

Summary Of State University Personnel Tort Liability And Right To Defense And Indemnification

State employees (Government Code Section 810.2 and 811.4)¹ are liable for injury caused by their acts or omissions in the same way as are private persons (820, 820.2). There is an exception for discretionary acts.²

As to actions by a State employee in the performance of his or her duties, he or she may request the State to defend him or her against any claim or action for any injury arising out of an act or omission occurring within the scope of employment. If this request is made at least ten days before the trial and the employee reasonably cooperates in good faith in the defense of the claim or action (Section 825), the State (Section 811.2) is obliged to pay any judgment which may be rendered against the employee, as well as any settlement to which the State agrees (Section 818, 825). Recent legislation, however, has allowed payment of punitive damages under limited circumstances at the election of the Board of Trustees and with the requirement of legislative approval.

For purposes of the above referenced provisions, "a public employee is acting in the course and scope of his employment when he is engaged in work he was employed to perform or when the act is an incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or conveniences." (Tenwolde v. County of San Diego, (1993) 17 Cal. Rptr. 789.

Upon request, the State is also obliged to defend an action brought against its employee. The only exceptions to this obligation are in cases where the State determines that the act or omission involved was not within the scope of the employee's employment, or that it was based on actual fraud, corruption, or actual malice, or that the providing of such defense would involved a conflict of interest.

In the event that State should decline or fail to defend the employee and he or she retains his or her own counsel to defend the action, the employee is entitled to recover from the state such reasonable attorney's fees and expenses as are necessarily incurred (if action arose out of an act or omission in the scope of employment), unless the State establishes that the employee acted or failed to act because of fraud, malice, or unless the action is brought against the employee by the State (Section 996.4; 995.4)

The State employee always retains the right to elect to be represented on any or all issues by private counsel at his or her own expense.

¹ All references are to the California Government Code.

² Generally speaking, a "discretionary act" within the meaning of the doctrine of governmental immunity for liability for discretionary acts performed by State officers and employees is one which requires exercise in judgment and choice and involves an equitable decision of what is just and proper under the circumstances. Rurgdorf v. Funder, 246 C.A.2d 443, 54 Cal.Rptr. 895 (1966)

In practice, all actions brought against an employee of the California State University involving some act or omission by the employee in his or her of official capacity are referred to the Chancellor's Office of General Counsel. Following that review, the case may be referred to the Office of the Attorney General, litigated by attorneys in the Office of General Counsel, or referred to private counsel, as determined by General Counsel to be in the best interests of the campus. The case may be accepted under a "reservation of right" by which the CSU preserves the issue of scope of employment. In that event, the State sustains the cost of conducting the defense, but if it is determined that the employee's actions were outside the course and scope of his or her public employment (Section 825, 825.6), the State may recover any payment it had to make from the employee. If no such "reservation of right" is taken, then both the expense of the trial and the judgment, if any, are paid by the State, unless the employee willfully failed or refused to reasonably cooperate in good faith in the defense conducted by the public entity (Section 825.6).

Under the California Tort Claims Act, the State of California is obligated to pay any judgment against a State for compensatory or general damages, but the State may not indemnify against punitive damages (Section 825).

According to Section 3294 of the Civil Code, the State law standard for punitive damages is that plaintiff must prove by clear and convincing evidence that the defendant is guilty of oppression, fraud or malice. The Federal civil rights standard is that a plaintiff must prove that the defendant "engaged in a discriminatory practice of or discriminatory practices with malice or reckless indifference to federally protected rights of an aggrieved individual." (42 United States Code Section 1977A (b)(1)).

In the event of a judgment for punitive damages against a State employee for which the Trustees and Legislature have not approved payment, he or she has the right to file a claim with the State Board of Control seeking State indemnification for that liability. However, there is no assurance that the Board would approve the claim nor that the Legislature would appropriate funds to pay it.

The purpose of the law on this subject is to free public employees from the anxiety which litigation and the threat of litigation brings. The law recognizes not only the burden of adverse judgment, but also the considerable cost of conducting a legal defense. It is based on the premise that it would not only be unfair to impose the burden of defense and possible judgment on employees who act in good faith, but also that to do so would inhibit the actions of all but the most careless.

(Prepared by Mr. William Knight, Esq., Office of General Counsel and presented at the Chairs Retreat at Morro Bay, CA, March 13, 1997.)

REQUEST FOR REPRESENTATION

(Office of the Vice President for Administration)

I, _____, pursuant to Government Code Section 995, *et seq.*, hereby request representation and defense by the State of California, Office of the Attorney General or such other counsel as the State may provide in the lawsuit entitled:

in which I have been named a defendant. This lawsuit is directly connected with my employment as

at California State University, Fresno.

I will cooperate in the defense of this action.

Service of Summons and Complaint

_____ I have not yet been served with a summons and complaint and will notify you when I am served

_____ I was served with a summons and complaint on _____

It was given to me

_____ by personal service (personally handed to me)

_____ by mail

_____ other means. (Please describe method by which you received, e.g., left on desk, given to secretary, etc.)

Signature

If service is by mail, **do not** complete acknowledgment of service form, but forward it to the Office of General Counsel (or assigned counsel, e.g., Deputy Attorney General) which will

complete the form. If you have already returned the form, promptly advise the Office of General Counsel or assigned counsel, of the date you acknowledged receipt. This information is needed by counsel.