

VERMONT LABOR RELATIONS BOARD

SUSAN WEBSTER, KATHRYN)	
BERGERON, JULIE BOARDMAN)	
AND FRANCES NEVILLE)	
)	
v.)	DOCKET NO. 95-12
)	
JEFFREY AMESTOY,)	
VERMONT ATTORNEY GENERAL)	
(IN RE: SRS CASEWORKERS)	
INDEMNIFICATION))	

MEMORANDUM AND ORDER

At issue is whether the Labor Relations Board should grant the Motion For Summary Judgment filed by the Vermont Attorney General.

On June 12, 1995, Susan Webster, Kathryn Bergeron, Julie Boardman and Frances Neville ("Petitioners") filed a petition requesting that the Labor Relations issue an order of indemnification pursuant to 12 V.S.A. Section 5606. Petitioners filed an amended petition on November 29, 1995. In the petition as amended, *Petitioners request that the Board order Jeffrey Amestoy, Vermont Attorney General,* either to indemnify Petitioners for all judgments, fees and costs incurred as a result of a civil complaint filed in Caledonia Superior Court by Cheryl Mitchell, entitled Myrick, et al v. Webster, et al, Docket No. S101-92 Cac, which had resulted in a jury verdict and judgment against Petitioners.; or approve a settlement amount of \$2,500 entered into by Petitioners and the complainants in the civil case. The settlement was reached after the jury verdict and judgment, and resulted in the judgment being vacated.

12 V.S.A. Section 5606 provides in pertinent part as follows:

(a) In any action defended by the attorney general or the attorney general's designee in which a judgment is rendered against an employee of the state for acts or omissions within the scope of his or her employment, or a settlement requires payment by such a person, and the right of action is based upon Title 42, United States Code, section 1983, or under a similar federal statute where state law is incapable of establishing employee immunity, the state shall indemnify the employee for the amount of the employee's liability.

...

(c) Notwithstanding subsection (a) of this section, no indemnification shall be paid:

(1) for a judgment or settlement which results from gross negligence or willful misconduct; or

(2) for a settlement not approved by the attorney general or the attorney general's designee ...

(d) ... If the attorney general believes there is reasonable doubt about whether the officer or employee is eligible for indemnification, the attorney general shall refer the matter to the labor relations board which may decide the matter. The decision of the board shall not be subject to appeal.

On October 20, 1995, the Attorney General filed a Motion For Summary Judgment, contending that there are no disputed issues of material fact and the Attorney General is entitled to judgment as a matter of law. The Attorney General based the motion for summary judgment on the following grounds: 1) 12 V.S.A. Section 5606 is not applicable because it applies only in cases in which the right of action is based on 42 U.S.C. Section 1983, or a similar federal statute, and the right of action here is based on a state law tort claim; 2) alternatively, even if 12 V.S.A. Section 5606 does apply, Petitioners still would not be entitled to indemnification since 5606(c) provides that no indemnification shall be paid on a judgment or settlement which results from gross negligence or willful misconduct, and in the

underlying civil case the jury found each of the Petitioners liable under the tort of intentional infliction of emotional distress; and 3) alternatively, even if Section 5606 does apply, to the extent that Petitioners have now settled the underlying civil case, indemnification of the settlement is not appropriate because settlement was not approved by the Attorney General as required by 12 V.S.A. Section 5606(c)(2).

On November 29, 1995, Petitioners filed a memorandum in opposition to the Attorney General's motion. Petitioners contend that the Attorney General is not entitled to summary judgment for three reasons: 1) the Attorney General's reading of Section 5606, that indemnification is limited to cases in which a federal right of action is involved, is too narrow; 2) given that the Superior Court has vacated the judgment against Petitioners based on the jury verdict, the jury verdict is not determinative in characterizing the wrongfulness of Petitioner's conduct; and 3) the Attorney General unjustifiably has refused to approve reasonable settlement offers in violation of his fiduciary duty to Petitioners.

Summary judgment may be granted only if there exists "no genuine issue as to any material fact and . . . any party is entitled to judgment as a matter of law". V.R.C.P. 56(c)(3). The moving party has the burden of proving that there is no genuine issue as to any material fact, and the non-moving party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. Hodgdon v. Mount Mansfield Co., 160 Vt. 150, 158-59 (1992). Price v. Leland, 149 Vt. 518, 521 (1988). Grievances of Choudhary, 15 VLRB 118, 179-80 (1992).

Once the moving party meets its initial burden of showing an absence of uncontroverted material fact, the burden shifts to the non-moving party which must go beyond the pleadings and set forth specific facts showing that there is a genuine issue for hearing, and demonstrate sufficient evidence to support a *prima facie* case. V.R.C.P. 56(c). State of Vermont v. G.S. Blodgett Co., ___ Vt. ___ (1995) (slip op. at p.5). Kelly v. Town of Barnard, 155 Vt. 296, 299-300 (1990). Choudhary, 15 VLRB at 180. If the nonmoving party fails to establish an essential element of their case on which they have the burden of proof at hearing, the moving party is entitled to summary judgment as a matter of law. Blodgett, slip op. at p.5. Choudhary, 15 VLRB at 180.

Material Facts

In this section, we set forth the material facts necessary to decide the Motion For Summary Judgment. These material facts are gleaned from the petition as amended and attachments, the Attorney General's Motion For Summary Judgment and attachments, and Petitioners' response to the Motion For Summary Judgment. The following facts, which we conclude are material to deciding the Motion For Summary Judgment, are uncontroverted.

At all times relevant, Petitioners were employees of the State Agency of Human Services, Department of Social and Rehabilitation Services ("SRS"). Each of the Petitioners were caseworkers in the St. Johnsbury SRS office. At all times relevant, Cheryl Mitchell and Calista Myrick also were employees in the St. Johnsbury office.

In April of 1992, Mitchell and Myrick filed a civil complaint in Caledonia Superior Court against Petitioners, other SRS caseworkers, the SRS District Director, the Agency of Human Services and its Secretary, and SRS and its Commissioner. The complaint as amended set forth a variety of allegations. Only the following two allegations ultimately were tried before a jury: 1) that Petitioners and other co-workers had intentionally inflicted emotional distress on Myrick and Mitchell; and 2) that Agency of Human Services and SRS management had failed to accommodate Myrick's handicap, depression, when it failed to provide her with a supportive work environment.

The Attorney General determined that Petitioners were entitled to legal representation at state expense, but that the Attorney General could not represent the employees due to a conflict of interest. Accordingly, Petitioners retained private attorney David Sleight at State expense. Counsel for the State and Petitioners worked closely together in the preparation for, and defense of, the claims prior to, and through, jury trial. Prior to trial, the State had conducted an investigation of the complaints made by Myrick and Mitchell and determined that the evidence was insufficient to support disciplinary action against Petitioners.

At trial, the jury found that Petitioners Webster and Neville were liable to Myrick and Mitchell for intentional infliction of emotional distress, and that Petitioners Boardman and Bergeron were liable to Myrick for intentional infliction of emotional distress. The jury awarded the following total damages against each Petitioner: Webster - \$10,272.77, Neville - \$6,136.39, Boardman - \$4,636.39, Bergeron - \$9,272.77.

The jury also found that State management had failed to accommodate Myrick's handicap, and awarded a total of \$107,786.20 in damages against the State.

Subsequent to the jury verdict, and while the judgment based on that verdict was under appeal, Petitioners, Myrick and Mitchell entered into a settlement agreement. The agreement provided that Myrick released Petitioners from any obligation with respect to the judgment she had been awarded in consideration of Petitioners withdrawing their appeal of the judgment, and that Mitchell released Petitioners from any obligation with respect to the judgment she had been awarded in consideration of Petitioners withdrawing their appeal of the judgment and making a lump sum payment of \$2,500 to Mitchell. The settlement agreement did not provide for any release of liability of the State. Petitioners sought approval of this settlement from the Attorney General pursuant to 12 V.S.A. Section 5606(c)(2), but the Attorney General declined to approve the settlement.

On August 21, 1995, Petitioners, Myrick and Mitchell filed a motion with the Caledonia Superior Court to vacate the judgment entered in the civil complaint. In the motion, Petitioners, Myrick and Mitchell informed the Court that they had "reached agreement on a settlement and compromise of all" of Myrick and Mitchell's "claims against" Petitioners. On September 14, 1995, Superior Court Judge Alan Cheever granted the motion to vacate the judgment.

The Attorney General has declined to approve the settlement entered into by Petitioners, Myrick and Mitchell, and has refused Petitioners' requests to indemnify them.

Discussion

In determining whether to grant the Attorney General's Motion For Summary Judgment based on these uncontroverted facts, we note that the issue before us is significantly different from when the initial petition was filed in this matter. Then, Petitioners had not entered into a settlement agreement with Myrick and Mitchell, and the Attorney General was declining to indemnify Petitioners for the judgments entered against them based on the jury verdicts that they were liable to Mitchell and/or Myrick for intentional infliction of emotional distress. The Attorney General declined indemnification based on the provisions of 12 V.S.A. Section 5606(c)(1), which provides that "no indemnification shall be paid . . . for a judgment or settlement which results from gross negligence or willful misconduct".

Subsequent to the petition being filed, the situation changed significantly. Petitioners, Myrick and Mitchell entered into a settlement agreement resolving all of Myrick and Mitchell's claims against Petitioners. The Attorney General was not a party to the settlement agreement, and declined to approve it. The Superior Court vacated the judgment entered against Petitioners based on the settlement agreement.

As a result, the issue whether the State should indemnify Petitioners based on the judgment entered against them is no longer before us since the judgment has been vacated. In place of the judgment is the settlement agreement of Petitioners, Myrick and Mitchell. One of the grounds for the Attorney General's Motion For Summary Judgment is that indemnification of the settlement is not appropriate because settlement was not approved by the Attorney General as required by 12 V.S.A. Section 5606(c)(2).

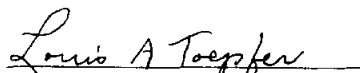
We agree. Section 5606(c)(2) is clear and unambiguous in providing that "no indemnification shall be paid . . . for a settlement not approved by the attorney general". The Attorney General has declined to approve the settlement. Under these circumstances, Section 5606(c)(2) clearly requires, without further inquiry, a determination that Petitioners are not eligible for indemnification. Our conclusion in this regard negates the need to address other theories addressed by the parties.

NOW THEREFORE, based on the foregoing facts and for the foregoing reasons, it is hereby ORDERED that the Attorney General's Motion For Summary Judgment is GRANTED, and the petition for indemnification filed by Susan Webster, Kathryn Bergeron, Julie Boardman and Frances Neville, pursuant to 12 V.S.A. Section 5606, is DISMISSED.

Dated this 14th day of December, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Catherine L. Frank, Chairperson


Louis A. Toepfer


Leslie G. Seaver