

# User's Guide to Qualified Immunity

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## **Governmental Liability: A Sizeable Shield**

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Qualified immunity is a valuable tool to protect governmental employees not only from the threat of personal liability, but also from the trouble and expense of defending a lawsuit entirely.

Qualified immunity insulates governmental officials from liability for civil actions arising from discretionary conduct taken under the color of law as long as their conduct does not violate clearly established rights of which a reasonable person in their position would have known.

The U.S. Supreme Court has declared that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Further, "officials are immune unless the law clearly proscribed the actions they took." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). Qualified immunity is a defense available to state and local officials and employees under 42 U.S.C. §1983 and to federal officials under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

## **Initial Considerations**

One of the first questions that an attorney should ask when confronted with a complaint against a governmental employee is whether a plaintiff has asserted a liability claim against the employee personally, at all. Governmental employees may be sued in two capacities: an official capacity or an individual capacity, sometimes called personal capacity.

Official capacity claims do not impose personal liability on employees. Instead, an official capacity claim is treated as a claim against the governmental entity that the individual represents. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n.55 (1978) (stating that official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent."). As explained by the Supreme Court in *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985):

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As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. (internal citation omitted).

Qualified immunity is only a defense to actions seeking to hold individual defendants personally liable for their actions taken under the color of law. It does not apply to official capacity actions, which require a showing that the individual acted in accordance with a policy or custom of the governmental entity, and the policy was the "driving force" behind the alleged constitutional or statutory violation. *Monell*, 436 U.S. at 694; *Oklahoma City v. Tuttle*, 471 U.S. 808, 817–818 (1985). Sovereign immunity may also bar a plaintiff's official capacity claims.

Conversely, the policies and customs of a governmental entity are irrelevant when the personal liability of a governmental employee is at issue. Whether an individual governmental employee followed or violated policies does not matter: "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 194 (1984). For this reason, counsel for a defendant sued in his or her individual capacity should seek to bifurcate individual liability claims from the claims against the governmental entity, particularly when the individual's conduct may have violated government protocols, so as to prevent their admission at trial against the individual employee.

The distinction between official and individual capacity, in addition to affecting the nature of the potential claims, also affects the ramifications of a verdict or a judgment. A plaintiff who obtains a verdict against a governmental employee in his or her personal capacity cannot then seek to collect the judgment from the related governmental entity. The Supreme Court has ruled that a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him. Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense. That a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone from a nonparty. *Kentucky v. Graham*, 473 U.S. 159, 167–68 (1985).

A judgment against a governmental employee also cannot constitute res judicata or support collateral estoppel with respect to claims against a municipal or other government entity and vice versa. *Warnock v. Pecos County*, 116 F.3d 776 (5th Cir.1997); *Mitchell v. Chapman*, 343 F.3d 811, 823 (6th Cir. 2003); *Conner v. Reinhard*, 847 F.2d 384, 395 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988); *Headley v. Bacon*, 828 F.2d 1272, 1277–79 (8th Cir.1987). Defense counsel should remain cognizant of the effects of these different capacities and carefully review pleadings to determine, precisely, the claims

that plaintiffs have asserted and the type of relief sought.

While most experienced plaintiffs' attorneys will specifically indicate in a complaint whether the plaintiff intends to assert official or individual capacity claims or both, there are times when a complaint does not make this clear. When faced with a vague complaint, most jurisdictions apply a "course of proceedings" test to determine whether a governmental official is being sued in his or her official or individual capacity with two exceptions. In the Ninth Circuit, the courts presume that a plaintiff has sued the defendant in his or her individual capacity, and in the Eighth Circuit, the courts assume in the face of a silent complaint that a plaintiff only intends to assert an official capacity claim. See generally *Moore v. City of Harriman*, 272 F.3d 769 (6th Cir. 2001) (listing decisions from various jurisdictions); *Biggs v. Meadows*, 66 F.3d 56 (4th Cir. 1995) (same).

The "course of proceedings test" questions whether the complaint allegations, either alone or sometimes combined with other documents filed in a case, provide the governmental officer or employee defendant with notice that he or she is being sued personally. One factor that courts view as relevant to whether or not a defendant received notice is how a complaint identifies an individual defendant. When a complaint identifies a defendant by his or her title, such as "Sergeant Jones," rather than his or her personal name, it signals to a court that a plaintiff has alleged an official capacity claim.

Similarly, the use of "the officers" rather than "the individual defendants" suggests that a plaintiff has not asserted a claim for personal liability. Courts also view allegations that an individual or individuals acted in line with a policy or custom as a hallmark of an official capacity claim, while a complaint that alleges that one or more individual defendant acted "for themselves" are viewed as indicative of a personal capacity claim. The type of damages that a plaintiff seeks also is instructive. A plaintiff cannot assert punitive damages against states or municipalities and such damages cannot be recovered with official capacity claims. Compensatory damages are also barred against sovereign entities, but not against their employees.

Unfortunately for defense counsel, whether or not an individual defendant has pleaded qualified immunity as a defense can also be a relevant factor for a court in determining whether the individual defendant received notice of a personal capacity claim. So a defendant has a "catch-22" quandary – waiving qualified immunity by failing to plead it as a defense in the event that a court finds that the complaint contains a personal capacity claim, or pleading qualified immunity and ensuring that a personal capacity claim exists, even if the plaintiff previously did not intend one. Perhaps the best practice when presented with an ambiguous complaint is to plead both municipal and individual defenses, thereby minimizing the inference of notice a court can draw from the asserted defenses. See *Biggs*, 66 F.3d at 61 ("Examining the course of proceedings, the defendants asserted, among other defenses, that they are entitled to qualified immunity. ... On the other hand, the defendants also raised the issue of Eleventh Amendment immunity, so this factor is accorded less weight than otherwise would be the case.").

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Once defense counsel has determined that a plaintiff has alleged an individual liability claim, the defendant must plead qualified immunity as an affirmative defense. The defendant has the burden of pleading that qualified immunity exists. *Gomez v. Toledo*, 446 U.S. 635, 639–41 (1980).

However, “[o]nce a §1983 defendant pleads qualified immunity and shows that he is a governmental official whose position involves the exercise of discretion, the plaintiff bears the burden of rebutting this defense by establishing that the official’s wrongful conduct violated clearly established law.” *Herrera v. Med. Ctr. Hosp.*, 241 F. Supp. 2d 601, 615 (E.D. La. 2002). See e.g., *Pierce v. Smith*, 117 F.3d 866, 871–72 (5th Cir. 1997); *Camarillo v. McCarthy*, 998 F.2d 638, 640 (9th Cir.1993); *Spivey v. Elliott*, 29 F.3d 1522, 1527 (11th Cir. 1994), *on reconsideration*, 41 F.3d 1497 (11th Cir. 1995).

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