

MINIMIZING YOUR RISK

What you don't know is liable to make you liable

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My goals for today

- Familiarize you with the meaning of “Tort”
- Outline the potential for you to be personally liable for your official actions.
- Explain the consequences of your personnel decisions
- Persuade you that your municipal policies and procedures matter.

The meaning of “Tort”

- According to Dictionary.com the meaning of tort is:
 - a wrongful act, not including a breach of contract or trust, that results in injury to another's person, property, reputation, or the like, and for which the injured party is entitled to compensation.

A brief history of governmental liability

- In English common law the king enjoyed “sovereign immunity” which translated to “the king can not be sued”
- This “sovereign immunity” carried over to governments in the United States after the revolutionary war.
- For many years it was believed that local governments in the United States enjoyed “sovereign immunity” and could not be sued even when an injury was the result of a local governments negligence.

A brief history of governmental liability

- In 1975 the Supreme Court of the State of New Mexico in a case captioned as *Hicks v. State* determined that state and local governments did not enjoy absolute sovereign immunity and thus the legislature adopted the state “Tort Claims Act” in 1976.

Waiver of Immunity

- In the “Tort Claims Act” the legislature defines those acts of negligence for which the state and local governments can be sued.
- It also defines those acts of negligence for which the state and local governments cannot be sued.
- Essentially, the legislature waives immunity for certain acts of negligence.

Notice of Intent to Sue

- The Tort Claims Act generally requires an individual to provide a governmental entity with notice that the individual may have a claim against the governmental entity within 90 days of the incident potentially giving rise to governmental liability.
- The individual then has 2 years from the incident to file suit.

Notice of Intent to Sue

- Even when an individual fails to give notice within 90 days of the incident, suit may be filed naming the individual employees or government officials alleged to have caused the injury to the individual.
- In most cases when individual employees and government officials are named they are sued in their official and individual capacity.

Personal Liability of Municipal Officials and Employees

- Many acts by government employees and officials that give rise to potential tort liability are “intentional acts”
- An “intentional act” is most easily defined as an act that is taken after consideration of the effect the act will have.
- Examples of intentional acts are hiring, promotion, discipline, suspension and termination of an individual.

Personal Liability of Municipal Officials and Employees

- Your municipality’s insurance contracts will exclude coverage for “intentional acts”.
- The reasoning behind the exclusion is to discourage employees and official from making rash decisions or from making cavalier statements like:
 - Go ahead and sue us, we have insurance”

Personal Liability of Municipal Officials and Employees

- If, when a case is tried, you are found to have acted intentionally and are found personally liable you may be required to pay damages personally.
- Your municipality may indemnify you and may pay the damages on your behalf.
- If you or your employee is found personally liable, your municipality will be required to pay the damages and if it chooses may attempt to recover the payment from the employee.

Personnel Decisions

- As a mayor or governing body member you will be asked to make or ratify the personnel decisions of the mayor or a department head.
- You may be asked to participate on a panel for the selection of candidates for employment or for promotion.
- The choices you make may have serious consequences.

Personnel Decisions

- When taking any kind of personnel action you may not consider:
 - The age of the person
 - The sex of the person
 - The sexual orientation of the person
 - The person's religious beliefs
 - The person's disability status
 - The person's race or ethnicity.
 - Other things your Human Resources Director can help you with.

Personnel Decisions

- If you allow yourself to consider things like age, sex, etc. in a personnel decision you will be liable for damages to the person you discriminated against.
- Failure to hire and/or promote a person based on such factors is impermissible.
- Taking an adverse employment action against an employee because the employee has filed a complaint about working conditions is prohibited.

Personnel Decisions

- When taking a personnel action please remember that your decision will have many consequences that you may not be aware of.

Personnel Decisions

- Once you have decided that taking adverse personnel action is the only option left to deal with an employee you have a responsibility to do so in a manner that protects you and your municipality.
- Be aware of what you say and to whom you say it.
- Be certain that you follow your personnel policies and procedures when engaged in employment actions.

Personnel Decisions

- When informing the individual of your desire to take an adverse personnel action, have a witness present if at all possible.
- Avoid the angry outburst. Take time to settle down and think through your decision.
- Review your history with the employee and try to imagine how your actions will look to others.

Personnel Decisions

- If after careful thought and examination of the past relationship you determine that the only alternative is to take action you need to anticipate that the action will result in litigation.
- No matter how well you follow your municipality's policies and procedures you cannot totally prevent litigation but you can minimize the damage such a event has on you and your municipality.

Personnel Decisions

- Prepare yourself for a long and messy legal action in which your motives, decisions, past practices and good intentions are dissected, misrepresented or twisted to make a case for paying for the decision you made to take the action.
- By paying we mean giving something of value (money) to the person you have taken the action against.

Personnel Decisions

- If you have documented the employees relationship well and that documentation is consistent with your actions you will be in the strongest position to defend yourself against claims made by your employee or former employee.
- If your documentation is nonexistent or inconsistent, get ready for a rough ride.

Personnel Decisions

- Ultimately you will probably be asked to compromise your position in order to end the action and get on with your life.
- Compromise gives you a certain end to an uncertain proceeding.
- In most cases, compromise is the best result you can expect. Remember you decided to take the adverse action.
- Remember that the fact finders (jurors) have had supervisors that they interacted with in a negative way in their past.

Policies and Procedures

- Your policies and procedures are in many ways like the laws that govern how a situation is handled.
- Failing to follow your own procedures can and will result in liability for you and your municipality.
- Your policies and procedures are like a written contract with your employees or citizens.

Policies and Procedures

- Your Municipality's Employee policies and procedures are a basic employment contract with your employees.
- Those policies and procedures that are set forth create expectations for your employees regarding how you will conduct yourself if the policies or procedures are violated.

Policies and Procedures

- Just as you outline your expectations regarding your employees conduct and work role your employees have expectations regarding how you will treat them.
- In the same way, policies and procedures regarding a variety of services you provide your citizens set for your expectations and also create expectations in your citizens.

Summary

- As a public official you have a tremendous responsibility to minimize your personal and professional risk regarding creating liability for yourself or your municipality.
- It is your responsibility to demonstrate to your employees that you are concerned about their rights and the rights of your citizens.

Summary

- If you lead in a manner that minimizes the risk of liability, your employees will follow suit.
- If you choose not to lead in this manner your employees will also follow suit.

A Definition to Ponder

- **Lawsuit.** (noun). A machine which you go into as a pig and come out as a sausage.
- Source: Ambrose Bierce, The Devil's Dictionary