

Outside Counsel and Qualified Immunity

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On April 17, the United States Supreme Court issued its opinion in *Filarsky v. Delia*, 566 U. S.___(2012), making the common sense finding that an outside counsel, hired by a municipality to act on its behalf in an employment matter, was entitled to qualified immunity in the same way as in-house counsel. In this case, City of Rialto Fire Department officials suspected that Delia, a firefighter on sick leave, was abusing his leave after conducting surveillance and discovering that Delia had purchased home renovation materials and rolls of insulation. The City initiated an internal affairs investigation and hired Filarsky, a private attorney, to interview Delia. At the interview, which Delia's attorney and two fire department officials also attended, Delia acknowledged buying home insulation supplies, but denied having done any work on his home. To verify Delia's claim, Filarsky asked Delia to allow a fire department official to enter his home and view the unused materials. When Delia refused, Filarsky, on the instructions of the fire chief, ordered Delia to bring the materials out of his home for the officials to see. Delia went with the officials to his home, where he brought out the still-unused supplies on the lawn. Delia's lawyer throughout had threatened a civil suit, telling Filarsky that "*everybody* is going to get named."

Delia subsequently did sue under Section 1983, alleging that the order to produce the building materials violated his Fourth and Fourteenth Amendment rights. The district court granted summary judgment to the individual defendants on the basis of qualified immunity, and the U. S. Court of Appeals for the Ninth Circuit affirmed, with the exception of Filarsky. (The court held that the order to produce the materials violated Delia's Fourth Amendment rights, but those rights had not been clearly established at the time of the incident, so the officials were protected by qualified immunity.) The appellate court held itself bound by circuit precedent, *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003), where an attorney retained to represent a county was held not to be entitled to immunity ("She is a private party, not a government employee, and she has pointed to 'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position." *Id.* at 835). Based on *Gonzalez*, the court concluded Filarsky was not entitled to qualified immunity because he was a private attorney, not a City employee.

This ruling, as can be expected, caused some degree of concern. As pointed out by the *amicus* brief filed by the League of California Cities and the California State Association of Counties in support of the petitioner, Filarsky:

> Flatly denying qualified immunity to private attorneys is not just legally wrong but will harm cities and counties by making [the] use of private attorneys less effective and more expensive. This, in turn, will force many cities and counties to forego the considerable advantages of employing private attorneys or to pay considerably more to do so.

Chief Justice Roberts delivered the opinion for a unanimous Supreme Court. Looking to the common law as it existed when Congress passed Section 1983 in 1871, it was not unusual for private citizens to be actively involved in government work in addition to carrying out some other regular business, and private lawyers were frequently engaged to conduct criminal prosecutions on behalf of the State. As a result, the common law did not draw a distinction between public servants, and private individuals engaged in public service, in according protection to those carrying out government responsibilities. Interpreting Section 1983 "in harmony with general principles of tort immunities and defenses," it was assumed that common-law principles of immunity should not be abrogated absent a clear legislative intent to do so. Moreover, "[e]nsuring that those who serve the government do so 'with the decisiveness and the judgment required by the public good,' *Scheuer v. Rhodes*, 416 U. S. 232, 240 (1974), [was] of vital importance regardless whether the individual sued as a state actor works full-time or on some other basis." There was the public interest, too, in ensuring the performance of government duties free from the distractions that could accompany even routine lawsuits, implicated when both permanent government employees and those retained to work on the government's behalf discharged these duties.

Applying this general framework to the facts, there was no dispute that qualified immunity was available for the sort of investigative activities at issue here, and that government employees performing such work were entitled to seek the protection of qualified immunity.

Justice Sotomayor, concurring, noted that it did not follow that every private individual who worked for the government in some capacity was necessarily entitled to claim qualified immunity when sued under 42 U. S. C. §1983: "Such individuals must satisfy our usual test for conferring immunity," she said, but left the scope of such cases for another day.

For the decision, see http://www.supremecourt.gov/opinions/11pdf/10-1018.pdf. ML