



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

February 24, 1987

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 87- 34

Robert A. Walsh
Cloud County Attorney
Cloud County Courthouse
Concordia, Kansas 66901

Re: State Departments; Public Officers and
Employees--Kansas Tort Claims Act--Employee's
Defense; Costs

Synopsis: Service of process is a condition precedent to an employee's request for the provision of defense counsel by a governmental entity, unless such condition is waived. If, after the employee has been served, the entity lawfully refuses to provide for such defense, and if the request was made in accordance with the statute, then the entity must reimburse the employee for attorney expenses incurred as a result of the retention of private counsel. Absent service of process, timely request for, and proper refusal of providing legal defense counsel, no right is conferred on the employee to retain private counsel at the expense of the governmental entity. Cited herein: K.S.A. 75-6103, 75-6108, 75-6109.

* * *

Dear Mr. Walsh:

As attorney for Cloud County, Kansas, you request our opinion regarding the Kansas tort claims act, K.S.A. 75-6101 et seq. Specifically, you inquire whether a governmental entity must reimburse an employee for attorney's fees and other costs which that employee has incurred prior to the

commencement of suit against the person in his or her capacity as a governmental employee. You indicate that, prior to the filing of the lawsuit, the person may find himself in a situation which is at odds with the position of the employer, creating a conflict of interest which justifies separate legal counsel.

We believe that the sections providing for legal defense of governmental employees clearly enunciate the procedure by which persons who are defendants in their official or individual capacity are to be paid for legal expenses they incur. First, we note that governmental entities are liable for negligent or wrongful acts or omissions of their employees who cause injury while acting within the scope of their employment. K.S.A. 75-6103(a). The entity must indemnify its employees against damages, with the exception of punitive or exemplary damages, or costs which are paid through an applicable contract or insurance policy. If the trier-of-fact finds that the employee acted with actual fraud or actual malice, or if the employee fails to cooperate in good faith in the defense, the entity may recover payments for judgments, costs and fees it has incurred on the employee's behalf. K.S.A. 75-6109. In addition to the governmental entity's liability for judgments, it is also responsible for providing the defense for the employee in any civil action or proceeding in which the employee is a defendant in his or her individual or official capacity when the suit arises out of an act or omission of the employee while acting within the scope of his employment. This defense is available to the employee upon proper request. K.S.A. 75-6108(a). The defense provided may be either by the entity's own attorney, by outside counsel employed by the entity, or counsel provided by an insurance carrier. K.S.A. 75-6108(b).

The request for defense must be made in accordance with K.S.A. 75-6108(e), which states in part,

"[the request] shall be made in writing within fifteen (15) days after service of process upon the employee in the action."

The timeliness of a request may be waived by the governmental entity in its discretion. It is our opinion that service of process on the employee is made a condition precedent to a request for the provision of defense counsel by the above-quoted subsection.

A governmental entity may refuse to provide for the employee's defense if it determines that

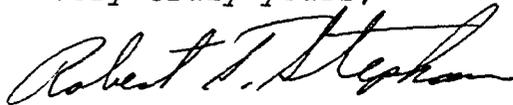
"(1) The act or omission was not within the scope of such employee's employment; (2) such employee acted or failed to act because of actual fraud or actual malice; (3) the defense of the action or proceeding by the governmental entity would create a conflict of interest between the governmental entity and the employee; or (4) the request was not made in accordance with subsection (e) [of K.S.A. 75-6108]." K.S.A. 75-6108(c).

If the request is timely made, and the governmental entity refuses to provide for the defense, then such entity must reimburse the employee for reasonable attorney's fees, costs, and expenses which the employee incurs as a result of retaining his or her own defense counsel. K.S.A. 75-6108(d). We perceive two relevant points in subsection (d). First, it is the prerogative of the governmental entity to determine whether any of the enumerated conditions exist for which it may refuse to provide defense counsel. As we opined in Attorney General Opinion No. 85-140, the decision must be made by the governing body. A determination by the entity's attorney or by the employee would be without effect. The second relevant point is that the request must be in accordance with subsection (e), as cited above. In short, the governmental entity is not required to reimburse employees for legal defense expenses if the request for counsel was not made in a timely fashion, i.e., within fifteen days after service of process on the employee. Otherwise, governmental entities might find themselves in the position of paying for what they may consider as needless expenses if the request is made too early, or, at a disadvantage if the request is made too late.

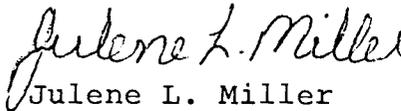
In conclusion, service of process on the employee is a condition precedent to the requirement that the governmental entity provide for the legal defense of an employee when such employee is named as a party defendant to a lawsuit in an action arising out of the employment relationship, unless, in its discretion, the governmental entity waives the condition. The governmental entity may refuse to provide such defense under specified circumstances, but if the request was made in a timely fashion, then the entity must reimburse the employee for reasonable costs incurred as a result of retaining outside counsel. It is therefore our opinion that the entity is not

required to reimburse the employee for those expenses when the employee's request for counsel was not made in the time period and manner prescribed by statute. The statute confers no right on the employee to retain outside counsel at the expense of the governmental entity prior to the happening of the events outlined above.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

RTS:JLM:jm