

STATE OF TENNESSEE

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January 10, 2002

Opinion No. 02-011

Liability coverage of Tennessee State Guard and members

QUESTION

1. Is the Tennessee state guard, as an entity, immune from suit when conducting monthly drills, annual training, training opportunities and active duty?
2. Are individual members of the Tennessee state guard immune from suit?
3. Are individual members of the Tennessee state guard eligible to receive workers' compensation benefits?

OPINION

1. Yes, when activated by the Governor to active state duty and operating in the course of that duty, the Tennessee state guard constitutes an arm of the state and enjoys the sovereign immunity of the State of Tennessee. If monthly drills and training opportunities are in the course of active duty, the state guard, under the order, control and supervision of the Governor, is immune from suit.
2. Yes, when on active state duty and in the course of that duty, the members of the Tennessee state guard have immunity. Tenn. Code Ann. §§ 58-1-409 and 9-8-307 (h). There is no immunity available, however, for training or other activities outside the scope of active duty.
3. Yes, workers' compensation claims of Tennessee state guard members are paid by the State, in appropriate cases, if Tennessee state guard members incur injury while on active duty and in the course of that duty. Tenn. Code Ann. § 9-8-307 (a) (1) (K).

ANALYSIS

1. In order to address this question, one must determine whether the monthly drills, annual training and training opportunities are controlled and supervised by the State, through the Governor and in the course of active duty. Unauthorized acts are not considered acts of the state. *State v. Ward*, 56 Tenn. (9 Heisk.) 100 (1871); *Texas Liquor Control Bd. v. Diners' Club, Inc.*, 347 S.W.2d 763 (Tex. Civ. App. 1961). The purpose for which the state guard is created, its function and authority to act on behalf of the State of Tennessee must be considered.

Tenn. Code Ann. § 58-1-104 describes this State's military forces, including the Tennessee state guard "whenever such a state force shall be duly organized and its reserve." The Governor has the power, under specified circumstances, to call members of the Tennessee state guard to active state duty. *See* Tenn. Code Ann. §§ 58-1-106 (a), 401. Tenn. Code Ann. § 58-1-401 provides:

"Whenever the president of the United States shall call any part of the national guard of this state into active federal service, the governor is authorized to enlist, organize, maintain, equip and discipline a volunteer defense force, other than the national guard, to be known as the Tennessee state guard.

The Tennessee state guard, when called to active duty by the Governor and acting under the Governor's supervision, constitutes an arm of the state amenable to suit for damages only in the Tennessee Claims Commission under Tenn. Code Ann. § 9-8-307 (a) (1).

"Active duty" and "active service" means military duty in a military force (not including the inactive national guard) or in the military department, under an order of the governor issued pursuant to parts 1, 2 and 4-6 of this chapter and while going to and returning from the same. Such duty may be either in a full-time or part-time status, depending upon the conditions under which it is performed:

Tenn. Code Ann. § 58-1-102. The State, through the Governor, has the power of oversight, or authority over the state guard when the guard is in active duty status and in the course of that status. *See* Tenn. Code Ann. §§ 58-1-106, 401, 405, 408. Because the State, through the Governor, has control of the guard when it is in active status, the state guard is immune from suit in federal and state court. The State has agreed to be subject to suit for liability in the Tennessee Claims Commission, within the narrow statutory exceptions to sovereign immunity set forth at Tenn. Code Ann. § 9-8-307(a) (1) *et seq.*

2. Immunity protects members of the state guard from state law tort claims under certain circumstances enumerated by statute. The general immunity statute for all state employees, Tenn. Code Ann. § 9-8-307 (h) provides: “State officers and employees are absolutely immune from liability for acts or omissions within the scope of the officer’s or employee’s office or employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain. For purposes of this chapter, ‘state officer’ or ‘employee’ has the meaning set forth in § 8-42-101 (3).” Of course, determination as to whether immunity would apply in any given case depends on the facts and circumstances of each case.

The statutory immunity provided by state law does not apply to claims alleging violations of federal law, although federal law provides other immunities. Qualified immunity from liability might be available if members of the state guard are sued in their individual capacities under 42 U.S.C. § 1983 for violations of federal rights. Qualified immunity protects public officials from liability for damages “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818. 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). Actions that violate constitutional standards would expose members of the state guard to individual liability for compensatory and punitive damages. Some violations would not be entitled to payment or indemnity through the Board of Claims pursuant to Tenn. Code Ann. §§ 9-8-307 (h) and 9-8-112.

There is no immunity available, however, for training or other activities outside the scope of active duty.

3. The Tennessee Claims Commission has jurisdiction of worker’s compensation claims of members of the Tennessee state guard when they are on active duty and in the course of that duty. Tenn. Code Ann. § 9-8-307 (a) (1) (K) provides for jurisdiction in the Claims Commission of “workers’ compensation claims by state employees, including injuries incurred by national guard members, *Tennessee state guard members*, civil air patrol members, civil defense agency personnel and emergency forest firefighters while on active duty and in the course of that duty.” Workers’ compensation benefits would be paid by the State, in appropriate cases, when members of the state guard in active state duty status are compensated pursuant to Tenn. Code Ann. §§ 58-1-106 or 411. Naturally, volunteers are not eligible for workers’ compensation benefits from the State. Tenn. Code Ann. § 8-42-101 (3) (B).

The Tennessee Supreme Court in *Yount v. State*, 774 S.W.2d 919 (Tenn. 1989), has recognized the requirement that a member of the national guard be on active state duty and in the course of that duty before workers’ compensation benefits from the State of Tennessee might be available to him. In *Yount*, the Court found that a national guardsman who was injured while exclusively on federal active duty was not a state employee at the time of his injury for worker’s compensation coverage purposes. *Id.* (copy attached).

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