

**Ohio Commission On Hispanic and
Latino Affairs Retreat
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**LEGAL LIABILITY: IMMUNITY,
INDEMNIFICATION, OHIO COURT OF
CLAIMS, AND REPRESENTATION BY
ATTORNEY GENERAL**

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Introduction

One of the first questions which may come to the mind of a prospective or newly appointed member of any organization, especially a governmental one, is "What is my potential personal liability in connection with my activities?" The threat of or the actual filing of a lawsuit in which a state commission member in Ohio is named as a defendant in his or her personal or individual capacity can be an aggravating and difficult experience. Fortunately, Ohio law provides significant protection to you as a Commission member.

This handout addresses the situation where a member of the Commission is sued in his or her individual capacity, with the possibility of personal liability. It is intended to provide a general discussion of the relevant provisions of law and not to be a detailed discussion of how those provisions might apply to a particular claim, either threatened or pending. It is important for members to discuss particular issues or questions with one of the Assistant Attorney Generals that represents the Commission.

A. *Immunity*

State officers such as members of a state commission may be sued in either their official or individual capacities. When they are sued in their official capacities, the civil action will be treated as one against the State, and no personal liability will be imposed.

Even if a suit is brought against a Commission member in his or her individual capacity, state law contains several provisions that protect state officials in most circumstances.

The members of the Commission and the people who assist them are particularly well-protected under Ohio law. Ohio's Local Fiscal Emergencies Law includes a provision that protects the Commission and its agents from being sued in their personal capacity. This provision, found at R.C. §118.05 (I), states in relevant part that:

“The financial supervisor, the members of the commission, the auditor of state, and any person authorized to act on behalf of or assist them shall not be personally liable or subject to any suit, judgment, or claim for damages resulting from the exercise of or failure to exercise the powers, duties, and functions granted to them in regard to their functioning under this chapter, . . .”

At the same time, Commission members receive the same protections afforded to all State officers and employees. The general statute which governs personal liability of State officers and employees is Ohio Revised Code §9.86. This statute reads as follows:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the laws of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton reckless manner.

This section does not eliminate, limit or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provisions of the Revised Code or by case law. This section does not affect the liability of the state in any action filed against the state in the court of claims pursuant to Chapter 2743, of the Revised Code. (Emphasis added).

According to Ohio Revised Code §9.85, the terms "officer," "employee," "state," and "employer" have the same meaning as they do in Ohio Revised Code §109.36. §109.36 defines these terms as follows:

(A) "Officer or employee" means any person who, at the time a cause of action against him arises, is serving in an elected or appointed office or position with the state or is employed by the state . . .

(B) "State" means the state of Ohio, including but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state of Ohio . . .

(D) "Employer" means the general assembly, the supreme court, any office of an elected state officer, or any department, board, office, commission, agency, institution, or other instrumentality of the state of Ohio that employs or contracts with an officer or employee or to which an officer or employee is elected or appointed.

The members of the Ohio Commission on Hispanic and Latino Affairs fall within these definitions.

It must be noted that the immunity provided in Ohio Revised Code §9.86 applies only to civil actions brought under state law. Therefore, in an action brought under federal law or under the law of another state, the statute does not offer any protection. In addition, it is unclear

whether the immunity provided by R.C. §118.05(I) would apply to all actions brought under federal law.

The most likely federal law claim would be an action brought under U.S.C. '1983. This federal statute reads in relevant part:

Every person who, under color of state or territorial statute, ordinance, regulation, custom or usage, subjects any person within the jurisdiction of the United States, or causes any such person to be subjected, to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution or law, is liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A lawsuit under this statute may be brought against a government official in either federal court or state court. Even though there may be no statutory immunity from liability in such an action, under the common law doctrine of qualified immunity a government official has quite a bit of protection. This doctrine was enunciated by the United States Supreme Court as follows:

[G]overnment 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.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1983).

B. Indemnification

Even if an individual state officer or employee is found personally liable in a civil action for damages under federal law or the law of another state, he may be entitled to be indemnified, or reimbursed, by the State. According to Ohio Revised Code §9.87(A):

The state shall . . . indemnify an officer or employee from liability incurred in the performance of his duties by paying any judgment in, or amount negotiated in settlement of, any civil action arising under federal law, the law of another state, or the law of a foreign jurisdiction . . .

Note that under this statute, indemnity is not available in cases filed under Ohio law. Those cases are governed by the immunity and procedural protections of Ohio Revised Code §9.86 and Ohio Revised Code Chapter 2743, discussed in the next subsection.

Under Ohio Revised Code §9.87, the maximum aggregate amount of indemnification paid directly from state funds is one million dollars per occurrence, regardless of the number of

persons who suffer damage, injury, or death as a result of the occurrence. The Attorney General or the director, administrative chief, or governing body of the employer of the State officer or employee has the authority to determine whether a consent judgment or settlement is reasonable. R.C. 9.87(A). Just as with immunity itself, indemnification is not available where the officer or employee has acted manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton reckless manner. R.C. §9.87(B).

C. *Ohio Court of Claims*

A factor which affects the liability of state officers or employees is the availability of the Ohio Court of Claims as a forum for adjudicating claims against the State of Ohio. According to the Ohio Revised Code §2743.02(A):

(1) . . . Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any state officer or employee, as defined in §109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) If the claimant proves in the court of claims that an officer or employee, as defined in §109.36 of the Revised Code, would have personal liability for his acts or omissions but for the fact that the officer or employee has personal immunity under §9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to §2743.16 of the Revised Code and that is based upon the acts or omissions.

Thus, as a general rule, if an aggrieved party chooses to file an action against the State in the Court of Claims, he cannot also maintain an action against the individual State officers or employees involved in the alleged wrongful conduct. This Court of Claims waiver applies to federal as well as state causes of actions brought against individuals. *Leaman v. Ohio Department of Mental Retardation* (6th Cir. 1987), 825 F.2d 946, *cert. den* 487 U.S. 1204. *See also, Ferrari v. Woodside Receiving Hospital*, (N.D. Ohio, 1985), 624 F.Supp. 819.

In some instances an action may be brought against State officers or employees in State court if certain prerequisites are met. These prerequisites are set forth in Ohio Revised Code §2743.02(F), which states:

(F) A civil action against an officer or employee, as defined in §109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or

employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially whether the officer or employee is entitled to personal immunity under §9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.

The filing of a claim against an officer or employee under this division tolls the running of the applicable statute of limitations until the court of claims determines whether the officer or employee is entitled to personal immunity under §9.86 of the Revised Code.

Under this statute, anyone seeking to hold an individual state officer or employee personally liable must first file a lawsuit against the State in the Court of Claims. If that Court determines that the officer or employee is not entitled to personal immunity under Revised Code §9.86, a lawsuit may then be filed against the officer or employee in another court of competent jurisdiction. The Court of Claims' determination about the nature of the individual officer's or employee's conduct is not binding on the individual. *Tschantz v. Ferguson* (Franklin Co. 1989), 49 Ohio App.3d 9.

D. Representation by the Ohio Attorney General

In most instances, a member of a state commission who is sued in his personal capacity in connection with his activities as a commission member will be entitled to be represented by the Ohio Attorney General. The general rule concerning such legal representation is set forth in Ohio Revised Code §109.361, which reads in pertinent part:

Upon the receipt of a written report by an officer or employee, the attorney general shall, except as provided in §109.362 of the Revised Code and, . . . except for civil actions in which the state is the plaintiff, shall represent and defend the officer or employee in any civil action instituted against the officer or employee. All expenses and court costs, including the reasonable compensation of special counsel, incurred by the attorney general in the defense of an officer or employee of the state shall be paid by the employer at the time the alleged act or omission occurred.

. . . The officer or employee shall cooperate fully with the attorney general's defense. §§109.36 to 109.366 . . . of the Revised Code do not deprive any officer or employee of the right to select counsel of his own choice or settle his case at his own expense at any time, and . . . do not prohibit the attorney general from entering his appearance in a case to protect the interest of the state

even though no request for the appearance has been made by the officer or employee.

According to Ohio Revised Code §109.362(A), the Attorney General may not defend an officer or employee if the Attorney General determines that the officer or employee was acting manifestly outside the scope of his employment or official responsibilities, with malicious purpose, bad faith, or in a wanton or reckless manner. §109.364 permits an officer or employee who is denied representation by the Attorney General to file an action in the Court of Claims after the action is terminated to recover his reasonable expenses in providing his own defense.

E. Conclusion

All the topics discussed above - immunity, indemnification, Ohio Court of Claims proceedings, and representation by the Ohio Attorney General -- are governed by the same principle: A member of a state commission will generally be protected by the State from personal liability so long as he does not act manifestly outside the scope of his employment or official responsibilities, or with malicious purpose, in bad faith, or in a wanton or reckless manner.

Depending upon the nature of the lawsuit against a commission member, *i.e.*, the court where it is filed, the legal basis for the causes of action, and the particular allegations made, it might be possible to get a case dismissed before trial. If not, evidence could still be presented at trial to establish that the commission member acted in such a way that he or she is immune from liability. Finally, even if a judgment is rendered against a commission member in an action filed other than in state court, or if the member settles such an action by agreeing to pay money, the member may be entitled to indemnification from the State of Ohio.