

**VOL 28 ISS 1 ART 3 | III | STATE LEGISLATIVE EMPLOYEES**

There has been some confusion in the cases about the proper treatment of section 1983 suits for damages against legislative employees. Tenney, standing alone, suggests that such employees are "persons" for 1983 purposes.<sup>36</sup> Courts generally have held, however, that legislative employees are protected only by a qualified immunity.<sup>37</sup> Several have gone so far as to hold certain legislative employees absolutely immune from personal liability. The Fifth Circuit, relying on Tenney, has said that employee-investigators of a statutorily established investigative commission are absolutely immune from liability for damages.<sup>38</sup> An Indiana District Court has held the same for legislative employees.<sup>39</sup> These decisions are questionable not only in light of Tenney's dictum but also because legislative employees are different from legislators in that they do not require the same autonomy in decision making so necessary for the effective operation of representative government. A qualified immunity appears sufficient for most purposes to ensure that employees are not unduly hampered by litigation and deterred from performing their jobs.<sup>40</sup>

A significant qualification, however, to the suggested general applicability of a qualified immunity to legislative employees must be made. In several Speech or Debate Clause cases, the Supreme Court put a gloss on its language in Tenney and extended absolute immunity to Congressional aides, committee staff and committee consultants who investigated and introduced material at committee hearings.<sup>41</sup> In determining whether these acts were legislative acts and thus absolutely immune, the Court was concerned with "freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator."<sup>42</sup> It therefore asked whether the acts would have been protected had they been done by the legislator himself. To the extent that these Speech or Debate Clause cases are relevant to the 1983 legislative immunity issue by analogy, the inquiry must focus not only on the defendant's status but also on the nature of the act itself. Viewed in this light, a legislative employee is only absolutely immune from liability under 1983 when his act is legislative in nature, such that, had the legislator himself performed it, he would have been immune.<sup>43</sup>

*(Copyright © Depaul University Law Review. All rights reserved. Sheldon H. Nahmod.)*



## Footnotes

<sup>36</sup>. The *Tenney* Court cited *Kilbourn v. Thompson*, 103 U.S. 168 (1881), in which a judgment was entered against the House's Sergeant-at-Arms for an illegal arrest, the court said: "Legislative privilege in such a case [where the defendants are members of a legislature] deserves greater respect than where an official acting on behalf of the legislature is sued .... " 341 U.S. at 378. This proposition was reiterated in *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

<sup>37</sup>. See, e.g., *Eslinger v. Thomas*, 476 F.2d 225, 229-30 (4th Cir. 1973). The Eslinger defendant, Clerk of the South Carolina Senate, who, in good faith reliance on official custom, refused plaintiff temporary employment as a page in the Senate because she was female, was held immune from liability for damages but not immune from suit for equitable relief.

<sup>38</sup>. *Martone v. McKeithen*, 413 F.2d 1373, 1376 (5th Cir. 1969) (per curiam).

<sup>39</sup>. *Porter v. Bainbridge*, 405 F. Supp. 83, 91 (S.D. Ind. 1975). The court neither set forth reasoning for nor offered citations in support of this holding. Also, while the court spoke of immunity, the case actually seemed to involve injunctive relief and federalism concerns. *Id.* at 85, 90-91.

<sup>40</sup>. See note 4 *supra*. See generally on qualified immunity A GUIDE TO SECTION 1983 chapter 8. A case with an interesting twist is *Saffloti v. Wilson*, 392 F. Supp. 1335, 1343 n.10 (S.D. N.Y. 1975), in which the court in dictum compared a governor, who was sued for injunctive relief after exercising his veto power, with a legislator. This suggests that the governor should be protected by an absolute immunity. This result seems questionable after *Scheuer v. Rhodes*, 416 U.S. 232 (1974), which held that executives are protected only by a qualified immunity, and *Wood v. Strickland*, 420 U.S. 308 (1975), which held the same for school board members regardless of whether they acted in quasi-legislative or quasi-judicial functions. In any event, the court resolved the matter on the merits in favor of the governor. 392 F. Supp. at 1347.

<sup>41</sup>. *Gravel v. United States*, 408 U.S. 606 (1972); *Doe v. McMillan*, 412 U.S. 306 (1973).

<sup>42</sup>. *Gravel v. United States*, 408 U.S. at 618 (emphasis added). 1978]DEPAUL LAW REVIEW

<sup>43</sup>. This approach to a legislative employee's immunity is similar to the approach used for determining the scope of immunity of a judicial employee who is following a judge's order or direction. See notes 120-123 and accompanying text *infra*. An additional factor justifying these approaches is the unfairness to a legislative or judicial employee in withholding an absolute immunity while the person responsible for the challenged conduct-the person ordering it gets its protection.

