



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 87-97

Robert A. Gottschalk  
Executive Secretary  
The Kansas State Fair  
2000 North Poplar  
Hutchinson, Kansas 67502

Re: State Departments; Public Officers and Employees --  
Kansas Tort Claims Act -- Personal Liability of  
Board of State Fair Managers

Intoxicating Liquors and Beverages -- Cereal Malt  
Beverages -- Prohibited Acts; Sunday Sales on  
Fairgrounds

Synopsis: Members of the Board of State Fair Managers are  
state employees for purposes of the Kansas Tort  
Claims Act. As such, except as provided in K.S.A.  
75-6104, they are subject to suit for claims  
arising out of their wrongful acts. Members who  
have been held liable for damages occurring within  
the scope of their employment shall be indemnified  
by the state, though in the event the employee has  
acted with actual fraud or malice or has failed to  
cooperate in the defense, the state is entitled to  
repayment of any amounts paid out.

The board is given authority to regulate and  
control fairground use. While the sale and  
consumption of intoxicating liquors are generally  
prohibited on public property, the prohibition does  
not extend to cereal malt beverages. Therefore, as  
long as the statutory and regulatory requirements  
are met, the board may authorize Sunday sales of

cereal malt beverages on the fairgrounds. Cited herein: K.S.A. 2-139; 2-202, as amended by 1987 Senate Bill No. 3, Sec. 7; 2-205, as amended by 1987 Senate Bill No. 3, Sec. 10; 41-102(b), as amended by 1987 House Substitute for Substitute for Senate Bill No. 141, Sec.54; 41-2704(a), as amended by 1987 House Substitute for Substitute for Senate Bill No. 141, Sec. 4; 74-520, as amended by 1987 Senate Bill No. 3, Sec. 3; 74-521, as amended by 1987 Senate Bill No. 3, Sec. 20; 75-6101, 75-6102(d); 75-6104, amended by 1987 House Bill No. 2023, Sec. 3; 75-6105(c); 75-6109; 1987 House Bill No. 2615, Sec. 4(b)(2).

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Dear Mr. Gottschalk:

As Executive Secretary of the Board of State Fair Managers, you have requested our opinion concerning two unrelated issues. First, you have questioned the extent of the personal liability of board members for claims which may arise out of the operation of the fair grounds. Your second inquiry involves the Sunday sales of cereal malt beverages on the fair grounds.

Membership of the Board of State Fair Managers is established by K.S.A. 74-520, as amended, and is comprised of the state board of agriculture, its secretary and three appointed individuals. The function of the board is to perform duties in connection with the holding of a state fair. K.S.A. 74-521, as amended. The lands held by the State of Kansas for fair purposes are directed and controlled by the board. K.S.A. 2-202, as amended. Inclusive in such direction and control is the authority to regulate the use of the fairgrounds in conducting and operating a state fair, and to lease the buildings and grounds when they are not necessary for use for fair purposes. K.S.A. 2-202; 2-205, as amended. As the board members act on behalf of the State of Kansas when performing the duties stated above, we believe they are employees of the state for purposes of the Kansas Tort Claims Act, K.S.A. 75-6101 et seq. C.F., Attorney General Opinions No. 86-155; 84-88.

An employee is defined by the tort claims act as:

"any . . . member of a board of a governmental entity, including elected or

appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation." K.S.A. 75-6102(d).

Employees who act within the scope of their employment are not immune from liability arising out of their wrongful acts, unless their actions fall within the exceptions to liability listed in K.S.A. 75-6104, as amended. However, pursuant to K.S.A. 75-6109, the governmental entity must indemnify an employee against damages caused by the employee's act if the act was within the scope of employment. The governmental liability for indemnification does not extend to an award of punitive or exemplary damages, but K.S.A. 75-6105(c) precludes such an award against employees absent actual fraud or malice. If the employee fails to cooperate in good faith in the defense of the claim or action, or if the trier of fact finds that the act or omission of the employee was because of such employee's actual fraud or actual malice, the governmental entity has the right to recover any payments made by it for any judgment or fees and costs associated with the defense of the employee.

In summary, we believe that members of the Board of State Fair Managers are employees for purposes of the Kansas Tort Claims Act. As such, they may be subject to suit for damages proximately caused by their wrongful acts. Members who have been held liable for damages occurring within the scope of their employment shall be indemnified by the state, though in the event there is actual fraud or malice or a failure to cooperate in the defense by the employee, the governmental entity is entitled to repayment of any amounts it indemnifies.

You next inquire whether the Fair Board may allow the Sunday sale of cereal malt beverages on the fairgrounds. The sale of cereal malt beverages on Sunday is allowed by 1987 House Bill No. 2615, Sec. 4(b)(2) when three conditions are met. First, the place of business must be licensed to sell cereal malt beverages for consumption on the premises. The second condition is that at least 30% of the business' gross sales must be derived from the sale of food consumed on the premises. Finally, the business must be located in a city or county which authorizes Sunday sales. We will assume that these conditions are met.

There is little doubt that the Board may allow the sale of cereal malt beverages on Sunday if the requirements of 1987

House Bill No. 2615 are met. The board is empowered to regulate and control the use of the fairgrounds in operating the state fair. K.S.A. 2-202, as amended. While the consumption of alcoholic liquor upon property owned by the state is generally prohibited (with exceptions not here relevant) by K.S.A. 41-719, as amended by 1987 House Substitute for Substitute for Senate Bill No. 141, Sec. 54 (hereinafter 1987 Senate Bill No. 141), there is no general prohibition against the sale or consumption of cereal malt beverages on state property. A similar prohibition regarding the sale of intoxicating liquor, applicable to county fair associations, appears in K.S.A. 2-139. These prohibitions refer only to alcoholic liquor, which by definition does not include cereal malt beverages. K.S.A. 41-102(b), as amended by 1987 Senate Bill No. 141, Sec. 2. There being no general prohibition, we believe that specific legislative authority enabling the Board to allow the Sunday sale of cereal malt beverages is not required. It is our opinion that the Board may allow such sales under its authority to regulate and control fairground use.

Licensing of cereal malt beverage retailers has lawfully been delegated to local units of government. City of Baxter Springs v. Bryant, 226 Kan. 383, 387 (1979). The appropriate local unit of government is empowered with authority to prescribe, within reason, hours of operation, standards of conduct, and rules regarding moral, sanitary and health conditions of licensed vendors. K.S.A. 41-2704(a), as amended by 1987 House Bill No. 2615, Sec. 4. Vendors who sell cereal malt beverages must therefore conform to the requirements of the licensing authority, and the terms of the license itself, for regulation beyond the cereal malt beverage act.

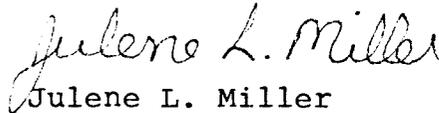
In conclusion, it is our opinion that members of the Board of State Fair Managers are state employees for purposes of the Kansas Tort Claims Act. As such, except as provided in K.S.A. 75-6104, they are subject to suit for claims of damages proximately caused by their wrongful acts. Members who have been held liable for damages shall be indemnified by the state, though in the event the employee has acted with actual fraud or malice or has failed to cooperate in the defense, the state is entitled to repayment of any amounts paid. In addition, the board is given authority to regulate and control fairground use. While the sale and consumption of intoxicating liquors are generally prohibited on public property, no such prohibition is placed on the sale and consumption of cereal malt beverages. Therefore, as long as

the statutory and regulatory requirements are met, the board may authorize the Sunday sale of cereal malt beverages on the fairgrounds.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Julene L. Miller  
Deputy Attorney General

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