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December 31, 1991

ATTORNEY GENERAL OPINION NO. 91- 156

Ken W. Strobel
City Attorney
City Hall, P.O. Box 880
Dodge City, Kansas 67801-0880

Re: State Departments; Public Officers and
Employees--Kansas Tort Claims Act--Governmental
Entity's Responsibility to Provide Defense and Pay
Judgment

Synopsis: Pursuant to K.S.A. 75-6108(a) and 75-6109 of the
tort claims act, governmental entities are required
to provide a defense and pay the judgment for a
claim for actual damages against an employee
arising out of an act which occurred in the scope
of employment and absent actual fraud or malice on
the part of the employee. It is discretionary with
the governmental entity to reimburse an employee
for costs incurred in defending a claim for
punitive or exemplary damages arising out of an act
occurring in the scope of employment, and the
governmental entity may discretionarily pay any
part of the judgment rendered on such claims.
K.S.A. 75-6116 contains similar provisions for
civil rights claims except that the governmental
entity may discretionarily pay any portion of the
judgment only if the employee's act or omission was
not a result of actual fraud or malice. Cited
herein: K.S.A. 75-6108; 75-6109; 75-6116.

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Dear Mr. Strobel:

As attorney for the city of Dodge City, you request our interpretation of K.S.A. 75-6108(a) and (f) of the Kansas tort claims act and 75-6116(a)(2), (c), (d) and (e). Specifically you ask whether the word "may" as used in these provisions should be interpreted as discretionary or mandatory language.

K.S.A. 75-6108(a) states:

"Upon request of an employee in accordance with subsection (e), a governmental entity shall provide for the defense of any civil action or proceeding against such employee, in such employee's official or individual capacity or both, on account of an act or omission in the scope of such employee's employment as an employee of the governmental entity, except as provided in subsection (c).
(Emphasis added).

The underscored language provides that the entity must provide for the defense of any civil action upon the request of the employee in the circumstances provided. However, subsection (f) states:

"Notwithstanding any other provision of law to the contrary, a governmental entity may reimburse an employee such reasonable attorney fees, costs and expenses as are necessarily incurred in defending a claim against the employee for punitive or exemplary damages if the governmental entity finds that:

"(1) The action or proceeding arose out of an act or omission in the scope of the employee's employment; and

"(2) the employee reasonably cooperated in good faith in defense of the claim."
(Emphasis added).

Further, K.S.A. 75-6109 provides:

"Except as otherwise provided in the Kansas [tort] claims act, a governmental entity is liable, and shall indemnify its employees against damages, for injury or damage proximately caused by an act or omission of an employee while acting within the scope of his or her employment. A governmental entity shall not be liable under the provisions of this act for any punitive or exemplary damages against an employee, nor for payment of any costs, judgments or settlements which are paid through an applicable contract or policy of insurance. The governmental entity shall have the right to recover any payments made by it for any judgment, or portion thereof, and costs or fees incurred by or on behalf of an employee's defense 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."
(Emphasis added.) See also K.S.A. 75-6105(c) (governmental entity not liable for punitive or exemplary damages; employee also not liable for such damages unless finding of actual fraud of malice).

The provisions of K.S.A. 75-6116 which are in question are similar:

"(a) If an employee of a governmental entity is or could be subject to personal civil liability on account of a noncriminal act or omission which is within the scope of the employee's employment and which allegedly violates the civil rights laws of the United States or of the state of Kansas, the governmental entity:

"(1) Shall provide for the defense of any civil action or proceeding which arises out of the act or omission . . . to the extent and under the limitations and

conditions provided by K.S.A. 75-6108 . .
.; and

"(2) may reimburse the employee attorney fees, costs and expenses in defending a claim for punitive or exemplary damages in such action or proceeding to the extent and under the conditions and limitations by K.S.A. 75-6108 and amendments thereto for reimbursement of such fees, costs and expenses incurred in defending a claim for punitive damages under the Kansas tort claims act." (Emphasis added).

Subsection (c) and (d) state:

"(c) Notwithstanding any other provision of law to the contrary, a governmental entity may pay any part of a judgment taken against an employee of the governmental entity that is for punitive or exemplary damages for the violation of the civil rights laws of the United States if the governmental entity finds that:

"(1) The action or proceeding arose out of an act or omission in the scope of the employee's employment;

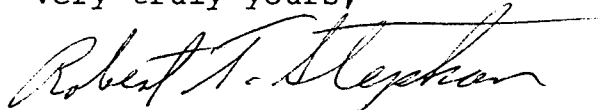
"(2) the employee reasonably cooperated in good faith in defense of the claim; and

"(3) the employee's act or omission was not the result of actual fraud or actual malice.

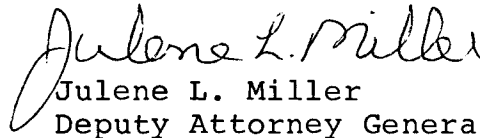
"(d) The possibility that a governmental entity may pay that part of a judgment that is for punitive or exemplary damages or attorney fees or other costs related thereto shall not be disclosed in any trial in which it is alleged that an employee of that entity is liable for punitive or exemplary damages and such disclosure shall be grounds for a mistrial." (Emphasis added).

In reading these provisions together, it is our opinion that K.S.A. 75-6108(a) and 75-6116(a)(1) require the governmental entity to provide a defense for claims seeking actual damages. It is discretionary on the part of the governmental entity to reimburse an employee for defending a claim for punitive or exemplary damages. Likewise, a governmental entity must pay a judgment rendered on a claim for actual damages (subject to the statutory limitations), but has discretion whether to pay any part of a judgment for punitive or exemplary damages. Since, under the tort claims act, employees acting within the scope of their employment are also not liable for punitive or exemplary damages without a finding of actual fraud or malice, the employee may seek new litigation if the governmental entity chooses not to pay punitive damages in a tort action. If a governmental entity's policy is to not pay punitive and exemplary damages, it should notify employees of this policy to allow them to seek insurance or make this issue part of any collective bargaining agreement negotiations.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

RTS:JLM:jm