

VOLUME NO. 37

OPINION NO. 171

COUNTIES - Liability for actions of county officers and employees; COUNTY ATTORNEYS - Defense of county officers; COUNTY OFFICERS AND EMPLOYEES - Compensation for legal fees; indemnification when action against is brought in federal court; suits against; PUBLIC OFFICERS - Compensation for legal fees; indemnification when action against is brought in federal court; suits against; REVISED CODES OF MONTANA, 1947 - Sections 16-1126, 16-3101, 16-3102, 16-3105, 82-4302, 82-4322.1, 82-4323; 42 U.S.C. - Section 1983.

- HELD: 1. The county attorney is not responsible for defending lawsuits brought against a county official in his individual capacity.
2. Pursuant to section 82-4323(3), R.C.M. 1947, the county must indemnify its officials for costs, attorney fees and personal liability resulting from actions taken by these officials unless the conduct upon which the claim is brought did not arise out of the course and scope of employment or is an intentional tort or felonious act.

3. "Other actionable conduct" as the term is used in section 82-4323(1), R.C.M. 1947, may include actions taken "under color of state law" as the term is used in 42 U.S.C. section 1983. Nevertheless, the requirement of section 82-4323(1) that the governmental entity employer shall be made a party in an action brought against its employee does not apply to actions brought under section 1983.

29 November 1978

John C. McKeon, Esq.  
Deputy County Attorney  
Phillips County Courthouse  
Malta, Montana 59538

Dear Mr. McKeon:

You have requested my opinion on the following questions:

1. Whether the county attorney is responsible for defending lawsuits brought against a county official in his individual capacity.
2. If not, whether the county can agree to indemnify county officials for costs, attorney fees and personal liability resulting from actions taken by said county against officials "under color of state law."
3. Whether "other actionable conduct" as said term is used in section 82-4323(1), R.C.M. 1947, includes actions taken "under color of state law" as the term is used in 42 U.S.C. section 1983.

Your questions relate to a civil suit against a county official brought in federal district court under 42 U.S.C. section 1983. This opinion addresses the defense and indemnification of a county official in the context of such an action. While the opinion in some respects may be applicable to other actions as well, the responsibilities of a county when one of its officials is sued necessarily vary with the nature of the action and the remedy sought.

Question 1:

Can the county attorney defend a lawsuit against a county official in his individual capacity?

There is no statutory authority for requiring a county attorney to defend a county official sued in his individual capacity. Section 16-3101, R.C.M. 1947, provides in part that the county attorney "must ... defend all suits brought against ... his county," and under section 16-3102, R.C.M. 1947, the county attorney "must attend and oppose all claims and accounts against the county which are unjust or illegal."

Section 16-3105, R.C.M. 1947, provides further that "[t]he county attorney must perform such other duties as are prescribed by law." The law is silent as to any duty on the part of the county attorney to defend a lawsuit brought against a county official in his individual capacity.

Under section 16-1126, R.C.M. 1947, the board of county commissioners of a second, third or fourth class county has the power to employ, or authorize the county attorney to employ special counsel "to represent said county in any civil action in which such county is a party." By its own terms, section 16-1126 limits a county's power to employ special counsel to actions in which the county itself is a party.

It is not necessary to sue a county official in his official capacity under section 1983. Nor is the question of whether the county is a real party in interest necessarily an issue. A county official may be sued in his individual capacity, alone, and the county is not then a party. Thus, when a section 1983 suit is brought against a county official individually and the county is not a party, neither the county attorney nor "special counsel" hired by the county commissioners is authorized to defend.

Question 2:

Can the county agree to indemnify a county official when the official's liability results from action taken "under color of state law?"

The Montana Comprehensive State Insurance Plan and Tort Claims Act, Title 82, chapter 43, R.C.M. 1947, as amended, provides for the immunization and indemnification of public officers and employees sued for their actions, other than

intentional torts or felonious acts, taken within the course and scope of their employment. Section 82-4322.1, R.C.M. 1947. The indemnification provision that is relevant here is set forth in section 82-4323(3), R.C.M. 1947.

In any action in which a governmental entity employee is a party defendant, the employee shall be indemnified by the governmental entity employer for any money judgments or legal expenses to which he may be subject as a result of the suit unless the conduct upon which the claim is brought did not arise out of the course and scope of his employment or is an intentional tort or felonious act of the employee.

There is no question that county officials are "employees" for the purposes of chapter 43. Section 82-4302(4), R.C.M. 1947. If the conduct of the county official did in fact arise out of the course and scope of his employment, and was neither an intentional tort nor a felonious act, the county as the governmental entity employer must indemnify the official.

There is no statutory qualification of the indemnification provided by section 82-4323(3), R.C.M. 1947, in terms of whether the official's actions were taken "under color of state law." Nor is this indemnification limited to officials sued in state court under chapter 43 of Title 82. Section 82-4323(3) expressly refers to any action; if the Legislature had intended to indemnify only those governmental employees sued in an action predicated on state law, it could and would have done so.

There are no Montana cases construing section 82-4323(3), R.C.M. 1947. In Williams v. Horvath, 129 Cal. Rptr. 453, 548 P.2d 1125 (1976), the California Supreme Court held that State's Tort Claims Act indemnification provisions apply whether liability is based on section 1983 or the California Tort Claims Act itself. The California statute, like section 82-4323(3), R.C.M. 1947, specifically referred to any claim or action in establishing the scope of indemnification. The Court found section 1983 does not preclude a state from indemnifying its employees found liable under that section, and concluded such indemnification therefore was proper.

In construing a statute, the goal is to give effect to the purpose of the statute. Burritt and Safeway v. City of Butte, 161 Mont. 530, 535, 508 P.2d 563 (1973). Section

82-4323(3), R.C.M. 1947, is unequivocal in extending indemnification to governmental employees sued in any civil action, with the only qualifications relating to factual determinations of whether the employee's conduct arose out of the course and scope of his employment or was an intentional tort or felonious act. Therefore, it is my opinion that section 82-4323(3) applies when a suit is brought against an individual county official alleging his actions were taken "under color of state law."

Question 3:

Your third question concerns the scope of section 82-4323(1), R.C.M. 1947, which provides:

In an action brought against any employee of a state, county, city, town or other governmental entity for a negligent act, error or omission, or other actionable conduct of the employee committed while acting within the course and scope of his office or employment, the governmental entity employer shall be made a party defendant to the action.

You ask whether "other actionable conduct" as that term is used in section 82-4323(1), R.C.M. 1947, includes actions taken "under color of state law" as the term is used in 42 U.S.C. section 1983. It is my opinion that such "other actionable conduct" may include actions taken "under color of state law."

The federal statute, 42 U.S.C. section 1983, provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 provides for a civil action for deprivation of federal constitutional and statutory rights resulting from a "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Monroe v. Pape, 365 U.S. 167, 187

(1960). Whether or not the conduct was authorized, even if proscribed by state law, the wrongdoer may be said to have been clothed with authority of state law. Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962). In any section 1983 action, whether a wrongdoer was acting "under color of state law" is a federal issue, and the focus is on the nature of the wrongdoer's action.

The purpose of section 82-4323(1), R.C.M. 1947, is to direct an action brought against a governmental employee to the attention of the governmental entity employer by requiring that the employer must be made a party to the action. The reference to "other actionable conduct" reflects an intent to include all suits arising from conduct of a governmental employee committed within the course and scope of his employment within this requirement.

A cause of action brought under section 1983, on the other hand, may be directed to the governmental employee alone. Traditionally, a governmental entity could not be sued directly under section 1983 because such an entity was not a "person" under that section. Monroe v. Pape, 365 U.S. 167 (1960); Dodd v. Spokane County, 393 F.2d 330 (9th Cir. 1968). Even if a section 1983 plaintiff wanted to join a governmental entity employer, he was precluded from doing so because the federal court had no independent jurisdiction over the governmental entity. Aldinger v. Howard, 427 U.S. 1 (1976).

In Monell v. Dept. of Social Services of the City of New York, 98 S.Ct. 2018 (1978), the Supreme Court held governmental entities may be responsible under section 1983. It is now possible that a governmental entity could be joined as a party defendant in such an action. Nevertheless, section 82-4323(1), R.C.M. 1947, cannot be invoked to compel joinder of a governmental entity employer in such an action. If the application of a state statutory requirement has the effect of qualifying a federally-created right, the requirement fails. Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969). Furthermore, remedies or procedures for the vindication of the federal right created in section 1983 are exclusively a federal concern. A state's procedural scheme to enforce its statutory system of liability and immunity does not apply to civil rights actions brought under section 1983. Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970).

THEREFORE, IT IS MY OPINION:

1. The county attorney is not responsible for defending lawsuits brought against a county official in his individual capacity.
2. Pursuant to section 82-4323(3), R.C.M. 1947, the county must indemnify its officials for costs, attorney fees and personal liability resulting from actions taken by those officials unless the conduct upon which the claim is brought did not arise out of the course and scope of employment or is an intentional tort or felonious act.
3. "Other actionable conduct" as the term is used in section 82-4323(1), R.C.M. 1947, may include actions taken "under color of state law" as the term is used in 42 U.S.C., section 1983. Nevertheless, the requirement of section 82-4323(1) that the governmental entity employer shall be made a party in an action brought against its employee does not apply to actions brought under section 1983.

Very truly yours,

MIKE GREELY  
Attorney General