Legal Opinion: GMP-0007

Index: 6.330, 6.805
Subject: Personal Liability of Proposing & Deciding Officials

October 22, 1991

MEMORANDUM FOR: Regional Counsel
Elmer Lee, Acting Director
Office of Personnel and Training, AP

FROM: Carole W. Wilson, Associate General Counsel
for Equal Opportunity and Administrative Law, GM

SUBJECT: Personal Liability of Proposing and Deciding Officials

The Employee Relations Branch, OPT, has requested that this office issue guidance to proposing and deciding officials regarding their liability, if any, for suits brought against them personally by HUD employees. This memorandum deals with that issue. This memorandum does not cover actions brought by citizens or companies against HUD officials in their individual capacities for allegedly negligent acts involving Departmental programs.

The short answer is that Federal supervisory employees are absolutely immune from action taken by them as proposing or deciding officials, provided that the action was taken within the scope of employment. Ramey v. Bowsher, 915 F.2d 731 (D.C. Cir. 1990) (performance based adverse action); Lombardi v. Small Business Administration, 889 F.2d 959 (10th Cir. 1989) (conduct based adverse action); see, Currie v. Guthrie, 749 F.2d 185 (5th Cir. 1984) (supervisor filing complaint with local authorities about subordinate's threat to kill her during performance based counselling session). The definition of the scope of employment depends on State law. Since, however, that definition is usually quite broad, actions of proposing and deciding officials would be included in the definition.

I. STATE TORT CLAIMS

A. BACKGROUND

A proper understanding of this issue must begin with some historical background. Federal officials were considered to be absolutely immune from common law tort actions as long as their actions were within the outer perimeter of their official duties. Barr v. Matteo, 360 U.S. 564 (1959). This doctrine underwent some modification over the years. In Doe v. McMillan, 412 U.S. 306 (1973), the Court limited legislative immunity and specifically limited the immunity of the Superintendant of

Documents and the Public Printer because they exercised discretion only to the extent of estimating the demand for

particular documents and adjusting the supply accordingly. Eventually, in Westfall v. Erwin, 108 S.Ct. 580 (1988), the Court held that low level Federal employees could not avail themselves of absolute immunity when their conduct occurred within the scope of employment but was not discretionary.

As a result of the Westfall decision, Federal officials were in an uproar. Congress reacted by enacting Pub. L. 100-694. This law, known as the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA), was enacted to provide immunity for Federal employees from personal liability for common law torts committed within the scope of their employment. Ibid. at 2(b). In its Findings section, Congress declared that:

> 1. Federal employees had been protected from personal common law tort liability by a broad based immunity and that the Federal Tort Claims Act (FTCA) had served as the sole means of compensating persons injured by the tortious conduct of Federal employees.
>
> 2. Recent judicial decisions, particularly the decision of the Supreme Court in Westfall v. Erwin, had eroded the common law tort immunity previously available to Federal employees.
>
> 3. The erosion of immunity of Federal employees from common law tort liability had created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

Id. at 2(a). Accordingly, Congress amended the FTCA to be the exclusive remedy for tort claims as follows:

> The remedy against the United States provided by the FTCA for injury or loss of property or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of

> or relating to the same subject matter
> against the employee or the employee's estate
> is precluded without regard to when the act
> or omission occurred.

Id. at 5, amending 28 U.S.C. 2679(b). Congress also provided that the Attorney General could certify as to whether the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose. Ibid. at 6. That certification was then to serve as the basis for substituting the United States as the defendant, if the case were in Federal court; it was to serve as the basis for granting a removal action to Federal court under the Federal removal statute, if the case were in State court. Ibid.

The resulting judicial reaction to FELRTCA has been supportive of the legislation in all the circuits where the issue has been raised. See, Kelly v. United States of America, 924 F.2d 355 (1st Cir. 1991) (FELRTCA "requires substitution of the United States for an individual defendant where the latter was sued by reason of acts or omissions occurring within the scope of his or her Federal employment."); Nasuti v. Scannel, 906 F.2d 802 (1st Cir. 1990) ("Westfall Act thus expressly provided for the absolute immunity of government employees for acts committed within the scope of their employment that amounted to common law torts."); Yalkut v. Gemignani, 873 F.2d 31 (2d Cir. 1989) ("FTCA was amended to provide absolute immunity to 'any employee of the federal Government' who acts within the scope of his or her employment, for money damages arising from common law torts...."); Melo v. Hafer, 912 F.2d 628 (3d Cir. 1990), cert. granted, 111 S.Ct. 1070 (1991) ("The purpose of FELRTCA was to 'return Federal employees to the status they held prior to the Westfall decision,' that is, a status of absolute immunity for activities within the scope of their employment."); Arbour v. Jenkins, 903 F.2d 416 (6th Cir. 1990) (same); Saul v. United States of America, 928 F.2d 829 (9th Cir. 1991) (same); Christensen v. Ward, __F.Supp.__ (D. Utah 1989), aff'd 916 F.2d 1462 (10th Cir. 1990), cert. denied, 111 S.Ct. 559 (1991) (appending and approving District Court's opinion) (FELRTCA "is designed to confer personal immunity from tort liability upon that class of Federal employees who are not protected by other statutes and whose functions would not be viewed as 'discretionary ' under the principles of Westfall...."); Sowell v. American Cyanamid Co., 888 F.2d 802 (11th Cir. 1989). See also, McCulley v. United States, LEXIS#5697, unreported decision of the Seventh Circuit dated April 3, 1991.1 The protection of

1 Although to date no Fifth Circuit cases have discussed FELRTCA, that circuit had previously decided that a Federal employee who was acting within the scope of his employment and whose action was discretionary is immune from state tort claims.

FELRTCA persists to protect a Federal employee notwithstanding the fact that the United States is also immune from suit under the FTCA. United States v. Smith, 111 S.Ct. 1180 (1991).

B. PROCEDURES

The key to the protection of absolute immunity is the determination that the supervisor was acting within the scope of his or her employment. Nasuti, supra. FELRTCA provides that the Attorney General shall make a determination as to whether an employee was within the scope of his or her employment. Id. at 6. (The Attorney General's authority to make such determinations has been delegated to United States Attorneys. 28 C.F.R. 15.3; Arbour, supra.) This determination is conclusive for purposes of determining whether removal from State to Federal Court is appropriate. 28 U.S.C. 2679(d)(2). Thus, the first step for a Federal employee to take, upon being sued personally, is to request that the Department of Justice make a scope of employment determination. The procedures for making such a request are found at 28 C.F.R. 50.15(a). The supervisor must make a request for representation in the law suit naming him or her personally and must provide a short explanation as to why the actions sued upon were in the scope of employment. That supervisor's supervisor must then endorse the request. The second line supervisor will then obtain the concurrence of the Regional Counsel. Regional Counsel should then discuss with the U.S. Attorney's Office whether the request may be sent to that office or whether it should be sent to the Branch Director, Torts Branch, Civil Division, Department of Justice, Washington, D.C. 20530. In the absence of direction to send the request to the U.S. Attorney's Office, the request must be submitted to the Torts Branch.

Once the action has been removed to Federal Court, the plaintiff may challenge the certification and the court must make a finding on the scope of employment issue. Nasuti, supra; Arbour, supra; Donio v. United States, 746 F.Supp. 500 (D.N.J. 1990). A Federal employee who receives a determination that he or she was not acting within the scope of his or her employment may also challenge the negative certification. Jackson v. United States of America, LEXIS#17629 (D.D.C. 1990); 28 U.S.C. 2679(d)(3), as amended by 6 of FELRTCA.

Currie v. Guthrie, 749 F.2d 185 (5th Cir. 1984). In Currie a Federal employee had sued her supervisor personally for having filed a complaint against her with the local police for disturbing the peace in a public place (threatening to kill her supervisor during a counselling session on job performance).

C. SCOPE OF EMPLOYMENT

The scope of employment issue is to be determined based upon the law of the State where the alleged negligence occurred. 28 U.S.C. 1346(b) and 2672; Kelly, supra; Arbour, supra.2 Generally, State definitions are quite broad.3 It is not possible to enumerate here the definitions of all of the States. However, the Restatement of Agency, Second, provides a formulation of the general American rule. Section 228, General Statement, provides:

2 The Second and Tenth Circuits subscribe to the view that scope of employment determinations are based on a two pronged Federal test:

> 1. Whether there is a reasonable connection between the act and the Federal agent's duties and responsibilities; and
>
> 2. Whether the act is "not manifestly or palpably beyond the agent's authority."

Yalkut, supra; Christensen, supra. These decisions are plainly wrong on this issue. Under the FTCA the claim must be decided in accordance with the law of the place where the act or omission occurred. 28 U.S.C. 1346(b) and 2672. Yalkut also ignored Second Circuit precedent on this issue. Compare Yalkut with Cronin v. The Hertz Corp., 818 F.2d 1064 (2d Cir. 1987) (finding the law of the place where the act occurred to apply in a scope of employment decision under the Federal Drivers Act, 28 U.S.C. 2679(b), which was replaced by the revision enacted by Pub. L.100-694).

3 In Massachusetts, for example, the conduct of an agent is within the scope of employment if it is of the kind he is employed to perform; if it occurs substantially within the authorized time and space limits; and if it is motivated at least in part, by a purpose to serve the employer. Kelly, supra, citing Wang Laboratories, Inc. v. Business Incentives, Inc., 398 Mass. 854, 501 N.E.2d 1163 (1986). In Michigan an employee is acting within the scope of his employment if he is engaged in the service of his master, that is, whether the employee's actions are within his authority. Arbour, supra, citing Barnes v. Mitchell, 341 Mich. 7, 67 N.W.2d 208 (1954); Leitch v. Switchenko, 169 Mich.App 798, 333 N.W.2d 140 (1983). An employee's actions may be within the scope of employment even if the actions constitute intentional torts. Arbour, supra, citing Raudabaugh v. Baley, 133 Mich.App 242, 350 N.W.2d 242 (1983).

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Section 229 reads:

> Kind of Conduct within Scope of Employment
>
> (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
>
> (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
>
> (a) whether or not the act is one commonly done by such servants;
>
> (b) the time, place and purpose of the act;
>
> (c) the previous relations between the master and the servant;

(d) the extent to which the business of the master is apportioned between different servants;

(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

(f) whether or not the master has reason to expect that such an act will be done;

(g) the similarity in quality of the act done to the act authorized;

(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) the extent of the departure from the normal method of accomplishing an authorized result; and

(j) whether or not the act is seriously criminal.

As may be seen by these generalized statements on the scope of employment, the actions that proposing and deciding officials take are of the kind the Federal supervisory employee is employed to perform. Furthermore, the actions of proposing and deciding officials are discretionary, Ramey v. Bowsher, 915 F.2d 731 (D.C.Cir. 1990), and would have been protected even under Westfall.

II. CONSTITUTIONAL TORTS

A. GENERAL

FELRTCA provides that "Paragraph (1) does not extend or apply to a civil action against an employee of the Government - (A) which is brought for a violation of the Constitution of the United States." Id. at 5, amending 28 U.S.C. 2679(b)(2)(A). Therefore, FELRTCA does not protect Federal officials and employees from constitutional tort claims. Constitutional torts are claims that Government agents acted in violation of the constitutional rights of the claimants. The Supreme Court has held that claimants have a cause of action for Federal agents' violation of fourth amendment rights, Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1970), for

equal protection violations, Davis v. Passman, 442 U.S. 228 (1979), and for eighth amendment violations, Carlson v. Green, 446 U.S. 14 (1980).

The court, however, has set forth two important standards as to when a constitutional tort will be recognized. First, Government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800 (1982). This standard has been modified to mean that the contours of the right must be sufficiently clear that a reasonable official would understand that what he was doing violates that right. Anderson v. Creighton, 107 S.Ct. 3034 (1987). In effect, the court stated that, in the light of preexisting law, the unlawfulness must be apparent. Ibid.

Second, constitutional torts will not be recognized, where the defendant demonstrates that:

> 1) there are "special factors counselling hesitation in the absence of affirmative action by Congress." Bivens, 403 U.S. at 396; Davis, 442 U.S. at 245; or
>
> 2) Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery and equally effective in the view of Congress. Bivens, 403 U.S. at 397; Davis, 442 U.S. at 245-247.

In the matter of the liability of Federal supervisory employees taking adverse actions, the second set of standards is of paramount importance. In Bush v. Lucas, 462 U.S. 367 (1983), the court held that a special factor counselled against the creation of a Bivens remedy for a Federal employee who was demoted allegedly for violating the plaintiff's first amendment rights. The special factor was the comprehensive procedural and substantive provisions of the Civil Service Reform Act of 1978 (CSRA), Pub.L. 95-454, 92 Stat. 1111. CSRA gave Federal employees meaningful remedies against the United States for employment related claims. United States v. Fausto, 484 U.S. 439 (1988). Some courts then began inquiring into whether the remedies provided to certain classes of Federal employees were meaningful. See, Spagnola v Mathis, 809 F.2d 16 (D.C. Cir. 1986) (denial of promotion, conspiracy to prevent plaintiff from pursing professional development in retaliation for Whistleblower activities); Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986)

(demotion from probationary supervisory position).4 However, in Schweiker v. Chilicky, 108 S.Ct. 2460 (1988), the court again clarified its position in an unrelated Social Security Administration case. In the course of that opinion, the court analyzed Bush and held that where Congress had designed a program that provides what it considers adequate remedial mechanisms for constitutional violations, Bivens actions should not be implied. The court opined that so long as Congress' failure to provide money damages, or other significant relief, has not been inadvertent, a court should defer to Congress' judgment. Id. at 2467-2468.5

Most of the courts of appeals in the Federal system have ruled that the CSRA constitutes a special factor or an alternative remedy precluding constitutional tort suits for money damages against Federal employees, in their individual capacities, arising in the Federal employment context. Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988)(en banc); Bryant v. Cheney, 924 F.2d 525 (4th Cir. 1991); Pinar v. Dole, 747 F.2d 899 (4th Cir. 1984); Broadway v. Brock, 694 F.2d 979 (5th Cir. 1982); Braun v. United States, 707 F.2d 922 (6th Cir. 1983); Feit v. Ward, 886 F.2d 848 (7th Cir. 1989); Moon v. Phillips, 854 F.2d 147 (7th Cir. 1988); McIntosh v. Turner, 866 F.2d 524 (8th Cir. 1988); Kotarski v. Cooper, 866 F.2d 311 (9th Cir. 1989); Saul v. United States, 928 F.2d 829 (9th Cir. 1991); Petrini v. Howard, 918 F.2d 1482 (10th Cir. 1990); Lombardi v Small Business Administration, 889 F.2d 959 (10th Cir. 1989); Stephens v. Dept. of HHS, 901 F.2d 1571 (11th Cir. 1990), cert. denied, 111 S.Ct. 555(1990); Hallock v. Moses, 731 F.2d 754 (11th Cir. 1984); Volk v. Hobson, 866 F.2d 1398 (Fed. Cir.), cert. denied, 490 U.S. 1092 (1989). In the First and Second Circuits, see, Kassel v. United States, 709 F.Supp. 1194 (D.N.H. 1988); and Healy v. United States Postal Service, 677 F. Supp. 1284 (S.D.N.Y. 1987). Since some of the above case were decided before Chilicky, they do not hold that a Federal employee has no Bivens remedy even if he has no right of action under the CSRA. See, Pinar, supra; and Braun, supra. The post Chilicky cases, however, generally preclude a Bivens remedy even though all other remedies are precluded.

4 Both Kotarski and McIntosh were vacated and remanded by the Supreme Court after its decision in Chilicky v. Schweiker. (See next sentence in text.) Turner v. McIntosh, 108 S.Ct. 2861 (1988); Kotarski v. Cooper, Ibid.

5 Obversely, where a class of Federal agents is not clearly covered by CSRA, and appears to have been inadvertently omitted from CSRA coverage, that class would be subjected to a Bivens action. Krueger v. Lyng, 927 F.2d 1050 (8th Cir. 1991) (county executive director for U.S. Department of Agriculture not subject to CSRA and Congress' failure to provide for them was inadvertent).

Lombardi, supra; and Saul, supra. Accordingly, it is safe to say that supervisors who take adverse action against employees are immune from constitutional torts for monetary damages.

Whether supervisors are personally immune from injunctive relief, notwithstanding the CSRA, is not entirely foreclosed. The Fourth Circuit has left that question open. Bryant, supra. The District of Columbia Circuit has held that injunctive relief is available. Spagnola, supra. The Ninth, Tenth and Eleventh Circuits have precluded injunctive relief. Saul, supra; Lombardi, supra; cf. Stephens, supra (mandamus unavailable).

B. PROCEDURES

The procedures for requesting Department of Justice representation in suits brought against supervisors personally for constitutional torts are similar to those for common law torts under FELRTCA. The same request for representation and agency endorsement must be prepared. For constitutional torts, however, the request should be sent directly to the Torts Branch.

III. OTHER RELATED MATTERS

Notwithstanding the open question in the courts as to whether supervisors may be personally enjoined from committing constitutional torts, supervisory actions may be enjoined within the Executive Branch. An executive agency adverse action may be enjoined by a Member of the MSPB, after the Office of Special Counsel makes a determination that an agency employee has committed a prohibited personnel practice. 5 U.S.C. 1214(a) and (b). Furthermore, a supervisor may be disciplined or removed for committing a prohibited personnel practice if the Office of Special Counsel believes that the practice was committed and the MSPB imposes sanctions after due notice and an opportunity to reply. 5 U.S.C. 1215.6

Finally, some collateral issues are mentioned to round out the discussion. A supervisor may intercept personal mail delivered to the office without personal liability, Saul, supra, and be absolutely immune for anything said as a witness in a

6 Under the Privacy Act of 1974, as amended, an officer or employee of an agency may be criminally prosecuted, inter alia, for disclosing information from a Privacy Act system of records in violation of that Act or any rules or regulations thereunder. 5 U.S.C. 552a(i).

judicial forum, Briscoe v. LaHue, 460 U.S. 325 (1983), or an administrative forum, Rocco v. Baron, __F.Supp.__ (No. 84-4205, E.D. PA, Feb. 13, 1986).