited reading?

MS. KRAUT: Your Honor, I think that in our material facts in issue we stated that Gilley was a nonpolicy-making supervisor. And then in our opposition papers at pages 7 and 8, we said something along the lines of this was a ministerial function. So, yes, we did.

QUESTION: What kind of malice are you talking about?

MS. KRAUT: We're talking about knowledge of falsity, deliberate -- false -- the knowledge that the information --

QUESTION: What does the court of appeals' talking about when it said "unconstitutional motive"?

MS. KRAUT: I think they're talking about the same thing, Your Honor, and if you look at White --

QUESTION: Well --

MS. KRAUT: If you look at White v. Nicholls, a

case that we cited in our reply brief at page 5, there's a very interesting discussion there about what constitutes motive, what kind of information must be presented to show malice. And what they talk about is falsity plus probable cause equal malice. That's what existed in this case, Your Honor.

QUESTION: Why -- why does -- why does knowledge that job performance has this technical meaning, why does that prove malice?

MS. KRAUT: Because --

QUESTION: I mean, why -- I thought -- I know it has its technical meaning, but this guy is really bad and I really think he's really bad, and in addition to this job performance information, they ought to know that. Why does it prove malice? I don't see that.

MS. KRAUT: Well, because if you look -- you can't just look at one thing. You have to look at everything -- everything other indicia of Siegert's job performance at Saint Elizabeths was exemplary. And that in fact indicates that Gilley knew or should have known that in fact --

CHIEF JUSTICE REHNQUIST: I think you've sufficiently answered the question, Ms. Kraut.

The case is submitted.

(Whereupon, at 11:11 a.m., the case in the

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above-entitled matter was submitted.)

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#90-96 - FREDERICK A. SIEGERT, Petitioner V. H. MELVYN GILLEY

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BY Rodney Hunter

(REPORTER)