

915 ACTING IN OFFICIAL CAPACITY

_____ ¹ act in an official capacity when they perform duties that they are employed² to perform.³ [The duties of a _____ include: _____⁴]

COMMENT

Wis JI-Criminal 915 was originally published in 1988 and revised in 1991 and 2005. This revision was approved by the Committee in February 2008.

The phrase "acting in an official capacity" or its equivalent is used in the following statutes: § 940.20(2), Battery to a Law Enforcement Officer or Fire Fighter (see Wis JI-Criminal 1230); § 940.20(2m), Battery to a Probation and Parole Agent or Aftercare Agent (see Wis JI-Criminal 1231); § 940.20(5), Battery to a Technical College District or School District Officer or Employee (see Wis JI-Criminal 1235); § 940.20(7), Battery to an Emergency Department Worker, an Emergency Medical Technician, a First Responder, or an Ambulance Driver (see Wis JI-Criminal 1237); § 940.203, Battery or Threat to a Judge (see Wis JI-Criminal 1240A and 1240B); § 940.205, Battery or Threat to a Department of Revenue Employee (see Wis JI-Criminal 1242); § 940.207, Battery or Threat to a Department of Commerce or Workforce Development Employee (see Wis JI-Criminal 1244); § 941.21, Disarming a Peace Officer (see Wis JI-Criminal 1328); § 946.41, Resisting or Obstructing an Officer (see Wis JI-Criminal 1765-1766A). While the Wisconsin appellate courts have tended to use the same definition for the phrase under each statute (see note 3, below), the Committee suggests using Wis JI-Criminal 915 only for those offenses where the officer or employee is the victim of the crime. Using the same definition for crimes where the officer is the defendant (for example, for § 946.12, Misconduct in Public Office) creates the problem that acts of an illegal nature would never fall within the scope of what the person was employed to do. See State v. Schmit, 115 Wis.2d 657, 665, 340 N.W.2d 752 (Ct. App. 1983), discussed in note 3, below.

1. Use the plural form of the title. For example: "Sheriffs act in an official capacity if they perform duties. . . ."

2. The word "employed" is used in its broad sense of "using or engaging the services of another." Webster's New Collegiate Dictionary. In cases involving public officials, it may be helpful to substitute "elected" or "appointed" for "employed," as appropriate.

3. The Wisconsin cases on "official capacity" have reached general agreement on a definition for the term, using the same definition regardless of the statute being reviewed. The results in the cases, however, have not been entirely what one might expect. A review of the Wisconsin case law yields the following:

(1) Williams v. State, 45 Wis.2d 44, 172 N.W.2d 31 (1969).

An off-duty police officer who was attacked while attempting to break up a fight was acting in his official capacity (under § 940.205, Battery to a Law Enforcement Officer).

- (2) State v. Barrett, 96 Wis.2d 174, 291 N.W.2d 498 (1980).
A deputy sheriff conducting a traffic stop in a neighboring county was not acting in his official capacity (also under § 940.205).
- (3) State v. Christensen, 100 Wis.2d 507, 302 N.W.2d 448 (1981).
A town constable investigating a disturbance was acting in his official capacity (under § 946.41, Resisting or Obstructing an Officer).
- (4) State v. Schmit, 115 Wis.2d 657, 340 N.W.2d 752 (Ct. App. 1983).
A prison guard who engages in consensual sexual intercourse with a prisoner while on duty was not acting in her official capacity (under § 946.12, Misconduct in Public Office).

In State v. Barrett, a definition of "official capacity" was adopted for purposes of the battery to a peace officer statute. It was applied to resisting an officer in State v. Christensen and misconduct in public office in State v. Schmit. In Barrett, the court adopted a definition for the term "official duties" given in United States v. Heliczer, 373 F.2d 241, 245 (2d Cir. 1967):

"Engaged in . . . performance of official duties" is simply acting within the scope of what the agent is employed to do. The test is whether the agent is acting within that compass or is engaging in a personal frolic of his own. It cannot be said that an agent who has made an arrest loses his official capacity if the arrest is subsequently adjudged to be unlawful.

The Barrett opinion elaborated on this definition as follows:

The deputy sheriff in this case was not performing any of the duties conferred upon him as a deputy sheriff of Richland county when he questioned the defendant in Grant county. Once he crossed the county line, unless his purpose i[n] questioning and detaining the defendant, had some relation to his employment as a deputy in Richland county, he was no longer acting in his official capacity. By the phrase "some relation to his employment," we mean that he must be acting as a peace officer, that is, he must be doing "police work" and he must be acting with the powers vested in him as a peace officer. In this case, Officer Breneman must not only have been questioning the defendant as a deputy sheriff but he must also have been acting with the powers of a deputy sheriff for Richland county. If a deputy sheriff crosses the county line of his employment and if there are no circumstances of his employment extending his duty to act, then the attempt to exercise his powers as a peace officer outside of his county of employment is not within the scope of his employment. 96 Wis.2d 174, 180-81.

The definition in Wis JI-Criminal 915 attempts to identify the essential attributes of the Barrett definition.

4. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, ___ Wis.2d ___, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, ___ Wis.2d ___, 743 N.W.2d 823.