

DATE: 07-26-91

CITATION: VAOPGCPREC 63-91
Vet. Aff. Op. Gen. Couns. Prec. 63-91

TEXT:

Immunity from Personal Liability under 38 U.S.C. § 4116 and 28 U.S.C. § 2679 for participant in VAMC Psychology Service Internship Program on elective rotation for training to a non-VA facility

QUESTIONS PRESENTED:

- a. Is a noncareer psychology intern in pay status with the Department of Veterans Affairs who is rotated to a training assignment at a non-VA facility entitled to the protection afforded by 38 U.S.C. § 4116 for alleged negligent acts occurring while working in the non-VA facility?
- b. Is such an intern entitled to immunity under 28 U.S.C. § 2679 for alleged negligent acts occurring while working in the non-VA facility?
- c. When establishing training opportunities in non-VA facilities, how can the Government's exposure to suit be minimized?

COMMENTS:

1. Under 38 U.S.C. § 4116, the VA health care personnel immunity statute, the exclusive remedy for injuries allegedly arising from the malpractice or negligence of a physician or supporting personnel of the Veterans Health Administration (VHA) when such treatment or care is furnished in the exercise of that person's duties in and for the VHA is the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671-2680.
2. The threshold question in a determination of immunity under section 4116 and of liability of the United States under the FTCA is who provides the supervision and control of the performance of the duties of the person for whom coverage is sought. Op.G.C. 5-84 (11-14-84); Op.G.C. 1-76 (04-23-76); Op.G.C. 8-75 (07-10-75); Op.G.C. 5-72 (11-15-72); Digested Opinion, 7-14-87 (1-5b Liability). The supervision and control test has also been used by the Federal courts to determine whether a physician is an employee for whose negligence the United States can be held liable under the FTCA. Quilico v. Kaplan, 749 F.2d 480 (7th Cir.1984); Lurch v. United States, 719 F.2d 333 (10th Cir.1983). Using this test, Op.G.C. 8-75 (07-10-75) held that medical residents or interns in pay status with the VA who are rotated to a training assignment at a non-VA facility would not be covered by section 4116 and, accordingly, would not be covered by the FTCA.

3. The Psychological Services Internship Program at the Department of Veterans Affairs Medical Center (VAMC), Reno, Nevada, is a 1900 hour predoctoral internship training program. The program consists of a core curriculum of three mandatory training rotations and one elective rotation. The mandatory rotations are all performed at the VAMC. For the fourth rotation, interns may elect clinical and research experiences at non-VA facilities. The entire internship program lasts 12 months. Interns enrolled in the program receive a stipend from the VAMC.

4. Off-site training rotations are established with non-VA providers under a Memorandum of Affiliation between the VAMC and the outside provider. The Memorandum specifically provides that interns will be governed by the rules and regulations of the outside provider. In addition, the outside provider maintains full responsibility for the care of patients and for both administrative and professional supervision of the interns in all matters related to patient care. The Memorandum further specifically provides that interns and faculty members furnishing professional services under the agreement will not be covered under the FTCA.

5. Under such a structure, section 4116 and the FTCA would only apply in exceptional circumstances. Such a circumstance may occur where a VA patient is transferred to the non-VA facility under the care of a VA physician or psychologist. If the VA doctor supervises the intern in the treatment at the non-VA facility, the Government may be liable for negligent acts or omissions in the course of such treatment. However, it is unlikely that liability coverage under the statutes would be extended to interns who have rotated to a non-VA facility.

6. An analysis of 28 U.S.C. § 2679 leads to the same result in this case. Under that section, the FTCA is the exclusive remedy for damages suffered as the result of the act of a Government employee within the scope of his office or employment. Employees of the Government are defined in 28 U.S.C. § 2671 as persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation. This is a much more expansive immunity provision than section 4116. The question of whether one is an employee of the United States Government within the meaning of 28 U.S.C. §§ 1346(b) and 2679 is a Federal question based upon Federal statutory interpretation. United States v. Orleans, 425 U.S. 807, (1976); Logue v. United States, 412 U.S. 521, (1973). The actual determination of whether one is an employee of the Government turns on who supervises the day-to-day operations of the individual. Lilly v. Fieldstone, 876 F.2d 857 (10th Cir.1989); Letnes v. United States, 820 F.2d 1517 (9th Cir.1987). The terms of the contract fixing the relationship of the parties are critical to this determination. Wood v. Standard Products, Co., Inc., 671 F.2d 825 (4th Cir.1982).

7. Therefore, the same considerations that would deny an intern immunity under section 4116 work to deny coverage under section 2679. Clearly all effective control of the day-to-day activities of the intern rotated to a non- VA facility comes from such non-VA facility. The VAMC has no say whatsoever in matters relating to patient care. Further, participants are noncareer interns with no obligation to the VHA upon completion of the program. The agency does not receive any significant benefit from the rotation of an intern to a non-VA facility. Patients to whom the VA has no obligation are being treated in non- VA facilities by interns who most likely will not bring the benefits of their experiences back to the agency. Under these circumstances, it would be difficult to find that the interns are acting in the service of the United States. This conclusion is confirmed by the contract paragraph which specifically denies FTCA coverage.

8. In conclusion, it is clear that, as the Psychology Service Internship Program is presently constituted, liability coverage under the FTCA and the Immunity Statutes generally will not extend to interns training at non-VA facilities. The same analysis would preclude a judgment against the United States based upon the professional negligence of such interns. Therefore, the administrative precautions required by VA Manual M-8, Part III, paragraph 1.11 must be exercised to assure that all parties understand the lack of statutory coverage.

9. Please note that in any tort action filed against an intern enrolled in the Psychology Service Internship Program, VA would make only an initial recommendation to the Department of Justice with respect to the applicability of the VA Immunity Statute and the FTCA. The determination of the intern's status under those statutes for purposes of the litigation would be decided by the Department of Justice. Of course, the Federal courts have the ultimate decision on the issue.

10. The greatest protection against suit could be accorded to the Government by including in the memorandum of Affiliation a paragraph providing that the non-VA facility will indemnify and hold harmless the United States from any and all damages resulting from care rendered at such a facility by a VAMC Intern acting within the scope of his duties at the non-VA facility. In any event, all affiliated facilities should be required to maintain liability insurance. It would be helpful if such insurance also extended coverage to participating interns. Exposure of the United States to a lawsuit may also be reduced if the intern carries personal liability insurance. This will reduce the possibility of the United States being named as a party to a lawsuit by assuring a recovery to successful plaintiffs.

Ultimately, however, if the intern is not covered by the applicable statutes, the United States will not be liable for the professional negligence of the intern who is not subject to VA supervision and control.

HELD:

a. An intern in a VAMC Psychological Services Internship Program in pay status with the VA and rotated to a training assignment at a non-VA location would not be considered an employee exercising duties in or for the VHA while under the technical and professional supervision of the staff of the non-VA institution. Accordingly, such an intern would not be covered by the provisions of 38 U.S.C. § 4116.

b. An intern in a VAMC Psychological Services Internship Program in pay status with the VA and rotated to a training assignment at a non-VA location would not be considered a Government employee while under the technical and professional supervision of the staff of the non-VA institution. Accordingly, such an intern would not be covered by the provisions of 28 U.S.C. § 2679.

c. The Memorandum of Affiliation should require participating non-VA facilities to maintain adequate liability insurance, including coverage for interns serving a rotation at that facility, in connection with the VAMC Psychological Services Internship Program.

VETERANS ADMINISTRATION GENERAL COUNSEL