

Revisiting the Limits of Commonwealth Employee Immunity

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Special to the Legal

On March 3, a federal jury sitting in Philadelphia sent shock waves through the halls of Harrisburg when it found four employees of the Pennsylvania Department of Environmental Protection (DEP) personally liable for violating a steel wool manufacturer's federal constitutional and state law rights, and awarded the company \$6.5 million in damages. The court rejected a number of the employees' defenses, including sovereign immunity and qualified immunity.

This article will examine the nature and limits of these immunities as demonstrated by this controversial case, and how it may impact commonwealth agencies.

CLAIMS AGAINST EMPLOYEES

In its complaint, MFS Inc., a mineral wool manufacturer, asserted two federal constitutional claims under the Civil Rights Act, 42 U.S.C. § 1983. First, MFS alleged the DEP employees retaliated after MFS exercised its rights of freedom of speech and freedom to petition the government for redress of grievances.

MFS claimed that beginning in 2003, in response to MFS petitioning state legislators for assistance with allegedly improper DEP actions, the DEP employees issued 13 insufficiently established malodor Notice of Violations (NOV) to MFS while not issuing any to other potential malodor sources nearby; made false and inflammatory statements regarding MFS at public meetings and to an MFS customer; and demanded that MFS install costly emissions controls, notwithstanding that the U.S. Environmental Protection Agency had previously determined the controls were not appropriate. The EPA had done so with a consent order entered in federal court. The DEP employees filed and then withdrew objections that MFS should be subject to those controls and was a source of malodors.



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In a pretrial order, the court held the two-year statute of limitations barred the claim of retaliatory conduct with respect to MFS's allegations of retaliatory actions from 2003 through May 29, 2006. However, MFS's retaliation claim was also based on subsequent allegedly improper conduct, including that after MFS had sought a meeting with the secretary of the DEP in late 2007, the DEP employees provided the secretary with a grossly misleading briefing memorandum in preparation for the meeting; advised MFS that, due to the malodor and emissions control issues, the DEP would not be renewing MFS's air emissions Title V Operational Permit; and drafted a renewal permit containing two improper conditions — that the DEP be allowed to immediately shut down the MFS facility if the DEP unilaterally decided to issue another malodor NOV, and that MFS install the costly emissions controls that previously the EPA had agreed were not required.

The DEP dropped those conditions after MFS filed its action; however, the DEP never took a final action on MFS's renewal application. The court held the statute of limitations did not bar these claims, but also held one of the DEP employees was not subject to them, because he had retired prior to their occurrence.

The second federal constitutional claim was for the DEP employees' alleged violations of MFS's procedural and substantive due process rights, and its right to equal protection. These claims related to MFS's right to pursue an occupation without undue governmental interference, and MFS's right to use its property for that purpose. MFS alleged that the DEP employees effectively denied MFS's Title V permit without any opportunity for appeal, thus preventing MFS from operating the facility. In doing so, the DEP employees had treated MFS differently than other potential malodor sources. MFS determined it could not reasonably operate the facility in the face of the DEP employees' wrongful conduct, and voluntarily ceased operations.

Finally, MFS's state law claim alleged intentional interference with prospective contractual relations. MFS asserted the DEP employees hampered MFS's ability to re-establish contracts with suppliers and customers, and dissuaded another company from purchasing the facility.

In pretrial rulings, the court held MFS's due process, equal protection and state law claims alleged continuing violations that equitably tolled the otherwise applicable statute of limitations. In addition, the court determined MFS could have established that the DEP employees were upset with MFS as early as 2003 for petitioning state officials, and that one employee admitted to being "pissed off" because MFS had "gone over his head." Therefore, the court determined a reasonable jury could find the DEP employees retaliated against MFS and intended to avoid renewing MFS's Title V permit and cause the facility to cease operating. Of course, the DEP employees disputed many of the above allegations.

SOVEREIGN IMMUNITY

Commonwealth agencies and employees generally enjoy statutory sovereign immunity against state claims of wrongdoing. According to 1 Pa. C.S.A. 2310, "the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to

enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly specifically waives sovereign immunity ...” In pre-trial motions, the DEP employees argued they were acting within the scope of their employment because they were acting on behalf of the DEP. MFS argued the DEP employees were not immune from suit, because they had acted outside the scope of their employment.

In defining “conduct within the scope of employment,” Pennsylvania has adopted the Restatement (Second) of Agency Section 228, which provides, “[c]onduct of an employee is within the scope of employment only if: (1) it is of the kind that the employee is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is calculated at least in part, by a purpose to serve the employer; and (4) if force is intentionally used by the employee against another, it is not unexpected by the employer.”

The court recognized that although the standard is high, an employee acting on behalf of an employer can exceed the scope of his or her employment. Based on the evidence in MFS’ motion papers, the court found a reasonable jury could conclude that the conduct of the DEP employees was “outrageous” or “abnormal,” not done with intent to perform their public duties, and instead done to harm MFS. In fact, the jury ultimately found that the four DEP employees had acted outside the scope of their employment, and had intentionally interfered with existing or prospective contractual relations of MFS.

QUALIFIED IMMUNITY

In addition to sovereign immunity, the DEP employees also claimed in pre-trial motions that they were immune from suit on MFS’s constitutional claims under the doctrine of qualified immunity, which protects government officials from liability for civil suit damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In resolving claims of qualified immunity, a court must decide whether the facts alleged or shown by a plaintiff make out a violation of a constitutional right; and whether that right was clearly established at the time of the defendant’s conduct (e.g. would a reasonable official know that his or her conduct was unlawful or unconstitutional).

After review of each of the specific constitutional claims asserted by MFS, the court concluded a reasonable jury could find the

DEP employees had violated MFS’s constitutionally protected rights, and that these violations were clearly established. The court noted the outcome of a qualified immunity determination in this case hinged upon the intent of the DEP employees, and that MFS had presented sufficient evidence of retaliatory conduct to raise a genuine issue of material fact as to the intent and motive behind Defendant’s conduct. Except for the claims dismiss as noted above, the jury ultimately found the DEP employees had committed each of the constitutional violations alleged by MFS, the DEP employees’ conduct was not based on a reasonable mistake of fact under the circumstances, and the DEP employees did not reasonably believe their conduct was proper under the laws of Pennsylvania and the United States.

PENDING DETERMINATION

Notwithstanding the verdict, the final legal outcome of this action remains to be seen. In response to pre-trial motions, the court noted the jury is not necessarily the last word on qualified immunity. While the court acknowledged the determination of what motivated the DEP employees is purely factual and must be resolved by the jury, the court also noted the ultimately determination of qualified immunity is a matter of law which must be resolved by the court. “Once the jury has resolved the issues of fact, however, the court, as a may resolve the ultimate question; whether qualified immunity applies.”

With the jury’s verdict and the court’s qualifiers fresh in their minds, the DEP employees have moved to have the court overturn the jury’s verdict. If the court does not, the DEP employees are certain to appeal.

IMPACTS OF THE DECISION

What is less certain, however, is what impact this decision will have on the way the DEP and other commonwealth agencies go about their business. Almost certainly, whether or not the court concludes qualified immunity protects the DEP employees, commonwealth agencies will more closely examine their employees’ activities with an eye toward preventing potential constitutional violations, interferences with contractual rights and other harms.

More specifically, the jury’s findings will likely cause agencies to more carefully ensure that employees’ accusations, made both to non-agency individuals and to their superiors, are correct and free of potentially illicit bases. Because juries can infer intent, agencies will have to look beyond stated bases for

actions recommended by employees. Even properly justified activities, when made in the context of careless factual assertions and expressions of personal animosity, may later appear to have been based on improper intent.

For example, the chief problem with the briefing memorandum to the DEP’s secretary was apparently that the jury believed, based in part on certain DEP employees’ expressions of animosity, that it was purposely misleading and designed to taint MFS’s petition to the secretary for redress.

Additionally, agencies will probably be more careful to follow proper procedures when making findings adverse to regulated entities. The problem with the NOV’s issued to MFS was that they were largely based on the complaints of one citizen, rather than on concurrent complaints of three citizens with the concurrence of a DEP employee, as required by regulation. Agencies also will likely make greater efforts to ensure that, before relying on accusations of wrongdoing as the basis for permitting actions, they allow the accused a meaningful opportunity to dispute the accusations.

For example, with respect to MFS, the NOV’s were not appealable actions, and therefore did not provide MFS with an opportunity to dispute them. Thus, to rely on the NOV’s as a basis for denying MFS’s permit, DEP might have either first issued one or more appealable orders based on those NOV’s, or expressly denied the permit on that basis and allowed MFS to file an appeal.

In the end, whether or not the DEP employees are held to be protected by qualified immunity, commonwealth agencies will likely make greater efforts to anticipate how their employees’ actions may subsequently be viewed. •

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