

STATE LIABILITY FOR ACTS OF STATE EMPLOYEES

This memorandum discusses the liability of the state and the state employee for the acts or omissions of the state employee, including the acts of a state employee which may be inappropriate.

BACKGROUND

In September 1994 the North Dakota Supreme Court abolished the doctrine of sovereign immunity in a 4 to 1 decision. In *Bulman v. Hulstrand Constr. Co. and the State of North Dakota*, 521 N.W.2d 632 (N.D. 1994), the Supreme Court held that Article I, Section 9, of the Constitution of North Dakota "does not bestow exclusive authority upon the legislature to waive or modify sovereign immunity of the State from tort liability and does not preclude this Court from abolishing that common-law doctrine." Although the court abolished sovereign immunity, the court indicated that its decision should not be interpreted to import tort liability for the exercise of discretionary acts, including legislative and quasi-legislative acts and judicial and quasi-judicial acts. In addition, the court concluded that the abrogation of sovereign immunity should be prospective so that the Legislative Assembly may "implement and plan in advance by securing liability insurance, or by creating funds necessary for self-insurance." Thus the court abrogated sovereign immunity for the *Bulman* parties and two other cases heard contemporaneously with *Bulman* and for any claims arising 15 days after adjournment of the Legislative Assembly in 1995.

1995 LEGISLATION

In 1995 the Legislative Assembly enacted Senate Bill No. 2080, which established procedures for bringing claims against the state for personal injury or property damage. The bill, codified as North Dakota Century Code (NDCC) Chapter 32-12.2, governs claims against the state and state employees for personal injury, death, or property damage caused by the state or a state employee "acting within the scope of the employee's employment." Section 32-12.2-02 limits recovery to a total of \$250,000 per person and \$1,000,000 for any number of claims arising from a single occurrence and prohibits punitive damages in actions against the state. Section 32-12.2-07 establishes the risk management fund. The Office of Management and Budget, through the risk management fund, has the authority to pay money damages for an injury caused by the negligence or wrongful act or omission of a state employee acting within the employee's scope of employment which the employee would be personally liable to pay a claimant under state law.

LIABILITY OF THE STATE AND STATE EMPLOYEES

North Dakota Century Code Section 32-12.2-03 provides that an action for an injury caused by the negligence, wrongful act, or omission of a state employee acting within the employee's scope of employment must be brought against the state. Section 32-12.2-03 also provides that a state employee may not be held personally liable for money damages for the injury when the injury is caused by the negligence, wrongful act, or omission of the employee who is acting within the scope of employment. The section further provides that the employee may not be held personally liable for the actions or omissions of the employee occurring within the scope of the employee's employment; however, the section also provides that a state employee may be personally liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting outside the scope of the employee's employment.

North Dakota Century Code Section 32-12.2-01 contains the definitions that apply to Chapter 32-12.2. Section 32-12.2-01(6) provides that "'Scope of employment' means the state employee was acting on behalf of the state in the performance of duties or tasks lawfully assigned to the employee by competent authority. Actions of a state employee that constitute reckless or grossly negligent conduct, malfeasance, or willful or wanton misconduct are not within the scope of the employee's employment for purposes of this chapter."

In the situation in which a state employee pulls a gun from his desk in a threatening manner in the presence of two other state employees, the primary question to be addressed when determining state liability is whether the state employee who committed the act was acting within the scope of employment. It could be argued that the act of keeping a gun in one's desk and pulling the gun from the desk in the presence of others constitutes reckless or grossly negligent conduct, malfeasance, or willful or wanton misconduct, and, therefore, pursuant to NDCC Section 32-12.2-01(6), is not within the scope of the employee's employment. The answer to the question of whether the state employee was acting within the scope of employment in this instance would depend upon the circumstances of the case and, therefore, is a question of fact for a judge or jury to determine. If it is determined the act was outside the scope of the employee's employment, the state employee, pursuant to Section 32-12.2-03(3), may be held personally liable for money damages if there is an injury and it is determined that the injury was proximately caused by the negligence, wrongful act, or omission of the employee.