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July 18, 1979

ATTORNEY GENERAL OPINION NO. 79- 154

The Honorable Willard "Woody" Thompson
8302 East Gilbert
Wichita, Kansas 67207

Re: Procedure---Civil---Small Claims Procedure Act---Representation
of a non-corporate employer by an agent in Small Claims Court

Synopsis: The Small Claims Procedure Act, K.S.A. 67-2701, *et seq.*, allows an agent fiduciary to file claims, cross claims, and be a witness on behalf of his principal, so long as the agent fiduciary is not an attorney, and so long as the "small claim" is not based on an obligation or indebtedness.

Dear Representative Thompson:

You make three specific inquiries in your opinion request. They are:

1. May an agent for a non-corporate employer file a claim pursuant to the Small Claims Act for the employer?
2. May an agent for a non-corporate employer file a counterclaim in a small claims action for the employer?
3. May an agent for a non-corporate employer testify for the employer?

You also asked if our answers would be affected by the fact that the individual employer is permanently disabled and unable to effectively represent himself in Small Claims Court.

On January 6, 1977, this office issued Attorney General Opinion No. 77-7 which concerned assistance to a handicapped party in Small Claims Court. A copy of that opinion is attached. We have reviewed that opinion and believe Opinion No. 77-7 to be valid in that a handicapped person may utilize the assistance of some other individual in the presentation of his claim or defense in Small Claims Court where such assistance is designed to permit the handicapped party to present his or her claim effectively despite speech, hearing, or other impairments which would otherwise hinder or prevent such handicapped person from utilizing the Small Claims Procedure Act for the resolution of disputes.

The last two of the three specific questions you stated must both be answered "yes" because of the dictates of the Small Claims Procedure Act itself (K.S.A. 61-2701, et seq.) While your first question must be generally answered "yes," it must be answered "no," when the "small claim" is based upon an obligation or indebtedness and the agent is not a full time, salaried employee of the person to whom the obligation or indebtedness is owed.

There is only one group of people specifically prevented from giving representation in Small Claims Court: ". . . No party in any such action shall be represented by an attorney prior to judgment." K.S.A. 61-2707(a).

K.S.A. 61-2704 specifically limits who may bring an action in Small Claims Court to a "person" as defined in K.S.A. 61-2703(b). There is no similar statute defining who may be a defendant, the only limitation being the no representation by an attorney statement of K.S.A. 61-2707(a).

K.S.A. 61-2703(b) defines "person" as follows:

(b) "Person" means an individual, partnership, corporation, fiduciary, joint venture, society, organization or other association of persons. (L. 1973, Ch. 239, Sec. 3; July 1.)

"Person" as defined by K.S.A. 61-2703(b) clearly includes a "fiduciary."

Elementary legal concepts define agent and the relationship an agency creates. An agent may be defined as:

An agent is one who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other, and to render an account of it. He is a substitute, or deputy, appointed by his principal primarily to bring about business relations between the latter and third persons. (2A C.J.S. Agency, Sec. 4(c).)

An agency relationship is a fiduciary relation in which the agent is considered to be a fiduciary.

Agency is a representative relation, in which the agent represents, acts for, and derives his authority from, another, his principal; he is an attorney standing in the place of his employer. The essential feature of the agency relation is the representative capacity of the agent, and it is one of the characteristics of the relation that the agent steps into the shoes of the principal and acts for him pursuant to the grant of authority vested in him by the principal.

Agency is generally considered to be a fiduciary relation, the agent being a fiduciary with respect to matters which are within the scope of the agency. It is a relation of trust and confidence, in which the utmost good faith is required, and, because it is a relation of trust and confidence, it is necessarily personal in nature. (2A C.J.S. Agency, Sec. 5)

The law of Kansas is in complete agreement. The Kansas Supreme Court very recently stated:

The relationship existing between a principal and agent is a fiduciary one demanding trust and confidence, and requiring of the agent the same obligation of individual service and loyalty as is imposed upon a trustee in favor of the beneficiary. Merchant v. Foreman, 182 Kan. at 566. (Henderson v. Hassur, 225 Kan. 678, 687 (1979)).

The Small Claims Procedure Act contains another definition which pertains to your inquiry. K.S.A. 61-2703(a) defines what is and what is not a "small claim" under the Act and (2) of that statute states that the following is NOT a "small claim":

(2) A claim based on an obligation or indebtedness allegedly owed to a person other than the person filing the claim, where the person filing the claim is not a full-time, salaried employee of the person who whom the obligation or indebtedness is allegedly owed; . . .

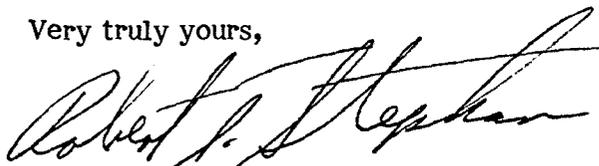
This subparagraph by its terms would require that to file a "small claim" which was based on an obligation or indebtedness, under the Small Claims Procedure Act, an agent would have to be a salaried employee of the person to whom the obligation or indebtedness is owed. This definitional subparagraph limits what is a "small claim" and thus justiciable under the Small Claims Procedure Act.

It is then our opinion that an agent is a fiduciary and may bring, defend, or be a witness in any action in a Small Claims Court pursuant to his fiduciary relationship and the Small Claims Procedure Act, K.S.A. 61-2701, et seq., except when the small claim is based upon an obligation or indebtedness at which time the agent must be a full-time salaried employee of the person to whom the

obligation or indebtedness is owed before he may bring the action under the Small Claims Procedure Act. It is further our opinion that an attorney may not act as an agent to get around the dictates of K.S.A. 61-2707.

We regret the delay in sending this opinion to you and hope it satisfactorily answers your questions. If this office may be of further assistance, please do not hesitate to contact us.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert T. Stephan". The signature is fluid and cursive, with a large initial "R" and "S".

ROBERT T. STEPHAN
Attorney General of Kansas

A handwritten signature in black ink, appearing to read "Bruce E. Miller". The signature is bold and cursive, with a large initial "B" and "M".

Bruce E. Miller
Deputy Attorney General
Chief, Litigation Division

RTS:BEM:MC