



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 89- 81

Ted D. Ayres
General Counsel
Kansas Board of Regents
Suite 609, Capitol Tower
400 S.W. Eighth
Topeka, Kansas 66603-3911

Re: State Departments; Public Officers and
Employees--Kansas Tort Claims Act--Persons Covered;
Faculty of the Kansas College of Technology

State Institutions and Agencies; Historical
Property--State Educational Institutions;
Management and Operation--Kansas College of
Technology; Faculty Covered by Tort Claims Act

Synopsis: Faculty members of the Kansas college of technology
(KCT) who instruct maintenance and flight courses
in the aeronautical training programs at KCT are
employees of a governmental entity for purposes of
the tort claims act. Instructors who maintain or
pilot planes for other state agencies may be deemed
employees of such other state agencies if acting in
their service in an official capacity. Cited
herein: K.S.A. 1988 Supp. 75-6102; K.S.A. 75-6103;
K.S.A. 1988 Supp. 75-6108; K.S.A. 75-6109; K.S.A.
1988 Supp. 76-711; 76-712.

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Dear Mr. Ayres:

On behalf of the Kansas board of regents and the Kansas college of technology (KCT) you request our opinion regarding the application of the Kansas tort claims act to certain persons involved with the aeronautical training programs at KCT.

Initially we must determine whether KCT is a governmental entity for purposes of the tort claims act. The term "governmental entity" is defined in the act as the state or any municipality. K.S.A. 1988 Supp. 75-6102(c). "State" in turn is defined to include "any agency, authority, institution or other instrumentality thereof." K.S.A. 1988 Supp. 75-6102(a). KCT has been established as a state educational institution pursuant to K.S.A. 1988 Supp. 76-711(a). K.S.A. 1988 Supp. 76-712 provides that state educational institutions are state agencies under the general control of the board of regents. Thus, we have little difficulty concluding that KCT is a governmental entity for purposes of the tort claims act. See Boaldin v. University of Kansas, 242 Kan. 288 (1987); Attorney General Opinion No. 86-45, 81-139.

We now proceed to your specific questions which you present as follows:

"1. Faculty supervise a laboratory setting wherein students learn about and do mechanical work on aircraft as part of their study. This situation raises two questions concerning coverage of the Tort Claims Act: 1) Are the faculty members protected if a student is injured? 2) Are these faculty members protected from liability if the supervised repairs or maintenance are alleged to be a cause of a subsequent aircraft failure?

"2. The second question deals with tort claims protection of flight instructors. Flight instructors at KCT include both full-time and part-time faculty. Their duties include flying with students and, instructing solo students from the ground. 1) Are these faculty members protected from liability if a student is injured? 2) Are these faculty members protected from liability if the supervised student pilot causes injury or damage during instructions?

"3. The question has also been raised asking about a student's use of that student's own plan, either owned or rented, for formal instruction and whether the Tort Claims Act applies.

"4. The final question is whether KCT instructors and airplanes may be used beyond the basic instructional mission and still be within the Tort Claims Act. There have been inquiries from other state agencies concerning the possibility of using KCT planes and faculty pilots for transporting state officials. The cost of such transportation would be borne by the other state agencies." (References omitted.)

You indicate that these questions assume the absence of actual fraud or actual malice.

K.S.A. 75-6103 provides in part:

"Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state."

"Employee" is defined as

"any officer, employee, servant or member of a board, commission, committee, division, department, branch or council 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. 'Employee' does not include an independent contractor under contract with a governmental entity. . . ." K.S.A. 1988 Supp. 75-6102(d).

Clearly a faculty member of KCT meets this definition unless circumstances indicate an independent contractor relationship. See Attorney General Opinion No. 89-65. Such faculty members are "acting on behalf or in service of a governmental entity" in an official capacity when instructing students in KCT aeronautical courses, and thus are entitled, in appropriate circumstances, to representation (K.S.A. 1988 Supp. 75-6108) and indemnification (K.S.A. 75-6109) in cases arising from negligent acts or omissions occurring while acting within their scope of employment. The act does not

differentiate between the type of tort alleged for purposes of determining coverage. This analysis applies for both faculty members employed to supervise the laboratory courses wherein maintenance skills are learned and faculty members employed as flight instructors and thus is responsive to question number 2 as well as question number 1.

Your third question concerns the use by a student of a plane other than one regularly maintained under the direction of KCT faculty for formal instruction. In our opinion, KCT and its faculty will not be held liable for damages caused by mechanical failures or damages attributed to the aircraft over which KCT had no control.

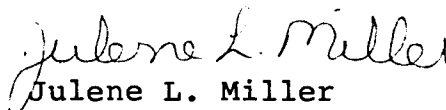
Finally, you question whether KCT instructors are covered under the tort claims act when performing services beyond the basic instructional mission. If the instructors are acting in service of a governmental entity in an official capacity, they will be covered for non-malicious tortious acts or omissions. However, it will be the governmental entity for which they are in service, not the KCT, which will be responsible for any defense or indemnification unless there is a contractual arrangement between the KCT and the state agency using the pilot/instructor.

In conclusion, faculty members of the Kansas College of Technology who instruct maintenance and flight courses in the aeronautical training programs at KCT are employees of a governmental entity for purposes of the tort claims act. Instructors who maintain or pilot planes for other state agencies may be deemed employees of such other state agencies if acting in their service in an official capacity.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General