



CASE REPORT

USE OF FORCE BY POLICE DEPARTMENTS. The Ninth Circuit adopts a definition of “deadly force” comports with that of the seven other federal circuits which have considered the issue. **Smith v. City of Hemet, 394 F.3d 689 (January 10, 2005).**

I. Facts. Police officers use pepper spray, batons and a K-9 unit to restrain an uncooperative but nonresistant defendant during an investigation of a domestic violence incident. Smith then sues the department and officers for use of excessive force. Following summary judgment in favor of the department by the Federal District Court, the Ninth Circuit reversed, abandoning its prior definition of deadly force and adopting the standard uniformly imposed by the other federal circuits.

II. Applicable Law and Analysis

The use of force, deadly or otherwise, in the course of arrest has for many years been analyzed under the fourth amendment to the U.S. Constitution and its “reasonableness” standard. *Graham v. Connor*, 490 US at 395, 109 S. Ct. 1865. The definition of reasonableness and determination of whether the officer’s actions were “objectively reasonable in light of the facts and circumstances confronting them,” did not comport with the standard used in the seven other federal districts which had considered the issue. The standard adopted by the Ninth Circuit differed in two significant respects. In *Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1998) the Ninth Circuit held that deadly force means “force reasonably likely to kill” expressly refusing to add the words “or result in serious bodily injury,” a phrase which appears in the definition employed by the other courts. Similarly the Ninth Circuit deliberately chose the standard “reasonably likely” rather than the standard “creates a substantial risk” again the phrase imposed by the other courts of appeal.

The Ninth Circuit in the *City of Hemet* case has now rejected their prior position and adopted the standard imposed by the other federal circuits. Therefore, eight of the federal judicial circuits now use the same definition.

III. Conclusion. There are three practical impacts of this case. First, your police department should review its rules to make sure that they include a definition of deadly force which complies with the new uniform federal standard. For example, a definition of “deadly force” could read:

The intentional application of force through the use of firearms or other means which creates a substantial risk of death or serious bodily injury.

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A second aspect to note is the court's dicta indicating that "...while we have not in any of our prior cases found that the use of police dogs constituted deadly force, we have never stated that the use of such dogs cannot constitute such force." *City of Hemet* at 706. The court goes on to cite *Robinette v. Barnes*, a 6th Circuit decision from 1998 to the effect that "...an officer's intent using a police dog, or the use of an improperly trained dog can transform the use of the dog into deadly force." 854 F.2d 909, 913. This ruling was contrasted with the decision of another circuit that the use of a properly trained police dog in the course of apprehending a suspect does not constitute deadly force.

Finally, the move to a more "objective" standard seems to indicate that fewer excessive force claims will be disposed of on summary judgment and that more will go to trial.