



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL .

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September 27, 1982

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ATTORNEY GENERAL OPINION NO. 82- 213

Bryce B. Moore, Director
Division of Worker's Compensation
Department of Human Resources
Sixth Floor, 535 Kansas Avenue
Topeka, Kansas 66603

Re: Automobiles -- Serious Traffic Offenses -- Driving
 While Under Influence of Alcohol; Performance of
 Community Service Not Covered by Workmen's Compen-
 sation

Synopsis: As amended by L. 1982, ch. 144, §5, K.S.A. 1981
 Supp. 8-1567 provides that a person convicted of
 a violation of the offense of operating a motor
 vehicle while under the influence of alcohol may
 be required to perform public or community service
 work as an alternative to incarceration or payment
 of a fine. In performing such work, a person re-
 ceives no compensation, but rather fulfills a con-
 dition of his or her sentence from the district
 or municipal court. Accordingly, such a person is
 not a workman, employee or worker, as those terms
 are defined by K.S.A. 44-508(b) of the Workmen's
 Compensation Act, and is therefore not covered by
 the terms of the Act. Cited herein: K.S.A. 1981
 Supp. 8-1567 (as amended by L. 1982, ch. 144, §5),
 K.S.A. 44-508, K.S.A. 1981 Supp. 75-6102.

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Dear Mr. Moore:

As Director of the Division of Worker's Compensation of the
Department of Human Resources, you request our opinion on a
question involving the scope of certain amendments to K.S.A.
1981 Supp. 8-1567, which relates to the offense of operating
a vehicle under the influence of alcohol. Specifically, you
inquire as to the effect of provisions which allow a person

who has been convicted of a violation to perform community service work in lieu of serving time in jail or paying all or part of a fine. Your question concerns the status of such a person under the Kansas Workmen's Compensation Act, K.S.A. 44-501 et seq., which is administered by your office.

As amended, subsection (c) of K.S.A. 1981 Supp. 8-1567 provides:

"Upon a first conviction of a violation of this section, a person shall be sentenced to not less than 48 hours' imprisonment or 100 hours of public service nor more than 6 months' imprisonment and fined not less than \$200 nor more than \$500, or by both such fine and imprisonment." (Emphasis added.)

The provision for the performance of public service is a new feature of the subsection, which previously allowed the imposition of jail time, a fine or both. Subsection (g) of the statute as amended provides a further alternative concerning payment of any fine imposed, to-wit:

"In lieu of payment of a fine imposed pursuant to this section, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to \$5 for each full hour spent by the person in the specified community service." (Emphasis added.)

A previous opinion of this office, No. 82-183, concluded that the terms "public service" and "community service" were synonymous.

Two previous opinions of this office have concluded that individuals performing such work are within the meaning of the term "employee" as defined by the Kansas Tort Claims Act at K.S.A. 1981 Supp. 75-6102(d). Attorney General Opinion Nos. 82-157, 82-183. As such, a governmental unit which utilizes the services of convicted violators in such circumstances could potentially be liable under that act for injuries and damages inflicted or suffered by such persons. You inquire whether the provisions of the Kansas Workmen's Compensation Act would by analogy also apply.

In our opinion, such would not be the case. It has been repeatedly held that for the provisions of K.S.A. 44-501 et seq. to apply, there must be an employer-employee relationship in

existence. See, Dorst v. City of Chanute, 185 Kan. 593 (1959) and cases cited therein at 598. At K.S.A. 44-508(b), the following definition appears:

"'Workman' or 'employee' or 'worker' means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. Such terms shall include but not be limited to: Executive officers of corporations; professional athletes; persons serving on a volunteer basis as duly authorized law enforcement officers, ambulance attendants, mobile intensive care technicians, firemen or fire fighters, but only to the extent and during such periods as they are so serving in such capacities; persons employed by educational, religious and charitable organizations, but only to the extent and during the periods that they are paid wages by such organizations; persons in the service of the state, or any department, agency or authority of the state, any city, school district, or other political subdivision or municipality or public corporation and any instrumentality thereof, under any contract of service, express or implied, and every official or officer thereof, whether elected or appointed, while performing official duties; volunteers in any employment, if the employer has filed an election to extend coverage to such volunteers; and minors, whether such minors are legally or illegally employed." (Emphasis added.)

It is noteworthy that the above definition looks to the existence of a "contract of service" between the employer and employee, which must exist before the other provisions of the Act come into play. Dorst v. City of Chanute, supra; Gaston v. San Ore Construction Co., 206 Kan. 254 (1970). Such a contract does not establish tort liability. Yocum v. Phillips Petroleum Co., 228 Kan. 216 (1980). This is in contrast to the Tort Claims Act, which looks to the degree of control which one person has over the actions of another. Thus, while the latter act covers employer-employee relationships, it also covers master-servant relationships in which no contract of service may exist. K.S.A. 1981 Supp. 75-6102(d); Attorney General Opinion No. 82-157.

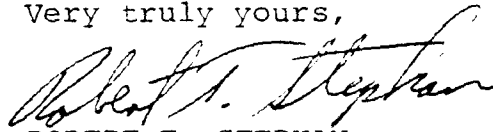
It is our opinion that this distinction is determinative here, where any agreement made by a convicted violator is with the court or prosecuting attorney and not the entity which receives the benefit of the service. Such agreements are not in the

Bryce B. Moore
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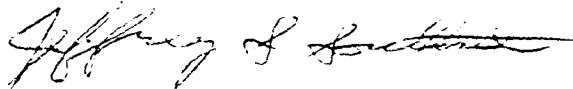
nature of a contract of employment, but rather are a condition of one's sentence, to be performed in lieu of serving jail time. Further, while the recipient of the service, whether a governmental entity or a private organization, has a right to control such persons' actions so as to invoke the Tort Claims Act, it makes no agreement with them as to compensation, length of time to be served, deadline for completion or the consequences of a failure to perform assigned tasks of community service work.

In conclusion, as amended by L. 1982, ch. 144, §5, K.S.A. 1981 Supp. 8-1567 provides that a person convicted of a violation of the offense of operating a motor vehicle while under the influence of alcohol may be required to perform public or community service work as an alternative to incarceration or payment of a fine. In performing such work, a person receives no compensation, but rather fulfills a condition of his or her sentence from the district or municipal court. Accordingly, such a person is not a workman, employee or worker, as those terms are defined by K.S.A. 44-508(b) of the Workmen's Compensation Act, and is therefore not covered by the terms of the Act.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle