

APHIS DIRECTIVE 460.2
5/28/76

EMPLOYEE LIABILITY - ACTION TAKEN WITHIN THE SCOPE OF EMPLOYMENT

I PURPOSE

This Directive quotes a memorandum dated 3/1/76 from the Department's General Counsel. The memorandum concerns employees' liability for actions taken within the scope of their employment.

II EMPLOYEE RESPONSIBILITY

APHIS employees are responsible for acquainting themselves with the contents of this memorandum in order that they may be aware of requirements which may affect them as Federal employees and as private individuals.

III GENERAL COUNSEL'S MEMORANDUM

"Questions have recently been raised by administrative officials as to the policy of the Department of Justice regarding the availability of legal representation to Department employees when they are sued in their individual capacities for actions taken within the scope of their authority as government employees. Specifically, concern has been expressed by such officials as to the possibility that an employee might be held individually liable for such actions.

"It has long been the general policy of the Department of Justice to afford counsel and representation to government employees who are sued civilly as a result of the performance of their official duties.

"The possibility that a government employee may be held personally liable for actions taken while acting within the scope of his employment was one of the factors that prompted the Congress to pass the Federal Driver's Act, an amendment to the Federal Tort Claims Act, 28 U.S.C. 2679, which provides that remedy by suit against the United States is exclusive, and the employee may not be sued personally, where damage to property or injury results from the operation by the employee of a motor vehicle while acting within the scope of his official duties. While the Department of Justice has sought legislation which would extend this "exclusive remedy" principle to other cases in which the employee was acting within the scope of his employment, no such legislation has been enacted.

"Notwithstanding the fact that Congress has not seen fit to extend the "exclusive remedy" principle of the Federal Driver's Act to other situations in which the employee is sued in his individual capacity, there are certain protections afforded such an employee.

"In such cases, it is the responsibility of the Department to supply the Department of Justice with information -- usually in the form of affidavits from the employee involved and his supervisor -- to show that the employee was in fact acting within the scope of his official duties.

"If the Department of Justice is satisfied that the employee was acting within the scope of his official duties, it will remove the action to Federal court if filed in a State or local court, and will file a motion in Federal court to dismiss the action against the employee under the official immunity doctrine set out in the Supreme Court cases of Barr v. Matteo, 360 U.S. 564 (1959) and Doe v. McMillan, 412 U.S. 306 (1973).

"Immunity is ordinarily a very good defense in such cases. The Department of Justice has asked us to make it clear to employees, however, that, while the possibility of employee being held personally liable in such cases is remote, the Department of Justice "will not and cannot provide a guarantee to that

effect." Letter dated February 6, 1975, from Assistant Attorney General Carla A. Hills to the Department of Agriculture, concerning a request by SCS employee for representation. The letter states as follows:

"The Supreme Court recently declined to hold that the immunity of a federal employee from civil liability for acts done while acting within the scope of his employment was absolute; instead it advised . . . a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh perhaps recurring harm to individual citizens'. Doe v. McMillan, 412 U.S. 306, 319 (1973).

"The Department of Justice will represent (the employees involved) and it is anticipated that a motion will be made to dismiss the action as to them. We cannot be as certain of the outcome as they appear to be. Immunity appears to be a very strong defense under the circumstances of this case but the Department of Justice cannot and will not guarantee its acceptance by the Court. Further, if a judgment were to be entered against the United States and one or more of the individuals, it would normally be satisfied by the United States as a matter of policy and plaintiff could not collect from the individual(s) [28 U.S.C. 2676]. If a judgment is entered solely against one or more of the individuals, however, there is not authority by which the United States could pay it. Again, the facts indicate that the possibility of such a result is indeed remote; however, the Department of Justice will not and cannot provide a guarantee to that effect.'

"In view of this possibility that an employee may be held personally liable, the Department of Justice recommends that the employee be advised of his right to secure private counsel.

"Cases wherein federal employees have been held personally liable for acts done within the scope of employment are few. This results in part from the fact that plaintiffs are concerned with the prospects of having any judgment obtained satisfied and the Federal Tort Claims Act provides a statutory basis for suing the agency concerned and having the judgment satisfied out of federal funds.

"Under all the circumstances, we believe that it is extremely unlikely that an employee would be found individually liable if he is indeed acting within the scope of his authority. Nevertheless, neither this Office nor the Department of Justice can guarantee that defense will be provided the employee in every case or that the employee will never be found civilly liable in his individual capacity.

"The Office of the General Counsel intends to do everything it can to assure prompt liaison with the Department of Justice and to encourage full representation of any employee who was acting within the scope of his employment. It is requested that administrative officials and employees promptly call to the attention of the appropriate Regional Attorney or Attorney-in-Charge, or other appropriate representative of this Office any lawsuits filed against them, so that the necessary action may be promptly taken to obtain representation by the Department of Justice."

Signed by:

Harry C. Mussman

DISTRIBUTION: G03, ALL EMPLOYEES

OPR: HRD