

STATE OF KANSAS

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March 12, 1980

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ATTORNEY GENERAL OPINION NO. 80-66

Mickey Carl Moorman
Chetopa City Attorney
P. O. Box 327
330 Maple
Chetopa, Kansas 67356

Re: State Departments, Public Officers,
Employees--Kansas Tort Claims Act--
Claims by Employees and Insurance

Synopsis: The Tort Claims Act applies to a cause of action founded in tort, including one brought by an employee of the governmental entity against such entity, except that the state or municipality is not liable where the claim arises under the Kansas Workmen's Compensation Act. Furthermore, the City of Chetopa, Kansas, may purchase liability insurance for those purposes contained in K.S.A. 1979 Supp. 75-6111 which would include coverage for city employees indemnified under the Act. Cited herein: K.S.A. 1979 Supp. 75-6101, 75-6102, 75-6104, 75-6108, 75-6109, 75-6111.

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Dear Mr. Moorman:

You request the opinion of this office regarding the Kansas Tort Claims Act, K.S.A. 1979 Supp. 75-6101 et seq. First, you inquire whether the Act would apply to a suit by an employee of a governmental entity against his or her employer and, second, whether the City of Chetopa may purchase liability insurance covering the city council, city attorney and city clerk.

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In response to your first query, the Act does apply to suits founded in tort where the plaintiff is an employee of the governmental entity, except that the governmental entity and its employees are not liable for

"any claim by an employee of a governmental entity arising from the tortious conduct of another employer of the same governmental entity, if such claim is compensable pursuant to the Kansas workmen's compensation act." K.S.A. 1979 Supp. 75-6104(b).

Thus, the city is obligated to defend itself and other employees under the conditions of K.S.A. 1979 Supp. 75-6108 and it also must indemnify such employees as provided in K.S.A. 1979 Supp. 75-6109, where it is sued by an employee and the claim does not arise under the workmen's compensation laws. We find nothing in the Act to suggest that the city is to provide for the plaintiff's counsel where the plaintiff is an employee of the city.

Your second inquiry may also be answered in the affirmative. The city may purchase insurance as provided in K.S.A. 1979 Supp. 75-6111, which states in pertinent part:

"A governmental entity may obtain insurance to provide for (1) its defense, (2) for its liability for claims pursuant to this act, including liability for civil rights actions as provided in K.S.A. 1979 Supp. 75-6111, (3) the defense of its employees, and (4) for medical payment insurance when purchased in conjunction with insurance authorized by (1), (2) or (3) above."

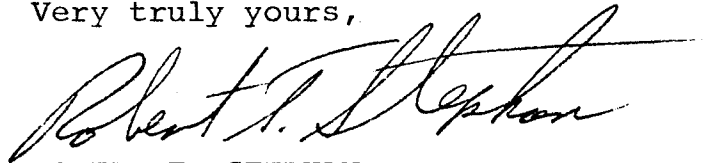
Since K.S.A. 1979 Supp. 75-6109 provides for the indemnification by the city of all "employees" of the city [as the term is defined in K.S.A. 1979 Supp. 75-6102(d)], insurance purchased for the city should specifically "cover" employees of the city, including the city council members, attorney and clerk, so long as such persons are acting within the scope of their employment. Persons acting beyond their authority are not protected by the Tort Claims Act and remain (as they have been) liable for their tortious conduct. The purchase of insurance by the city to protect city employees acting beyond the scope of their authority would be the expenditure of public funds for the protection of persons acting in their private capacities and, indeed, would be an inappropriate, if not unlawful, purchase.

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It should be noted that the Act does not apply to claims arising under contract actions. Thus, the insurance liability funds and defense provisions of the Act are inapplicable for any action founded on contract and traditional methods for the payment of legal expenses and contract claims must be relied upon by the city.

In summary, the Tort Claims Act applies to a cause of action founded in tort, including one brought by an employee of the governmental entity against such entity, except that the state or municipality is not liable where the claim arises under the Kansas Workmen's Compensation Act. Furthermore, the City of Chetopa, Kansas, may purchase liability insurance for those purposes contained in K.S.A. 1979 Supp. 75-6111, which would include coverage for city employees indemnified under the Act.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:gk