



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 90- 21

Claire K. McCurdy
Chief Counsel
Department on Aging
Docking State Office Bldg., 122-S
Topeka, Kansas 66612

Re: State Departments; Public Officers and Employees --
Kansas Tort Claims Act -- Definitions; Employees;
Volunteers Who Work as Representatives of the State
Long Term Care Ombudsman

Synopsis: Persons in the service of or acting on behalf of a
municipality, as defined by K.S.A. 75-6102(b), are
covered by the Kansas tort claims act for acts
within the scope of their authority unless such
persons are independent contractors. Persons
acting on behalf of or in the service of an
independent contractor rather than a municipality
do not meet the definition of employee as set forth
at K.S.A. 75-6102(d) and are therefore not afforded
the protections of the Kansas tort claims act.
Cited herein: K.S.A. 75-6101; 75-6102.

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Dear Ms. McCurdy:

As Chief Counsel for the Kansas Department on Aging you
request an opinion concerning application of the Kansas tort
claims act, K.S.A. 75-6101 *et seq.* You specifically ask
whether the provisions of the tort claims act protect
representatives of the office of the state long term care
ombudsman regardless of whether these individuals are
employees of the Kansas Department on Aging. You inform us

that there are some entities which employ individuals whose duties are very similar to those of the state long term care ombudsman. Such entities include area agencies on aging (who contract to provide services on behalf of KDOA), volunteers in community programs, or employees of other governmental entities. You are primarily concerned with whether the tort claims act affords protection to individuals in the community who may volunteer to take part in a local ombudsman program. You therefore request our guidance concerning how far the protections available under the tort claims act extend.

The primary issue is whether a particular individual is an employee as defined by the Kansas tort claims act. K.S.A. 75-6102(d) defines "employee" to mean "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. . . ." If an individual can be defined as an employee of a municipality pursuant to the tort claims act, the protections and representations provided therein will apply and be available to that person for acts within the scope of their authority. Each potential employee relationship should be examined on facts a case-by-case basis. Another issue will be whether the employer is a municipality as defined by the tort claims act. Attorney General Opinion No. 79-219 opined that area agencies on aging were subject to the Kansas open meetings act. Thus, there may be a plausible argument that employees of those entities are covered by the tort claims act because their employer is a municipality. For purposes of this opinion we will provide the tests ordinarily utilized to determine whether an individual is an employee pursuant to the tort claims act.

Bonewell v. City of Derby, 236 Kan. 589 (1985), examined whether the Derby Jaycees were employees as defined by K.S.A. 75-6102(d). This group administered a softball program for the city. The court recognized that the statutory definition of employee is broad, and that the tort claims act included persons acting on behalf of or in service of a governmental entity with or without compensation. The only exclusion noted in the definition is that of an independent contractor. The court found that the Jaycees did not fall within the independent contractor exception. The Jaycees were assisting the city in carrying out a public purpose and the court therefore held that these individuals clearly fell within the statutory definition of employee.

Persons volunteering to assist the KDOA, the county, or other governmental entities with public programs are like the individuals discussed in Bonewell and thus would appear to be covered by the act. However, volunteers assisting an independent contractor which does work for a public entity have a more tenuous relationship with the public entity.

Attorney General Opinion No. 88-93 examined whether a member a redevelopment committee of a city could be considered an employee as defined by K.S.A. 75-6102(d). The opinion discussed the Bonewell case and opined that a member of a redevelopment committee was covered by the tort claims act. The determining issue was whether the member acted on behalf or in the service of a governmental entity in an official capacity and not pursuant to an independent contractor relationship. The same test should be applied to volunteers working for independent contractors of the state. Ordinarily, such an individual is acting on behalf of the private entity. An independent contractor is exempted from coverage by the tort claims act, and employees or volunteers of that independent contractor do not appear to be employees as defined by the tort claims act.

Therefore, it is our opinion that persons in the service of or acting on behalf of the Kansas Department on Aging or Kansas municipalities are covered by the tort claims act for acts within the scope of their authority unless such persons may be characterized as independent contractors. Persons acting on behalf of or in the service of an independent contractor do not fit within the definition of employee set forth at K.S.A. 75-6102(d) because they do not act on behalf of a municipality or the state. Volunteers working on behalf of or in the service of a non-municipal entity are not covered by the Kansas tort claims act.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General