VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 93-67
MATTHEW McCUE	)	

FINDINGS OF FACT, OPINION AND ORDER

On November 12, 1993, Matthew McCue ("Appellant"), filed an appeal with the Labor Relations Board pursuant to 3 V.S.A. §1102(c). The appeal arose from a decision by the Attorney General not to defend Appellant in a civil action filed in Washington Superior Court by Patricia Terrien against Appellant, and others, including the State Department of Mental Health and Mental Retardation. The Attorney General based the decision not to defend Appellant on the grounds that the alleged acts of Appellant did not occur within the scope of his official duties.

A hearing was held on April 28, 1994, before Labor Relations Board Members Louis Toepfer, Acting Chair; Catherine Frank and Leslie Seaver in the Board hearing room in Montpelier. Appellant appeared pro se. Assistant Attorney General Mark DiStefano represented the Attorney General. The Attorney General filed a Memorandum of Law at the hearing. The Board provided the parties with an opportunity to file post-hearing briefs. Neither party filed such a brief.

FINDINGS OF FACT

1. In September, 1991, Appellant was hired by the State *Department of Mental Health ("Department") as Director of the* Brandon Training School. Appellant was hired after the decision had been made to close Brandon, a state home for the mentally retarded. It was Appellant's responsibility to supervise the closing of Brandon and the placement of Brandon residents in community settings.

2. In addition to the Brandon Training School duties, in September, 1992, the Department assigned Appellant to provide technical advice to Franklin Grand Isle Mental Health ("FGIMH") concerning FGIMH making changes to achieve acceptable standards of services. FGIMH is a private, non-profit community mental health agency which has a contract with the State to provide services for the mentally ill and the mentally retarded. FGIMH receives state and federal funding.

3. Patricia Terrien was employed by FGIMH at the time Appellant was assigned to provide consulting services to FGIMH. Terrien remained employed at FGIMH until the Summer of 1993. Appellant had previously supervised Terrien when they both were employed at Howard Center For Human Services, and they had acrimonious relations. Also, Terrien was an active opponent of the closing of Brandon Training School. At the time Appellant was assigned to provide consulting services to FGIMH, Appellant's supervisor told him that Terrien was employed by FGIMH. Appellant informed his supervisor that he had difficulties with Terrien while they were at Howard Center for Human Services, but indicated that these past difficulties did not prevent him from going to FGIMH.

4. Appellant provided consulting services to FGIMH from the time of his assignment there until November, 1993, when he left employment with the Department. Appellant worked approximately 30 hours per week at FGIMH, and approximately 20 hours at Brandon Training School. Appellant was paid solely by the Department.

5. Shortly after arriving at FGIMH, Appellant was informed by FGIMH employees and other persons that Terrien was making

derogatory comments about Appellant, including comments about his personal life. In early December, 1992, FGIMH, along with another organization, organized a forum for local legislators to hear from families about their needs and what the State could do to help them. Prior to the forum, Appellant was informed that Terrien was going to criticize him and the closing of Brandon Training School at the forum. During the forum, Terrien directed questions and comments to Appellant in a belligerent manner. Appellant was frustrated by Terrien's actions. Immediately after the forum, Appellant stated in reference to Terrien that he wished he "had a .357 magnum to put a bullet between her eyes". Several persons heard this remark by Appellant; Terrien did not hear the remark.

6. At a FGIMH staff meeting in December, 1992, subsequent to the forum, some of the staff expressed their displeasure at Terrien's actions at the forum and stated their opinion that Terrien should be dismissed. Terrien was not present at this meeting. Appellant was present at the meeting. During this discussion, Appellant stated that "her problem is that she hasn't been fucked enough" and "someone should have nailed her big 'tits' to the wall a long time ago". Appellant made such comments in the context of expressing his views that, although Terrien's actions were inappropriate, it was inappropriate to seek her dismissal.

7. By January, 1993, Terrien became aware of Appellant's comments about her, and she made a complaint that such comments constituted harassment of her. Appellant informed his supervisor

of his comments and apologized for them. The Department personnel officer suggested to Appellant that he write a letter of apology to Terrien. Appellant wrote a letter to Terrien, dated January 20, 1993, which provided:

> After the legislative meeting last month there were several discussions at the Marshall Center about the nature of your interactions at that meeting. Among the comments I expressed included some that were crude and inappropriate. They had no place in a professional setting. Indeed the nature of these comments were offensive to many of the individuals at that meeting. It is my understanding that you have heard about some of these comments. I want to apologize to you for whatever offense my words may have caused you, just as I have already apologized to the participants at those discussions. You can be sure that I will not allow this situation to repeat itself.
> (State's Exhibit 2)

8. During the period from December, 1992, to September, 1993, Appellant had no contact with Terrien, other than writing her the January 20, 1993, letter.

9. In March, 1993, Appellant's supervisors informed him that he was being suspended for five days by the Department for his comments about Terrien. The five day suspension actually was not implemented until July, 1993.

10. Terrien left employment with FGIMH in the Summer of 1993. On September 15, 1993, Terrien filed a complaint in Washington County Superior Court against Appellant, the Department, FGIMH, and Amy Campono, Terrien's supervisor. Among other things, Terrien alleged in the complaint that Appellant's statements about her were false, malicious, slanderous and unprivileged; and that they proximately resulted in Terrien's loss of employment, impairment of her reputation and standing in the community, personal humiliation, embarrassment, mental

anguish and suffering in both her professional and private life. Terrien alleged that Appellant's comments had the effect of unreasonably interfering with Terrien's work performance and created an intimidating, hostile and offensive work environment.

11. At all times relevant, the State had a policy prohibiting harassment of anyone on the basis of sex. The policy was applicable to all employees of the State (State's Exhibit 1).

OPINION

At issue is whether the State is obligated to provide legal representation to Appellant, who was named as a defendant in a civil action brought by Patricia Terrien. The State is required to provide legal representation at state expense to defend an action on behalf of an employee "(i)n any civil action against a state employee for alleged damage, injury, loss or deprivation of rights arising from an act or omission to act in the performance of the employee's official duties". 3 V.S.A. §1101(a).

The Attorney General contends that the acts complained of by Terrien in her civil complaint - i.e., comments made by Appellant about Terrien at a legislative forum and staff meeting in December, 1992 - did not occur within the scope of Appellant's official duties. Thus, the Attorney General contends that the State is not obligated to provide legal representation to Appellant. Appellant contends that the inappropriate comments which he made occurred within the scope of his official duties, and thus he is entitled to legal representation by the State at State expense.

Pursuant to 3 V.S.A. §1101(a) and §1102(c), it is our task to determine whether Appellant's acts were acts in "the

performance of" Appellant's "official duties". This case is the first time the Board has been required to apply these statutory provisions. In such cases, where at issue is whether the Attorney General has appropriately declined to provide legal representation to a state employee, we conclude that the Attorney General bears the burden of proving that the denial of representation was appropriate.

The Attorney General seeks to meet this burden by referring us to Vermont law on scope of employment cases as supplying the appropriate standards for the Board to apply. Such standards are that the inquiry turns not on whether the act done was authorized or was in violation of the employer's policies, but rather whether the acts can properly be seen as intending to advance the employer's interests. McHugh v. University of Vermont, 758 F.Supp. 945, 951 (D.Vt. 1991) (citing Anderson v. Toombs, 119 Vt. 40, 45 (1955)). An act of an employee is not within the scope of employment if it is done with no intention to perform it as part of or incidental to a service on account of which the employee is employed. McHugh, 758 F.Supp at 951 (citing Anderson, 119 Vt. at 45).

We decline the Attorney General's invitation to apply Vermont law on scope of employment cases in denial of representation appeals brought pursuant to 3 V.S.A. §1101-1102. The Vermont General Assembly chose to use the words "an act or omission to act in the performance of the employee's official duties", rather than an act or omission "within the scope of employment", as governing when the State's obligation to provide

legal representation to a state employee attaches. 3 V.S.A. §1101(a). We cannot conclude that the difference in language is without effect. The General Assembly has used the phrase "within the scope of employment" elsewhere in Vermont Statutes. In the chapter governing tort claims against the State, the legislation provides that the State "shall be liable for injury to persons or property or loss of life caused by the negligent or wrongful act or omission of an employee of the state while acting within the scope of employment". 12 V.S.A. §5601(a). See also 12 V.S.A. §5606(a). The failure to use the "scope of employment" terminology in 3 V.S.A. §1101-1102 is an indication that the General Assembly did not intend that the body of law attached to scope of employment cases would apply.

Further, the nature of the issue before us is different than in scope of employment cases. In scope of employment cases, the issue is whether the employer will be held vicariously liable for acts or omissions of an employee of the employer. McHugh, supra. Anderson, supra. Ronan v. Turnbull, 99 Vt. 280 (1926). That is not the issue in the case before us. In appeals brought under 3 V.S.A. §1101-1102, the statutory obligation of the State to defend State employees does not necessarily mean that the State assumes direct liability for the acts of an employee; rather its status is analogous to that of an insurer. Libercent v. Aldrich, 149 Vt. 76, 82 (1987). The employee may remain primarily liable, but is saved the cost of defending himself or herself. Id.

Also, if we were to apply scope of employment law in this case, it would mean that the merits of whether an employee's acts

or omissions actually occurred within the scope of employment would be adjudicated twice - once at the hearing before the Board in §1101-1102 appeals, and again when the civil suit is tried in court. We do not believe that the General Assembly intended such a result.

In sum, we conclude that Vermont law on scope of employment cases is not appropriate to apply in determining whether the State is obligated to provide legal representation to a state employee pursuant to 3 V.S.A. §1101-1102. We conclude that the use of the words, "an act or omission to act in the performance of the employee's official duties", means that the General Assembly intended to require the State to represent employees in a broader category of cases than if the issue was whether the State was vicariously liable for an employee's acts or omissions in scope of employment cases.

As the Vermont Supreme Court has recently recognized as a general proposition in another context, "the state must bear the duty and cost of representing . . . its officers and employees, in actions arising in the course of state activity, for it is the state that derives benefit from the activity". McLaughlin v. State of Vermont and the Office of the Attorney General of the State of Vermont, slip. op., p. 10 (Docket No. 93-093, April 1, 1994) (interpreting 3 V.S.A. §157 concerning power and responsibility of the Attorney General to represent the state in civil and criminal matters). We interpret the provisions of 3 V.S.A. §1101-1102 to create a presumption that the State will defend a state employee in a civil action arising from an act or

omission of the employee in a workplace during the work hours of the employee. The State has the burden of rebutting that presumption.

Here, we conclude that the Attorney General has failed to meet the burden of proving that Appellant's comments about Terrien did not occur in the performance of Appellant's official duties. This is because of the close connection which existed between Appellant's comments and his carrying out of official duties. Appellant's comment that he "wished he had a .357 magnum to put a bullet between (Terrien's) eyes" was an apparent emotional reaction immediately following a forum where Terrien had acted in a belligerent manner towards Appellant. At all times, both during and after the forum, Appellant was in the midst of performing his official duties.

Appellant's comments that Terrien's "problem is that she hasn't been fucked enough", and that "someone should have nailed her bit 'tits' to the wall a long time ago" came during a staff meeting during a discussion about whether Terrien should be dismissed. Appellant made such comments in the context of expressing his views that, although Terrien's actions were inappropriate, it was inappropriate to seek her dismissal. Again, Appellant was in the midst of performing his official duties when he made the comments.

Thus, on both occasions in question, Appellant's comments about Terrien occurred in conjunction with Appellant engaging in other acts within the scope of his official duties. This close connection is sufficient under the circumstances to trigger the

State's obligation to provide legal representation for Appellant in the civil action brought by Terrien arising, in part, from Appellant's comments.

Our conclusion does not mean that we condone Appellant's comments in any way. As Appellant admits, the comments were crude, offensive and inappropriate. Nonetheless, the State is obligated to provide legal representation for Appellant because his comments about Terrien were acts in the performance of his official duties.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is HEREBY ORDERED:

1. The determination of the Attorney General that the acts of Matthew McCue, complained of by Patricia Terrien in her civil action filed in Washington Superior Court, were not acts occurring within the scope of Matthew McCue's official duties is REVERSED; and

2. The State of Vermont shall provide legal representation at state expense to Matthew McCue for the purpose of defending the civil action on his behalf.

Dated this 23rd day of June, 1994, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Louis A. Toepfer, Acting Chair

Catherine L. Frank

Leslie G. Seaver