

Legal Opinion: GMP-0008

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Subject: Personal Liability of Proposing and Deciding Officials

October 22, 1991

MEMORANDUM FOR: Regional Personnel Officers  
Elmer Lee, Acting Director  
Office of Personnel and Training, AP

FROM: Carole W. Wilson, Associate General Counsel  
for Equal Opportunity and Administrative Law, GM

SUBJECT: Personal Liability of Proposing and Deciding Officials

The Employee Relations Branch, OPT, has requested that this office issue guidance to proposing and deciding officials regarding their liability, if any, for suits brought against them personally by HUD employees. This memorandum deals with that issue. This memorandum does not cover actions brought by citizens or companies against HUD officials in their individual capacities for allegedly negligent acts involving Departmental programs.

The short answer is that Federal supervisory employees are immune from action taken by them personally as proposing or deciding officials.

The Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA), Pub.L. 100-694, was enacted to provide immunity for Federal employees from personal liability for state common law torts committed within the scope of their employment. Common law torts are, for example, claims of libel, slander and invasion of personal privacy. FELRTCA provides that the Attorney General shall make a determination as to whether an employee was within the scope of his or her employment. (The Attorney General's authority to make such determinations has been delegated to United States Attorneys. 28 C.F.R. 15.3.) Thus, the first step for a Federal employee to take, upon being sued personally, is to request that the Department of Justice make a scope of employment determination. The procedures for making such a request are found at 28 C.F.R. 50.15(a). The supervisor must make a request for representation in the law suit naming him or her personally and must provide a short explanation as to why the actions sued upon were in the scope of employment. That supervisor's supervisor must then endorse the request. The second line supervisor will then obtain the concurrence of the Regional Counsel. Regional Counsel should then discuss with the U.S. Attorney's Office whether the request may be sent to that office or whether it should be sent to the Branch Director, Torts Branch, Civil Division, Department of Justice, Washington, D.C.,

20530. In the absence of direction to send the request to the U.S. Attorney's Office, the request must be submitted to the

Torts Branch.

The definition of the scope of employment depends on state law. However, in general that definition is usually quite broad. The definition of scope of employment covers the conduct of a servant if it is of the kind he is employed to perform. The actions that proposing and deciding officials take are of the kind the Federal supervisory employee is employed to perform and are discretionary. *Ramey v. Bowsher*, 915 F.2d 731 (D.C.Cir. 1990) (performance based adverse action); *Lombardi v. Small Business Administration*, 889 F.2d 959 (10th Cir. 1989) (conduct based adverse action); see, *Currie v. Guthrie*, 749 F.2d 185 (5th Cir. 1984) (supervisor filing complaint with local authorities about subordinate's threat to kill her during performance based counselling session). Thus, FELRTCA will protect supervisors, sued personally for their proposing and deciding official actions, from common law torts.

FELRTCA does not protect Federal officials and employees from constitutional tort claims. Constitutional torts are claims that Government agents acted in violation of the constitutional rights of the claimants. (For example, an employee might allege a constitutional tort by claiming that his first amendment right to free speech was violated by some agency action.) However, nine Federal courts of appeals, U.S. District Courts in those circuits which have not ruled on the issue and the Federal Circuit have ruled that the Civil Service Reform Act, Pub.L.95-454, constitutes a barrier precluding constitutional tort suits for money damages against Federal employees, in their individual capacities, arising in the Federal employment context. Accordingly, supervisors who take adverse action against employees are immune from constitutional torts for money damages.

The procedures for requesting Department of Justice representation in suits brought against supervisors personally for constitutional torts are similar to those for common law torts under FELRTCA. The same request for representation and agency endorsement must be prepared. For constitutional torts, however, the request should be sent directly to the Torts Branch.