

SCD SUPERVISORS AND EMPLOYEES

- IMMUNITY FROM LIABILITY FOR TORTIOUS ACTS AND, IN PARTICULAR, FOR EMPLOYMENT-RELATED TORTS?
- OAG REPRESENTATION?

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Questions addressed in OAG Advice Letter

- Are District Supervisors and employees afforded immunity under State law?
- Are there circumstances when District Supervisors and employees are not afforded immunity?
- To what extent will the OAG provide legal guidance and representation to the SCDs, their supervisors and employees, particularly in tort cases.

Answers provided in OAG Advice Letter

- Are District Supervisors and employees afforded immunity under State law? **YES**
- Are there circumstances when District Supervisors and employees are not afforded immunity? **YES**
- To what extent will the OAG provide legal guidance and representation to the SCDs, their supervisors and employees, particularly in tort cases. **GENERALLY, THE OAG WILL PROVIDE LEGAL ASSISTANCE TO THE SCDs.**
- **This is particularly true in tort actions filed under the DTCA because any judgement against a District will ultimately be paid by the State Insurance Program.**

TACKLING THE THIRD QUESTION RE: OAG REPRESENTATION

- **Existing State law provides:** “The Office of the Attorney General may provide services to the supervisors as needed.”
- See Agriculture Article, § 8-303(c).
- State law permits the Attorney General to decline representation.
- Factors in making this decision include: (a) Existing resources; and/or (b) The existence of a conflict.
- But, what actually has been the reality (thus far)?

My Experience

- I have been with the OAG since 1986, advising MDA most of my career.
- During this 33-year period, I know of only one instance when the OAG declined to represent a SCD; and in that case, the named defendants also included two State agencies, whose interests conflicted with the SCD.
- Recently, the OAG represented:
 - The Baltimore County SCD in a tort action; and
 - The Worcester SCD in a claim alleging that the district took an adverse discriminatory employment action against a female employee (terminating her employment) because of her sex.
- The OAG recently wrote a letter of advice to:
 - The Washington County SCD, addressing changes to its Employee Manual; and
 - The State Committee, addressing whether an individual, who was employed by the State, may also serve as a Board supervisor.
- The OAG also recently advised numerous SCDs on PIA requests they received.

Answering the First Question more in depth

- Are District Supervisors and employees afforded immunity under State law?
- To answer this question, we need to examine the DTCA.

District Tort Claims Act (“DTCA”)

Courts & Judicial Proceedings Art., § 5-517(a)

Immunity from suit and from liability

(a) A member or employee of a board of supervisors for a soil conservation district is immune from suit in courts of the State and [immune]from liability in tort for a tortious act or omission:

(1) That is within the scope of the public duties of the member or employee;

(2) That is made without malice or gross negligence; and

(3) For which the soil conservation district has consented to suit under subsection (b) of this section, even if damages exceed the limits of that consent.

District Tort Claims Act cont'd.

Courts & Judicial Proceedings Art., § 5-517(b)

The exclusive remedy for tortious act or omission is suit against the SCD.

- (b)(1) **The exclusive remedy** for a tortious act or omission, for which a member or employee of a board of supervisors for a soil conservation district is immune from suit or liability under subsection (a) of this section, **is a suit brought against the appropriate soil conservation district.**
- (2) The soil conservation district may not assert the defense of governmental immunity in any suit brought under this section.
- **TURNING IMMUNITY ON ITS HEAD; INSTEAD OF THE SUPERVISORS OR EMPLOYEES BEING LIABLE, THE DISTRICT IS LIABLE.**
- **Substituting the liability of the District for the liability of the District Supervisor or employee who committed the tort.**

District Tort Claims Act cont'd.

Courts & Judicial Proceedings Art., § 5-517(c)

- **State Insurance Program**
- (c) **The State Insurance Program** administered under Title 12 of the State Government Article for purposes of providing coverage under the Maryland Tort Claims Act¹ shall:
 - (1) **Govern the limits of liability** in any suit brought under this section; and
 - (2) **Provide funds** for the **payment of any settlement or judgment** entered against the soil conservation district in a suit brought under this section.
- This is the same law that governs tort actions against MDA.

Limits of Liability under the State Insurance Program

- The liability of the State and its units may not exceed \$400,000 to a single claimant for injuries arising from a single incident or occurrence. State Government Art., § 12-104

Answering the Second Question more in depth

- Are there circumstances when District Supervisors and employees are not afforded immunity?
- Again, we must look to the DTCA to answer this question.

Circumstances when DTCA does not afford protection

- The DTCA affords no protection if the tortious act or omission:
 - (1) Is not within the scope of the public duties of the member or employee; or
 - (2) Is made with malice or gross negligence.
- There are no appellate decisions interpreting the DTCA.
- This is a good thing. Essentially, it means that a SCD has not had to appeal a trial court decision to the appellate courts finding that a District Supervisor or employee has committed a tortious act. This because there have been not been any such decisions.
- Under DTCA, District Supervisors and employees do not have immunity from federal-law claims (this is also true of State employees under the MTCA).

Using the MTCA as a guide

- The MTCA (which protects State employees) is analogous to the DTCA.
- Decisions interpreting the MTCA are a useful guide to interpreting the DTCA.

What is meant by “Scope of Public Duties”?

- The **general test** that the courts have applied for determining if an employee’s tortious acts were within the scope of his/her duties is **whether the acts were in furtherance of an employer’s business and were authorized by the employer.**
- Typical employment decisions, including decisions to hire, fire, and discipline SCD employees, are within the scope of a supervisor’s public duties.
- Agric. Art., § 8-303(b) expressly empowers supervisors the power to “employ a secretary, technical experts, and other permanent and temporary officers as they require.
- By implication, supervisors have the authority to fire or discipline the employees they hire.
- Most likely, sexual assault and sexual harassment would fall outside the scope of employment.

WITHOUT MALICE OR GROSS NEGLIGENCE

- “Malicious Conduct” is conduct characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill-will or fraud.
- “Gross negligence” comprises more than simple negligence (acting without due care); it is more akin to reckless conduct, evincing a reckless disregard of the consequences and an utter indifference to the rights of others.

An example of when immunity is not afforded

- District employee, while driving a State/District-owned vehicle, strikes another vehicle, causing injury to the driver in the other vehicle. The accident occurs late at night, while the employee was not on duty. In addition, the employee was speeding and driving under the influence of alcohol.
- Is the District employee immune from suit and from liability under the DTCA? If not, why not?
- Is the District liable for this act?
- Is the (former?) District employee personally liable for this act?
- Will the OAG represent this employee?
- Will the OAG represent this SCD?

Possible options in those circumstances when the DTCA does not apply

- **Indemnification** – Requesting indemnification from the Board of Public Works
 - Federal Law Claims

- **Purchasing Liability Insurance** – A discussion for another day