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Torts - Federal Tort Claims Act - Government Liability for Torts of Servicement. Williams v. United States, 352 F.2d 477 (1965)

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tinues and seems likely to persist until the matter is ultimately settled.

Even the Supreme Court in remanding this case stated emphatically that they recognized the "widespread support for the recognition of labor unions as juridical personalities". [16] With this statement, the Court itself seems to feel the need for change but only differs as to which branch of the federal government should initiate the change. They feel and with some justification, regardless of the opinions of their critics, that the proper avenue for correction of this situation is solely within the responsibility of Congress.

David K. Sutelan

Torts—FEDERAL TORT CLAIMS ACT—GOVERNMENT LIABILITY FOR TORTS OF SERVICEMEN. Contrary to Army regulations, defendant, an Army sergeant, inadvertently took home a few small explosive devices and left them in a drawer. Plaintiff, a thirteen-year-old boy, was given one of these devices by defendant's wife. Plaintiff lit the fuse, but before he could throw the device, it exploded, causing serious injuries.[1] In an action under the Federal Tort Claims Act,[2] the District Court denied recovery under Georgia law on the ground that the intervening act of the wife "snapped the chain of causation" that might impose any liability of the United States for the negligence of the sergeant. The Court of Appeals, Fifth Circuit, reversed this ruling, finding that the intervening act was forseeable under Georgia law, and hence, the Government was liable in the absence of any affirmative defenses. The case was remanded for a determination of the issue of contributory negligence.

Both courts invoked the Georgia rules of *respondeat superior* in find-

16. United Steelworkers v. Bouligny, *supra* note 1, at 276.

1. Williams v. United States, 352 F. 2d 477 (5th Cir. 1965).

2. "[T]he district courts . . . shall have exclusive jurisdiction of all civil actions or claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." U.S.C.A. #1346(b) (1950).

ing that the sergeant was "acting in the line of duty" [3] when he failed to return the explosives. This interpretation of the Federal Tort Claims Act was consistent with well-established precedent in resolving the following issues of statutory construction: (1) Whether federal or state rules govern in determining when an employee of the Government is "acting within the scope of his office or employment"; and (2) The distinction in meaning between the phrases "acting in the scope of his office or employment" and "acting in the line of duty" as used in the act for delineating the area of government liability for tortious acts of civilian as opposed to military employees.

Concerning the first of these issues, the Supreme Court of the United States in 1949 adopted the policy that the act should be construed liberally.[4] Yet many courts restricted its scope by invoking federal rules to determine the scope of employment[5] in spite of the apparently unambiguous provision of the act specifying that the *lex loci delicti* should determine the liability of the United States.[6] The climax of this trend came in *Williams* v. *United States* (1954),[7] where the Circuit Court held that "acting in the line of duty" meant "acting in the line of military duty", and rejected the application of California rules of *respondeat*

3. " 'Employee of the government' includes . . . members of the military or naval forces of the United States . . ." " 'Acting within the scope of his office or employment', in the case a member of the military or naval forces of the United States, means acting in the line of duty." 28 U.S.C.A. #2671 (1950).

4. United States v. Aetna Cas. & Surety Co., 338 U.S. 366, (1949); United States v. Yellow Cab Co., 340 U.S. 543, (1951); Sommerset Seafood Co. v. United States, 193 F. 2d 631 (4th Cir. 1951); Salter v. Keleket X-Ray Corp., 172 F. Supp. 715 (D.C.D.C. 1959), *rev'd on other grounds*, 275 F. 2d 167, 107 U.S. App. D.C. 138; Jones v. United States, 126 F. Supp. 10 (D.C.D.C. 1954), *aff'd*, 228 F. 2d 52, 97 U.S. App. D.C. 81.

5. "[W]hether Sergeant Thompson was 'acting within the scope of his office or employment' within the meaning of the statute . . . involves a question of statutory construction as to which the federal courts are not bound by local decisions but apply their own standards . . . We look to the federal law and decisions to determine whether or not the person who inflicted the injury was an 'employee of the Government . . . acting within the scope of his office or employment.' We look to local law for the purpose of determining whether the act . . . gives rise to liability." United States v. Sharpe, 189 F. 2d 239, 241 (4th Cir. 1951).

In accord: United States v. Eleazer, 177 F. 2d 914 (4th Cir. 1949), *cert. denied*, 339 U.S. 903 (1950); United States v. Campbell, 172 F. 2d 500 (5th Cir. 1949), *cert. denied*, 377 U.S. 957 (1949); Hubusch v. United States, 174, 2d 7 (5th Cir. 1949); United States v. Lushbough, 200 F. 2d 717 (8th Cir. 1952); Williams v. United States, 105 F. Supp. 208 (D.C. Cal. 1952) (see note 7, *infra*); United States v. Inmon, 205 F. 2d 681 (5th Cir. 1953); Field v. United States, 107 F. Supp. 401 (D.C.N.D. 1952); Jozwiak v. United States, 123 F. Supp. 65 (D.C. Ohio 1954).

6. *Supra* note 3.

7. 215 F.2d 800 (9th Cir. 1954).

superior to cases involving members of military or naval forces by reason of the "drastic modification" of the master and servant doctrine adopted by Congress.[8] However, in a terse *per curiam* decision the Supreme Court reversed the Circuit Court's decision and remanded the case for consideration in light of the California doctrine of *respondeat superior*.[9]

By adopting this interpretation of the Federal Tort Claims Act, The Supreme Court gave the federal courts wide latitude for defining "acting in the line of duty" as it relates to military personnel.[10] In effect, the courts were bound neither by military interpretations nor by state precedents, since state doctrines of *respondeat superior* developed quite independently of any considerations of military service. The courts, ignoring the obvious dissimilarities existing between military service and civilian employment, solve the second issue by virtually abolishing any distinction between "scope of employment" and "line of duty" that Congress might have contemplated. "Acting in the line of duty merely invokes the state law of respondeat superior." [11] As a result, the courts

8. *Ibid.* This case involved an automobile accident caused by an intoxicated soldier out joyriding in a military vehicle issued to another. The court said that California rules of respondeat superior would apply to cases involving civilian employees of the Government," . . . but in dealing with the problem of federal liability for tortious acts of *members of the military and naval forces* a wholly different situation is presented because Congress saw fit to adopt a drastic modification of this 'master and servant' doctrine. By carefully chosen language it delineated the area of this group by specifically providing that so far as concerns such acts, the phrase 'acting within the scope of his office or employment' shall *mean* 'acting in the line of duty.' By use of such plain, unambiguous, and highly significant language, Congress made abundantly plain that federal liability can arise *only* when the tortious act was committed a time when the tort feasor . . . was actually 'acting in the line of duty.' Unless we are prepared to utterly disregard this mandate and refuse to conform to its obvious meaning, we must . . . hold that 'acting in the line of duty' means *acting in the line of military duty* . . . We need not stress the fact that when the sovereign waives its immunity from suit, it may, as here, do so *on its own terms*." Williams v. United States, 215 F. 2d 800, 807, 808 (9th Cir. 1955), lower court decision, 105 F. Supp. 208 (D.C. Cal. 1952). See note 8, *infra*.

9. Williams v. United States, 350 U.S. 857, (1955).

10. Prior to the Federal Tort Claims Act, the phrase "line of duty", has been used to determine benefit claims by members of the armed services, and it has been liberally construed.

11. Merritt v. United States, 332 F. 2d 397, 398 (1st Cir. 1964).

"[F]or the purpose of respondeat superior, [the status of a member of the armed services] is to be considered similar to that of any private employee. We discern no basis in the statute . . . for making a distinction which would extend the scope and application of *respondeat superior* beyond that traditionally applied to private employers simply because the federal government in its military capacity finds itself in

have been reluctant to expand governmental liability for tortious acts of servicemen beyond the recognized limits of "scope of employment" as defined in the state where the tort arose.[12] Hence, there exists no uniform interpretation of the Federal Tort Claims Act, since the decision in a particular case may depend to some extent upon the location of the tort.

In the instant case it appears that the Georgia rules of respondeat superior permitted the Court of Appeals to adopt a fairly liberal interpretation of "acting in the line of duty" where a more strict construction could produce a different result. The Federal Tort Claims Act specifies both "scope of employment" and "line of duty" as bases of government liability. Equating these two concepts under the *respondeat superior* doctrines of the several states introduces unnecessary geographic inconsistencies into the application of the act to military personnel. These inconsistencies might be substantially diminished by the adoption of a uniform liberal interpretation of "acting in the line of duty" which would be more in keeping with the apparent purpose and tenor of the act.

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the role of employer." Chapin v. United States, 258 F. 2d 465, 468 (9th Cir. 1958), *cert. denied*, 359 U.S. 924, ( ).

In accord: McCall v. United States, 338 F. 2d 589 (C.A. Wash. 1964), *cert. denied*, 380 U.S. 974, United States v. Taylor, 236 F. 2d 649 (6th Cir. 1956). 74 A.L.R. 2d 860, *cert. dismissed*, 355 U.S. 801; United States v. Hainline, 315 F. 2d 153 (10th Cir. 1963), *cert. denied*, 375 U.S. 895; United States v. Campbell, 172 F. 2d 500 (5th Cir. 1949), *cert. denied*, 337 U.S. 957; Hinson v. United States, 257 F. 2d 178 (C.A. Ga. 1958).

12. In McCall v. United States, 338 F. 2d 589 (9th Cir. 1964), recovery was denied for a death caused by the negligent driving of a Navy serviceman on leave, who had requested and received permission to transfer from a vessel moored in California to a vessel docked in Washington, and who was driving his own automobile. The reason given was that the use of the automobile was authorized for the convenience of the serviceman only, and was effected at no expense to the government.

Yet the same court allowed a recovery under similar circumstances, where the serviceman on leave was to be reimbursed for expense incurred in driving to a new base. United States v. Kennedy, 23 F. 2d 674 (9th Cir. 1956).