

(Almost) Everything You Ever Wanted to Know about Discretionary Immunity (But Were Afraid to Ask)

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The Illinois Supreme Court has said that discretionary immunity is the most significant protection afforded to public entities for tort claims. However, what kinds of actions or omissions are entitled to discretionary immunity, and how townships can avail themselves of that protection, is not susceptible to an easy explanation.



Q. What is discretionary immunity?

A. Discretionary immunity is based on the idea that public officials should be allowed to exercise their judgment in making decisions without fear that a good-faith mistake might subject them to liability.

Q. How far does discretionary immunity extend?

A. Discretionary immunity provides absolute immunity for both negligence and willful and wanton conduct. However, Section 2-201 of the Tort Immunity Act limits discretionary immunity “except as otherwise provided by Statute.” Practically speaking, this exception means that discretionary immunity can be used a defense by the township in situations that are not otherwise explicitly provided for in the Tort Immunity Act.

Q. How does a township use discretionary immunity as a defense?

A. Because discretionary immunity is an “affirmative defense” to a tort claim, the burden is on the municipality to prove it. In order for immunity to attach, a township needs to prove: (1) The employee held either a) a position involving the determination of policy; or b) a position involving the exercise of discretion; and (2) The injury resulted from an action or omission by the employee in determining policy *and* in exercising discretion.

Q. What kind of action determines policy?

A. A “policy decision” requires the municipality to balance competing interests, such as time, budget, and resources, and to make a judgment call as to what solution will best serve each of those interests.

Q. Are all decisions by township officials “policy decisions”?

A. No. In general, there are **discretionary** acts and **ministerial** acts. **Discretionary** acts are those which are unique to a particular public office, and involve the exercise of personal deliberation and judgment in deciding whether to perform a particular act, or how and in what manner that act should be performed. **Ministerial** acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official’s discretion as to the propriety of the act.

Q. How can the township official know if an action is discretionary or ministerial?

A. Determining whether an act or omission is discretionary is made on a case-by-case basis, depending on the particular facts and circumstances. However, in the last several years, the Illinois Supreme Court has emphasized that a municipal defendant asserting discretionary immunity must present evidence of a “**conscious decision**” by its employee to the conduct alleged to have caused the plaintiff’s injury. To prove that a conscious decision was made, the township has to present evidence that demonstrates the decision-making process — that the township employee both had the ability to determine policy or exercise discretion, and then used his judgment or skill in making the decision for which immunity is sought.



Q. Can a township official or employee make a “conscious decision” if they did not know about a claimed dangerous condition before the plaintiff’s injury?

A. No. If the township employee was totally unaware of a condition prior to the plaintiff’s injury, he or she cannot be determined to have exercised discretion with respect to that condition, and will not be able to claim discretionary immunity. However, other defenses may be available, such as lack of notice.

The best way to understand how discretionary immunity works in practice are some real-life recent examples where the courts considered whether discretionary immunity barred the plaintiff’s claim or not.

Example 1:

The building-and-grounds manager for a community college had a policy in place regarding sidewalk defects, including marking the defect with yellow paint to repair in the spring, after the “freeze-and-thaw” process finished. Near the end of winter, the plaintiff tripped on an uneven sidewalk marked with yellow paint. The plaintiff argued that because the college knew about the defect, repairing the uneven sidewalk was a ministerial function; the college argued that the decision when to repair the sidewalk was a discretionary act. The court agreed with the college, and found that the building-and-grounds manager had unfettered discretion to determine how best to proceed with each sidewalk defect, and there was no set of rules or regulations that he had to follow, entitling the college to discretionary immunity.

Example 2:

A plaintiff tripped in an unimproved alley behind her home. The city was not entitled to discretionary immunity because the city had established an annual program of regrading all the unimproved alleys, which merely involved the execution of a set task – i.e., a ministerial act. Once the plaintiff’s alley was on the priority list for repair, the city supervisor no longer had discretion whether to allocate resources for the alley’s repair. However, if the city had presented evidence at trial that it had repaired the alley, there would be a question whether the supervisor exercised his discretion in choosing which materials to use in the regrading.

Example 3:

The city was entitled to discretionary immunity because the manner of repair of potholes (i.e., how much the sufficient amount of asphalt and moisture removed) was left to the personal judgment and discretion of each worker, and it was a matter of policy to efficiently prepare the potholes for repair in each area.

Example 4:

A city was not entitled to discretionary immunity because there was no evidence that any official made a conscious decision not to repair a sidewalk defect, even though that site was included in the city’s overall evaluation of the sidewalks. There was no evidence of the factors taken into account by the city in deciding not to repair that sidewalk, nor whether anyone took note of a sidewalk deviation at that location or it was simply overlooked.

What townships can do to avail themselves of discretionary immunity:

- 1. DO** allow for the exercise of discretion by township officials and employees about when, how, or what to use to make repairs that are not otherwise regulated by law.
- 2. DO** your best to document your decision making process.
- 3. DO** report all accidents/injuries/damage as soon as you become aware of them.
TOIRMA can’t investigate what it doesn’t know about.

