

Claims Against Government Entities

By

Cobby A. Caputo and Brad Young

Bickerstaff, Heath, Pollan & Caroom, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443
(512) 472-8021
ccaputo@bickerstaff.com
byoung@bickerstaff.com

I. Introduction

Litigation against governmental entities continues to increase. Often clients will ask us, “Am I going to be sued?” if a particular action is taken. The question should not be “can you be sued?” Any person with a Big Chief tablet and a number two pencil can file a lawsuit. Take the recent experience of one of our clients. One pro se former employee has filed three lawsuits against our client in the past four months. This same individual has also filed at least four other lawsuits against judges or other lawyers involved in his litigation. Clearly, anyone can be sued, even people who do not take controversial action.

The pertinent question, rather, is “If I am sued for this action, can I win?” This may not be the most comforting way to analyze the situation, but it is certainly more realistic. Happily for governmental entities in Texas, the law provides significant immunities and other defenses from liability. Equally encouraging is the fact that the law provides significant immunities and other defenses from liability in favor of governmental employees and elected officials. This paper will explore some

of the significant defenses available to governmental entities and their officers and employees under state and federal law.

II. Defenses Against Federal Claims

In federal court, the primary vehicle for suing governmental entities is a statute found at 42 U.S.C. § 1983. This provision of federal law merely states that citizens may sue units of local government in federal court to assert claims alleging violations of the United States Constitution or other laws passed by Congress. Section 1983 itself does not provide for any form of immunity or defense, but the federal courts have developed a rich and robust body of case law to define such matters.

A. Defenses to Federal Constitutional Claims Against The Governmental Entity

In *Monell v. Department of Social Services*, 436 U.S. 658, 692, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that a governmental entity can only be found liable under § 1983 in the limited circumstances where the entity itself causes the constitutional violation at issue. In *Monell*, the Court held that

respondeat superior or vicarious liability is not a basis for recovery under § 1983; thus a municipality cannot be held liable under § 1983 merely because it employs a tortfeasor. See e.g., *Gonzales v. Westbrook*, 118 F.Supp.2d 728, 733 (W.D.Tex.2000). Liability under § 1983 only attaches where a deprivation of a right protected by the Constitution or by federal law is caused by an official policy.

This then raises the question, “When is an official policy the cause of the constitutional harm?” The courts have said that such a finding can be made only in the following circumstances:

(1) A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality’s lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

(2) A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.

Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir.1984) (per curiam).

As to the former, isolated instances of official misconduct by a governmental entity’s non-

polymaking employees are inadequate to prove knowledge and acquiescence by the entity’s policymakers. *Gonzales*, 118 F.Supp.2d at 734. However, sufficiently numerous prior incidents of official misconduct may tend to prove a custom and accession to that custom by municipal policymakers. *Id.*

A claim of a violation of § 1983 pursuant to the latter form of official policy - a persistent, widespread practice of city officials or employees - may in an appropriate case also encompass allegations that a policymaker failed to act affirmatively, including a failure adequately to train a subordinate.

A plaintiff must necessarily establish knowledge on the part of a policymaker that a constitutional violation will most likely result from either an official custom or an actual policy to state a claim under § 1983. Thus, to hold a governmental entity liable under § 1983 a plaintiff must demonstrate “[a]ctual or constructive knowledge of such custom ... attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.” *Bennett* 735 F.2d at 862.

Where an official policy or well-established practice is clearly unconstitutional on its face, it follows that the policymaker was not only aware of the specific policy, but was also aware that a constitutional violation will most likely occur. *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir.2001). However, when an alleged policy or custom is facially neutral, establishing the requisite official knowledge requires that a plaintiff prove that an official

policy was “promulgated with deliberate indifference to the ‘known or obvious consequences’ that constitutional violations would result.” *Id.* at 579.

The knowledge requirement applies with equal force where a § 1983 claim is premised on a failure to train or to act affirmatively. Thus, a governmental entity can only be found liable under § 1983 for a failure to train only where the plaintiff establishes that:

(1) The government failed properly to train or supervise the officers involved; and

(2) There is a causal connection between the alleged failure to supervise or train and the alleged violation of the plaintiff’s rights; and

(3) The failure to train or supervise constituted deliberate indifference to the plaintiff’s constitutional rights. *Thompson v. Upshur County*, 245 F.3d 447, 459 (5th Cir.2001).

As the Court noted in *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 1204 (1989), “[t]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”

There is also an extremely limited exception, as noted in *Brown v. Bryan County*, 219 F.3d 450 (5th Cir.2000), *pet. for reh’g en banc denied*, 235 F.3d 944 (5th Cir.2000). That exception recognizes that in a very limited set of cases, a plaintiff

who is unable to show a pattern of constitutional violations may establish deliberate indifference by “showing a single incident with proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights.” *McClendon v. City of Columbia*, 258 F.3d 432, 442 (5th Cir.2001).

This single incident exception, however, is a narrow one, and one that the courts have been hesitant to expand. As the Fifth Circuit noted in *Pineda v. City of Houston*, 291 F.3d 325, 334- 35 (5th Cir.2002), “Charged to administer a regime without *respondeat superior*, we necessarily have been wary of finding municipal liability on the basis of [the single-incident] exception for a failure to train claim.” Accordingly, the exception will apply only in the limited case where the facts giving rise to the violation are such that it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy or failure to train. *Bryan County*, 219 F.3d at 461.

B. Qualified Immunity Applied to Federal Claims Against Individuals

Generally a governmental employee or elected official will be sued under § 1983 in their individual capacity. This means the plaintiff seeks to impose liability not on the governmental entity itself, but rather on the individual being sued. In response to such suit, the United States Supreme Court created a form of qualified immunity for governmental officials sued in their individual capacities under § 1983. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Because this form of immunity was

created by the Supreme Court, it is not found in a code or statute. The courts originated the doctrine, and the courts continue to modify and evolve the doctrine of qualified immunity as cases are presented to them.

Government officials performing discretionary functions have qualified immunity from claims for damages so long as the official's conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have been aware. *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738; *Wilson v. Layne*, 526 U.S. 603, 614, 119 S.Ct. 1692, 1699, 143 L.Ed.2d 818 (1999) Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

Whether an official can be held personally liable for taking an allegedly unlawful action turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time the action was taken. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987). Qualified immunity shields an officer if a reasonable officer could have believed the action to be lawful in light of clearly established law and the information the officer possessed. *Anderson*, 483 U.S. at 641, 107 S.Ct. at 3040; *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991).

When applying this immunity to the facts of a case, the court will engage in a two-part test:

- (1) whether the plaintiff has alleged a violation of

a clearly established constitutional right; and

- (2) whether the official's conduct was objectively reasonable at the time of the incident.

Wilson, 526 U.S. at 609, 119 S.Ct. at 1697; *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001).

The threshold question is whether the facts show that the official's conduct violated a constitutional right. *Saucier*, 533 U.S. at 201, 121 S.Ct. at 2156. In this stage of the analysis, the courts will review the facts in the light most favorable to the party asserting the injury. If the facts do not show a constitutional violation, the official is entitled to immunity and the claims against him or her should be dismissed. If, on the other hand, violation of a constitutional right is shown by the facts alleged, the court must proceed to the next step of the analysis to determine whether that right was clearly established at the time of the alleged violation.

In analyzing this second part of the analysis, "the right ... alleged to have [been] violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). In this analysis, the courts do more than merely look to see if previous cases have held that the exact same facts implicate a violation of the constitution. The previous cases do not

have to include exactly the same facts as the case being considered. The courts have held that a governmental official can be on notice that conduct violates clearly established law in novel factual scenarios provided that the state of the law gave them “fair warning that their [conduct] was unconstitutional.” *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

Finally, assuming there has been a constitutional violation alleged, and assuming the right was so clearly established that a reasonable official should have known his conduct could violate that right, the court then consider whether the official’s conduct was objectively reasonable. “[E]ven if a defendant’s conduct actually violates a plaintiff’s constitutional right, the defendant is entitled to qualified immunity if the conduct was objectively reasonable.” *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir.1990).

The standard applied here is: “[a] defendant’s acts are held to be objectively reasonable unless all reasonable officials in the defendant’s circumstances would have then known that the defendant’s conduct violated the United States Constitution or the federal statute as alleged by the plaintiff.” *Thompson v. Upshur County*, 245 F.3d 447, 457 (5th Cir.2001). The emphasized word in that quotation is the key to presenting this defense. We have merely to show that some officials in same or similar circumstances could have believed the conduct in question was legal, and we can still take advantage of the immunity defense.

III. Defenses to State Law Claims

The cases that get filed in state court generally do not involve

constitutional claims. This is because the Texas Supreme Court determined in 1995 that violations of the Texas Constitution do lead to monetary relief. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 147-49 (Tex.1995). Not surprisingly, plaintiff’s lawyers stopped bringing claims under the Texas Constitution very soon after this ruling came down. The great majority of the claims brought in state court are for simple common law torts. Over the years, the common law developed a pair of immunities for such claims in order to protect the public treasury from enterprising lawyers. As a matter of public policy, the courts decided it was bad to allow unfettered claims against the government. Thus, sovereign immunity was imported from English common law to protect governmental entities, and qualified immunity was developed to protect public officers and employees who are merely performing their duties as best they can.

A. Sovereign Immunity And The Tort Claims Act

The doctrine of sovereign immunity provides that state entities, including cities, cannot be sued absent a waiver of sovereign immunity. *Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex.1999) (per curium); *Fed. Sign. v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex.1997). Sovereign actually consists of two different forms of immunity. First is immunity from suit, which bars a suit unless the state entity has consented to be sued. The second component is immunity from liability, which protects the state (and its political subdivisions) from judgments even if it has consented to the suit.

Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371, 374 (Tex.2006).

However, sovereign immunity only applies to a city's governmental functions, which have been defined as functions "in the performance of purely governmental matters solely for the public benefit." *Tooke v. City of Mexia*, 197 S.W.3d 325, 343 (Tex.2006). Thus, if a city is engaged in a proprietary function, the sovereign immunity defense is not available and the city is liable to the same extent as a private entity or individual. *Dilley v. City of Houston*, 148 Tex. 191, 193, 222 S.W.2d at 993. This distinction obviously raises the issue of what makes a particular act governmental or proprietary in nature.

Traditionally, "generally speaking, a municipality's proprietary functions are those conducted 'in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government.'" *Tooke*, 197 S.W.3d at 343. However, the Legislature has acted in this area as well, and has defined several municipal functions as governmental, no matter how the common law would have characterized them. As the Texas Supreme Court explained in *Tooke*, the "Texas Constitution [Article XI, § 13] authorizes the Legislature to 'define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law.'" *Id.*

Therefore, a municipality engaged in a function defined by the Legislature to be governmental is entitled to sovereign immunity, unless the Legislature has waived that immunity (even for governmental

functions). The Texas Tort Claims Act provides a long list of city services that are "governmental" functions, such as: police and fire protection; health and sanitation services; airports; water and sewer services; museums; parks and zoos; tax collection; street construction and design and hospitals. Tex. Civ. Prac. & Rem. Code Ann., § 101.0215(a).

In the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code § 101.001 *et seq.*, the Texas Legislature has waived this sovereign immunity in certain limited instances. The state, its political subdivisions, and other governmental units can be held liable for personal injury, property damage, or death due to:

- (1) The negligence of an employee of the governmental unit operating or using a motor vehicle or motor driven equipment; or
- (2) A condition or use of tangible personal or real property, if such condition or use would make a private person liable.

Tex. Civ. Prac. & Rem. Code § 101.021.

Finally, even if immunity from liability has initially been waived, exceptions to the waiver of immunity from liability may exist so as to ultimately preserve sovereign immunity. Tex. Civ. Prac. & Rem. Code Ann. §§ 101.051-.066 (Vernon 2005). One such exception is found at § 101.056 which states:

This chapter does not apply to a claim based on:

- (1) the failure of a governmental unit to perform an act

that the unit is not required by law to perform; or

- (2) a governmental unit's decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit.

Id. § 101.056.

Thus, to establish subject-matter jurisdiction pursuant to the TTCA, a plaintiff must not only allege sufficient facts to establish a waiver of immunity under § 101.021, but also avoid alleging facts that would support an exception to the waiver pursuant to § 101.051 through § 101.066. *City of San Augustine v. Parrish*, 10 S.W.3d 734, 739-40 (Tex.App.-Tyler 1999, pet. dismissed). It is important to remember in analyzing this statute that the Tort Claims Act does not create immunity. It provides for waivers of the immunity all governmental entities enjoy.

B. Qualified Immunity for Individuals Under State Law

Government officers and employees in Texas are entitled to official immunity from suit arising from the performance of their:

- (1) Discretionary duties;
 - (2) When acting in good faith;
- and
- (3) Within the scope of their authority.

Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex 1994); *Kassen v. Hatley*, 887 S.W. 2d 4, 8 (Tex 1994). This is another common law form of immunity. There is no statute or other law that defines the parameters of this defense. Of course, the courts have defined it and continue to modify the elements.

In determining the first element of official immunity (*i.e.*, whether suit arises from the employee's performance of a discretionary duty), the court must look to whether the employee performs a discretionary function. *Lancaster*, 883 S.W. 2d at 653. An employee performs a discretionary function if his actions involve **personal deliberation, decision, and judgment**. *Id.* at 654. If the officer or employee is required to perform job duties that are not prescribed to be performed with such precision and certainty as to leave nothing to the exercise of his or her personal judgment, the actions are discretionary. Put another way, "Ministerial actions require obedience to orders or the performance of a duty as to which the actor is left no choice of his own." *Koerselman v. Rhynard*, 875 S.W.2d 347, 350 (Tex.App.—Corpus Christi 1994, no writ).

In determining the second element of official immunity (*i.e.*, whether the employee acted in good faith), the court tests whether a reasonable public employee could have believed his or her conduct to be lawful in light of the information possessed by the official at the time the conduct occurred. *Lancaster*, 833 S.W. 2d at 656. This standard of good faith is not a test of carelessness or negligence, or a measure of an official's subjective motivation. *Ballantyne v. Champion Builders, Inc.*, 144 S.W. 3d 417, 426-

428 (Tex. 2004). The test does not inquire into “what a reasonable person would have done,” but into “what a reasonable person could have believed.” *Id.* Additionally, the *Ballantyne* Court held that “When a public official considers two courses of action that could reasonably be believed to be justified, and selects one, he satisfies the good faith prong of official immunity as a matter of law. The inquiry is not what was the best course of action, but whether the [defendants] could have believed their actions were justified at the time they were taken.” *Id.*

Finally, the officer or employee must be acting in the course and scope of his or her job duties. The courts will generally look at job descriptions and other objective indicators of the person’s responsibilities, including police manuals, employment handbooks and other departmental documents that define aspects of the employment relationship. A question that sometimes comes up has to do with whether the employee’s failure to abide by the rules set out in an employment handbook or other departmental guideline defeats the element of acting in course and scope of employment. In answering this question, the courts have been most generous. As held in *Harris County v. Ochoa*, 881 S.W.2d 884, 888 (Tex.App.—Houston [14th Dist.] 1994, writ denied), “The fact that the specific act that forms the basis of the suit may have been wrong or negligent does not mean they were acting outside the scope of their authority.”

IV. Conclusion

In conclusion, both governmental entities and their officers and employees enjoy immunity from many

of the claims through which plaintiffs seek to hold them liable. Although governmental entities do not often have “deep pockets” in the way that large corporations do, there is a perception among some members of the public that, “I pay my taxes, so the county/city/district/[insert governmental entity here] owes me something for my injuries.” For that reason, governments find themselves in the unenviable position of being lawsuit magnets. These issues can be difficult to navigate, and your first line of defense is the assistance of competent counsel.

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