



Private Attorney Hired by City Enjoys Qualified Immunity

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In a recently issued opinion, the U.S. Supreme Court held that an attorney hired to perform an internal investigation was entitled to seek the protection of qualified immunity. *Filarsky v. Delia*, 132 S.Ct. 1657 (2012). The case involved the City of Rialto, California. Rialto hired an experienced employment law attorney Filarsky on a limited basis to investigate a firefighter it suspected was taking advantage of its sick leave policy. Filarsky demanded that the firefighter produce evidence that he was not working at home while taking sick leave from work. The firefighter complied, but then sued under 42 U.S.C. §1983 for violation of his Fourth and Fourteenth Amendment rights.

The firefighter sued multiple city officials and Filarsky; the District Court granted summary judgment in favor of all defendants based upon qualified immunity. The Court of Appeals for the Ninth Circuit affirmed that decision for all defendants, except Filarsky, finding that “because he was a private attorney and not a City employee, he was not entitled to seek the protection of qualified immunity.” *Id.* at 1661 (citing *Delia v. Rialto*, 621 F.3d 1069, 1080-1081). The Ninth Circuit noted that its decision conflicted with Sixth Circuit on this question, but considered itself bound by its own precedent. *Id.* (citing *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997)). The Supreme Court granted Filarsky’s petition for certiorari.

To determine if a occasional or part-time governmental actor was to be afforded the protections of qualified immunity enjoyed by their full-time counterparts, the Court analyzed the common law regarding private individuals exercising governmental powers. Noting that Congress passed §1983 in 1871, it examined the common law that existed at that time. The Court found that many private citizens, such as prosecutors, judges, sheriffs and notaries, were engaged in government work on a part-time basis. At that time, the common law granted these part-time governmental officials “absolute immunity from suit.” *Id.* at 1661-1662.

As a general rule, common law immunities are “not to be abrogated absent clear legislative intent to do so.” *Id.* at 1665 (citing *Pulliam v. Allen*, 446 U.S. 522, 529, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984)). The Court examined this issue and concluded that §1983 did not change the existing common law immunities. *Id.* at 1662.

The rationale for granting immunity to part-time governmental actors is to give such persons the ability to act without fear of suit, and to attract the best people to such positions. Should a successful attorney fear suit for undertaking

occasional or part-time governmental work, then she might avoid it. Granting such persons qualified immunity benefits government. “Allowing suit under §1983 against private individuals assisting the government will substantially undermine an important reason immunity is accorded public employees in the first place.” *Id.* at 1666.

In its conclusion, Justice Roberts acknowledged that today many large cities have full-time paid staff to perform most functions, and that these staff members enjoy qualified immunity. Smaller cities, however, “must rely on the occasional services of private individuals,” and there is no reason such persons should “be denied qualified immunity enjoyed by the ones who work for” larger cities. *Id.* at 1668.