

New Jersey Law Journal

VOL. CLIV - NO. 2 - INDEX 120

OCTOBER 12, 1998

ESTABLISHED 1878

IN PRACTICE

LABOR & EMPLOYMENT

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Is the Crown Always Right?

Tomorrow, the New Jersey Supreme Court will be hearing arguments, including mine, about a case with important implications for the rights of government employees.

Chasin v. Montclair State University arose when Professor Barbara Chasin was sued by one of her students for awarding him an "incomplete" grade in a sociology class.

As a state employee, Chasin asked the attorney general to represent her, but her request was denied. After the action was resolved in her favor, Chasin sought reimbursement of her legal fees, under the Tort Claims Act. The attorney general refused, however, alleging that Chasin refused to obey the state's direction.

The attorney general's refusal to indemnify Chasin could jeopardize the important public policies underlying the New Jersey Tort Claims Act and place state employees at risk for merely doing their jobs.

The New Jersey Tort Claims Act, N.J.S.A. 59:10A-1, provides that the attorney general must represent state employees, or reimburse them for legal

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fees incurred, in any action brought "on account of an act or omission in the scope of his [or her] employment," subject to the exceptions of N.J.S.A. 59:10A-2.

The three exceptions under the act are: (1) that the act or omission was not within the scope of employment; (2) the act or failure to act was because of actual fraud, willful misconduct or actual malice; or (3) representation would create a conflict of interest. Even where one of the three exceptions applies, the attorney general still has discretion to represent the employee pursuant to N.J.S.A. 59:10A-3.

As the 1972 Attorney General's Task Force stated at the time of its enactment, the New Jersey Tort Claims Act strikes a balance between providing the public employee with an "absolutely essential measure of security from liability in the performance of his duties while at the same time providing for a necessary element of accountability for his performance."

Public employees are given broad protection from civil liability as long as their conduct is within the scope of employment and does not constitute fraud, willful misconduct or actual malice.

Chasin v. Montclair State University

Chasin is a professor at Montclair State University. In 1992, James Lloyd,

a former student, sued her and the university for awarding him an "incomplete" in her sociology course. As a Marine reservist, Lloyd was called to active duty in the Persian Gulf as part of "Desert Storm" after about 10 weeks of classes.

Chasin gave Lloyd an "incomplete" for the course but Lloyd contended he was entitled to an "A" (based on a quiz and midterm exam). His contention was based on the "Desert Storm Law," which provided that a student called to duty who had completed eight weeks of classes should receive a grade based on the work completed.

However, Chasin believed that any change to the "incomplete" already awarded Lloyd could only be made by the administrative channels of the university, rather than by her. Her position was vindicated when Lloyd's lawsuit was settled with the university administratively awarding Lloyd a grade, but annotating his transcript to show that the grade was administratively awarded. All claims against Dr. Chasin were dismissed with prejudice. The settlement was signed by the Attorney General's Office.

Despite her vindication, the state refused to reimburse Chasin's legal fees. Chasin filed suit, and the Law Division granted summary judgment, awarding Chasin the fees she incurred in defending Lloyd's actions.

The state appealed, and the Appellate Division reversed in part, remanding for additional fact-finding on the issue of whether the attorney general in fact advised Chasin that she was obligated to award Lloyd a grade pursuant to the "Desert Storm Law."

Significantly, the Appellate Division held that even if Chasin otherwise acted in good faith, she would forfeit her statutory right to reimbursement of legal fees if she failed "to conform her conduct to the law as interpreted by the Attorney General."

The New Jersey Supreme Court granted the parties' petitions for certification. Chasin argues that she should be indemnified even if she failed to follow the attorney general's advice, because she was completely vindicated.

Indeed, as the New Jersey Supreme Court held only a year ago, a public employee is presumptively entitled to reimbursement of legal fees when all claims against the employee are dismissed. In *Bower v. Board of Education of East Orange*, 149 N.J. 416 (1997), a teacher was accused of sexually abusing three of his pupils. When the students' parents would not allow them to testify, all charges against the teacher were dismissed prior to trial.

The Supreme Court held that the dismissal of the charges was sufficient to establish the teacher's entitlement to reimbursement of legal fees, even though doubts persisted about his actual innocence. *Id.* at 431, 434.

This result does not change when the state employee allegedly fails to follow the attorney general's advice. On the contrary, the Tort Claims Act recognizes that a state employee and the attorney general may part ways over a particular case; yet, in ordinary circumstances the employee will still be entitled to indemnification and reimbursement of legal fees.

Thus, the act states that even "[i]f the Attorney General refuses to provide for the defense of a State employee," the state will still "pay or reimburse him for all costs of defending the action, including reasonable counsel fees." N.J.S.A. 59:10A-2.

In support of his contrary position, the attorney general does not cite any authority under indemnity provisions for

government employees. Instead, the attorney general has relied on his role as "sole legal advisor" for all state officers and

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departments, N.J.S.A. 52:17A-4(e), to argue that a state employee "may obtain legal advice only from the Attorney General." But the statute cited by the attorney general applies to officers, not every state employee.

Indeed, for state officers the attorney general must provide representation "in all proceedings or actions of any kind," without exception. N.J.S.A. 52:17A-4(e) (emphasis added). For a state employee, by comparison, the Tort Claims Act allows the attorney general to decline representation, in which case the employee

may retain legal counsel at the state's expense. N.J.S.A. 59:10-2.

The attorney general reasons that a state employee who does not follow the attorney general's advice is not following the law, and thus loses her right to indemnification. "[W]here," the attorney general asks, "is it within [plaintiff's] job responsibilities not to ... comply" with "the law as interpreted by the Attorney General?"

But courts have repeatedly held that even government employees who violate the law are entitled to indemnification and reimbursement of legal fees if they act in good faith. *Errington v. Mansfield Township Bd. of Educ.*, 100 N.J. Super. 130, 137-38 (App. Div. 1968); *Quick v. Bd. of Educ. of the Township of Old Bridge*, 308 N.J. Super. 338, 342-43 (App. Div. 1998).

As the court noted in *Quick*, a "liberal approach is taken" so that the government employee will not be inhibited from "acting for the public good without fear of economic loss."

The attorney general's contrary view, however, is even more far-reaching and would have an even greater chilling effect on state employees. The attorney general reasons that Chasin would lose her statutory right to indemnification if she failed to follow the attorney general's advice, regardless of "whether ultimately our advi[c]e would have been right or wrong."

If this rule is adopted by the New Jersey Supreme Court, a state employee facing criminal or civil claims could be placed in an impossible bind. If the attorney general tells the employee to admit liability, the employee would be forced to choose between accepting the consequences of admitting liability, or forfeiting indemnification — even if the employee is later proved right.

At the core of the attorney general's view is the age-old belief that underlies the very sovereign immunity repealed by the Tort Claims Act, namely, "The Crown is always right."

While government workers appreciate that their roles require sacrifice, it's important to recognize that public service does not mandate slavish devotion to the views of the state. ■