

WHAT IS OFFICIAL IMMUNITY?

Official immunity is a common law doctrine that protects public officers from personal liability for civil damages sustained from wrongs alleged to have been committed while acting in furtherance of their official duties. It rests on the theory that public officers should not face personal liability exposure for doing their jobs. Official immunity is distinguishable from sovereign immunity. Whereas sovereign immunity protects government itself (e.g. state, city, town, village, etc.), official immunity protects its officers. “Sovereign immunity shields the state from suit in its own courts and confers immunity from liability for torts committed by its officers and employees. Official immunity, on the other hand, shields the state officials and employees themselves in certain circumstances.”¹ In short, sovereign immunity pertains to when a municipality is sued and official immunity to when its officers are sued.

Official immunity is not just a defense to liability, it also confers upon public officers complete immunity from suit.² Whether an officer can claim immunity under this doctrine depends on whether they are sued in their official or individual capacity. Whereas an action brought against an officer in their official capacity is a suit against the government, an action brought against an officer in their individual capacity is a suit against that particular officer. In the latter case, if the suit is successful, the officer is personally liable for any damages awarded. Official immunity therefore operates to shield public officers from the “distraction and expense of defending themselves in the courtroom”³ so that they may better serve the public.

SUING IN THE NAME OF . . .

In Vermont, state statute directs which government party a plaintiff may sue. Pursuant to [24 V.S.A. § 901](#), an action against any appointed or elected officer must be brought against the municipality in which that official serves. In those cases, the municipality sued must assume all reasonable legal fees incurred by the officer when the officer performed their duties without malicious intent. A similar but different statute, [24 V.S.A. § 901a](#), requires any suit against a “municipal employee”⁴ that stems from an act or omission performed during the scope of their

¹ *Libercent v. Aldrich*, 149 Vt. 76 at 80 (1987).

² *Billardo v. Appel*, 165 Vt. 482 at 498 (1996).

³ *Cook v. Nelson*, 167 Vt. 505 at 509 (1998).

⁴ “(M)unicipal employee’ means any person employed for a wage or salary by a municipality; a volunteer whose services have been requested by the legislative body of a municipality; a volunteer whose services have been requested by a municipal officer; or a volunteer whose services have been requested by an employee of the municipality acting within the scope of the employee's authority.” 24 V.S.A. § 901a(a).

employment to also be brought against the municipality. Essentially, these laws require suits to be brought in the municipality's name when the subject of the suit is an officer or employee acting in their official capacity. Under the dictates of both, a municipality must effectively stand in the shoes of the officer or employee sued. In other words, a municipality can only assert those defenses that would have otherwise been available to the officer or employee sued, and must waive any and all defenses that would not have been available to that officer or employee, including sovereign immunity.⁵ Typically, the only defense left for the municipality to assert is official immunity. Due to the Vermont Supreme Court's recent ruling in the [Civetti case](#) which prevents municipalities from asserting the defense of sovereign immunity in such instances, the defense of official immunity is more important to municipalities than ever before.

ABSOLUTE vs QUALIFIED IMMUNITY

Courts recognize two types of official immunity: 1) absolute or unqualified immunity and 2) "good-faith" or qualified immunity. Both immunities protect public officers from suit for their official acts and omissions. Both are also affirmative defenses which impose upon the officers claiming them the burden of justifying their application. As the name suggests, "absolute" immunity offers public officers complete protection from suit for acts committed within the scope of their official duties, regardless of whether they were performed in good faith or not. Courts employ a functional approach to applying absolute official immunity, reserving it only for those acts that are judicial, prosecutorial, or legislative in nature. Regardless therefore of whether an officer is acting in their official capacity, they are only absolutely immune when performing a judicial, prosecutorial, or legislative function. Accordingly, absolute immunity has generally only been conferred upon those that execute these functions such as judges, legislators, and executive officers. Add to this list certain municipal officers including local legislators who the U.S. Supreme Court has held are absolutely immune for their legislative activities.⁶

By contrast, qualified official immunity is, as its name suggests, "qualified" in the sense that it requires a public officer to satisfy several elements as a condition of attaining immunity. Namely, to avail themselves of its protections, officers must demonstrate that they were "1) acting during the course of their employment and ... within the scope of their authority; 2) acting in good faith; and 3) performing discretionary, as opposed to ministerial acts."⁷ Given its conditional nature, qualified immunity does not protect all public officers from civil liability, only those who meet its qualifications. The net effect is that public officers are not held

⁵ *Paul Civetti v. Selby L. Turner, Jr. and Town of Isle La Motte*, 2020 VT 23.

⁶ *Bogan v. Scott-Harris*, 523 U.S. 44 at 46 (1998).

⁷ *Libercent v. Aldrich*, 149 Vt. 76 at 81 (1987).

personally liable for any good faith acts involving the negligent exercise of their discretion. They remain liable however for their ministerial acts, acts of wanton misconduct or “bad faith”, and those acts performed beyond the scope of their legal authority. Determining whether qualified immunity applies is a multi-factored analysis. The first prong; whether a public officer was acting during the course of their employment and within the scope of their authority is easy enough to determine. Typically, it’s the resolution of the last two prongs of the test – whether the officer acted in good faith and whether their acts were discretionary in nature – on which qualified immunity will turn.

QUALIFIED IMMUNITY: THE “GOOD FAITH” TEST

Courts measure whether a public officer acted in good faith or not by applying an objective standard known as the “clearly established law” or “good faith” test. First adopted by the U.S. Supreme Court in the case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this test holds 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.”⁸ (Emphasis added.) Consequently, qualified immunity will not apply when an officer knew or should have known that their conduct violated the law. In order to tell whether an officer acted in good faith, courts will look to the objective reasonableness of the officer’s actions as measured by reference to clearly established law. Whether a law is clearly established is a threshold question in this analysis. If a law is not clearly established, then a public officer could not reasonably be expected to know of its existence and whether or not their conduct was lawful. In such an instance the good faith test is satisfied and qualified immunity may still apply. If, however, the law is clearly established and the officer cannot show that they did not know or should not have known of its existence, then they have failed the good faith test and by extension their immunity defense. This test helps ensure that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.”⁹

QUALIFIED IMMUNITY: DISCRETIONARY or MINISTERIAL?

The last prong in the qualified immunity test is whether the acts complained of are discretionary or ministerial. The general rule is that lower level public officers are immune from liability when performing discretionary acts in good faith during the course of their employment and within the scope of their authority. In contrast, public officers performing ministerial acts are not immune from suit, regardless of whether they acted in good faith. As is the case with sovereign immunity, the application of which may also depend on whether an act is

⁸ *Harlow v. Fitzgerald*, 457 U.S. 800 at 818 (1982).

⁹ *Billado v. Appel*, 165 Vt. 482 at 487 (1996).

discretionary, distinguishing between a discretionary and a ministerial act is not as simple as relying on a dictionary understanding of the words.

Not all discretionary acts are worthy of protection. Hard pressed to conceive of any act that doesn't involve the necessary exercise of at least some measure of discretion in its execution, "even if it only involved the driving of a nail[,]"¹⁰ courts will only confer immunity on those discretionary acts that require a weighing of the potential benefits and risks to the public. This necessarily requires courts to examine the specific facts of each case in light of the purposes served by qualified immunity, which is to protect public officers from exposure to personal liability that would "(1) hamper or deter those employees from vigorously discharging their duties in a prompt and decisive manner, and (2) unfairly subject employees who have a duty to exercise discretion regarding matters of public policy to the judgment of those acting within a judicial system that is ill-suited to assess the full scope of factors involved in such decision making."¹¹ In this regard, official immunity serves many of the same purposes of sovereign immunity, including preserving the separation of powers of coordinate branches of government by avoiding judicial second guessing of legislative and executive decision making. If a decision is not policy based or if it does not require the exercise of judgment in its performance, then a public officer won't have "the right to be wrong"¹² and will not be immune from suit for their negligent acts. Some examples of acts found by Vermont courts to be ministerial (i.e. not discretionary) and thus not immune from liability include working on roads¹³, repairing vehicles¹⁴, and operating snowplows.¹⁵

At first blush, the interplay between sovereign and official immunity can lead to some seemingly unfair outcomes as lower level municipal officers can be held liable for their negligent ministerial acts while the very municipalities they work for or serve are left immune. However, the absence of immunity does not prove the presence of negligence; it only means that a suit may be brought. Plaintiffs must still prove their case in order to prevail. And, as a practical matter, the Vermont Supreme Court notes there in fact typically isn't any personal liability because municipalities defend and indemnify their officers for those acts performed within the scope of their authority.

¹⁰ *Morway v. Trombly*, 173 Vt. 266 at 273 (2001).

¹¹ *Hudson v. Town of E. Montpelier*, 161 Vt. 168 at 172 (1993).

¹² *Morway v. Trombly*, 173 Vt. 266 at 273 (2001).

¹³ *Hudson v. Town of E. Montpelier*, 161 Vt. 168 (1993).

¹⁴ *Libercent v. Aldrich*, 149 Vt. 76 (1987).

¹⁵ *Morway v. Trombly*, 173 Vt. 266 (2001).

CONCLUSION

Official immunity works in tandem with its counterpart sovereign immunity to enable municipalities to function. While sovereign immunity protects the municipality itself, official immunity protects its officers from personal liability. Without official immunity, public officers would have to put their own financial well-being at risk when serving their communities. But official immunity doesn't protect everyone as it, ironically, leaves those least able to defend themselves (lower level municipal officers performing ministerial duties) vulnerable to suit. Thankfully, where the law has failed, municipalities have delivered by generously providing insurance that enables their officers to work unhampered and undeterred from fear of liability exposure.

Of course, no defense is perfect and the best protection against tort suits continues to be the exercise of reasonable care in all official activities with the goal of preventing harm from occurring in the first place. After all, if there is no harm, there can be no damages.