



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 86- 45

J. Eric Engstrom, Counsel  
Board of Trustees  
Wichita State University  
125 N. Market, P.O. Box 997  
Wichita, Kansas 67201-6997

Re: State Departments; Public Officers and Employees --  
Tort Claims Act -- Board of Trustees; Wichita State  
University

Synopsis: Under the provisions of the Kansas Tort Claims Act,  
K.S.A. 75-6101 et seq., a member of the Board  
of Trustees of Wichita State University will be  
provided with legal representation in, and will not  
be personally liable for judgments resulting from,  
lawsuits in which the member has acted within the  
scope of his employment. Cited herein: K.S.A.  
75-6102; 75-6103; 75-6108; 75-6109; 76-3a16.

\* \* \*

Dear Mr. Engstrom:

As counsel for the Board of Trustees of Wichita State  
University, you request our opinion on an issue concerning the  
Kansas Tort Claims Act. Specifically, you inquire concerning  
the status of members of the Board of Trustees of Wichita  
State University under the Kansas Tort Claims Act, K.S.A.  
75-6101 et seq., particularly as to the coverage from  
liability afforded them under the act.

K.S.A. 75-6102 establishes the scope of the Kansas Tort Claims  
Act. The statute states, in part, as follows:

"As used in K.S.A. 75-6101 through 75-6118, and amendments thereto, unless the context clearly requires otherwise:

"(a) 'State' means the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof.

. . . .

"(d) 'Employee' means 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. 'Employee' does include former employees for acts and omissions within the scope of their employment during their former employment with the governmental entity." (Emphasis added.)

The board of trustees of Wichita State University is established by K.S.A. 76-3a16, which transfers the powers and authority of the board of regents of the former Wichita University to the trustees. Appointed by the governor, the trustees manage the properties held in trust by the university and invest the university's endowment funds in ways to benefit the university. Some of the trustees' actions are subject to approval by the state board of regents, which has oversight authority over all of the four-year universities in the state system. Given this, we have no difficulty in concluding that the board of trustees is an "agency, authority, institution or other instrumentality" of the state, pursuant to K.S.A. 75-6102(a).

Accordingly, under K.S.A. 75-6102(d), a member of the Board of Trustees of Wichita State University would be included within the term "employee" under the Kansas Tort Claims Act provided that such person was "acting on behalf or in service of a governmental entity." K.S.A. 75-6103(a) defines the liability

of governmental entities for damages caused by employee acts or omissions:

"(a) 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." (Emphasis added.)

K.S.A. 75-6108(a) establishes (with four exceptions) that legal representation shall be provided to an employee when he has acted within the scope of his employment, either in his official or individual capacity. As per K.S.A. 75-6102(d), this encompasses any action on behalf of or in the service of a governmental entity in any official capacity, whether with or without compensation, including participation of boards or commissions. It is important to note that a governmental entity will not be liable for punitive or exemplary damages. See K.S.A. 75-6109.

Legal representation by the state is initiated by the employee who has been sued. K.S.A. 75-6108(e) provides that an employee must make a request for legal defense to the attorney general within fifteen (15) days after being served with process. Subject to exceptions in K.S.A. 75-6108(c), a request will result in the state providing a defense to the claim. If the request is not made within the fifteen day time period, it is at the discretion of the attorney general to decide if such representation should be provided.

The state may decline to provide defense counsel if the university, board of trustees or this office determines that the acts or circumstances fall under one of the exceptions listed in K.S.A. 75-6108(c). The first exception concerns claims which do not arise out of the scope of one's employment. An act completely unrelated to the character of the employment which an employer would not reasonably contemplate occurring may be presumed to be an act outside the scope of employment.

The second circumstance under which this office or the board may decline to provide legal defense is when, in the determination of this office or the board, an employee has acted with fraud or malice. These types of acts have been

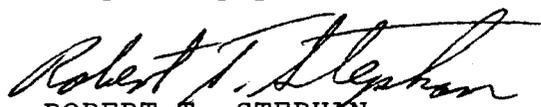
defined by the Kansas Supreme Court as being "so outrageous as to be incompatible with the performance of the duty undertaken."

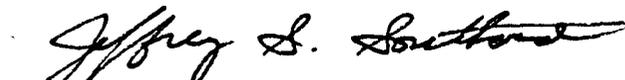
Finally, representation may be declined when a conflict of interest would arise as to the board or the state of Kansas and its employees, or when the employee fails to timely request legal representation, as noted above.

As outlined above, this office and the board may decline representation to a state employee. However, an employee retains the right to petition the court to compel a governmental entity to provide legal defense. Further, if under any of these circumstances an employee is required to hire his own attorney, the employee may be entitled to indemnification of damages. However, K.S.A. 75-6109 provides that such indemnification will not be made where the employee has failed to cooperate in good faith in the legal defense, or if a jury (or a judge in a non-jury trial) finds that the employee acted with fraud or malice.

In summary, a member of the Board of Trustees of Wichita State University will be afforded protection from personal liability and legal representation under the Kansas Tort Claims Act as long as such member falls within the reach of the term "employee," as defined by K.S.A. 75-6102(d), and has acted within the scope of his employment pursuant to K.S.A. 75-6103(a).

Very truly yours,

  
ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS

  
Jeffrey S. Southard  
Deputy Attorney General

RTS:JSS:crw