

Appendix B: Opinion of the Attorney General, 15-01

STATE OF TENNESSEE

Office of the Attorney General



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January 6, 2015

The Honorable Mark Norris
State Senator
Tennessee Advisory Commission on Intergovernmental Relations
226 Capitol Boulevard Building, Suite 508
Nashville, TN 37243-0760

Dear Senator Norris:

Enclosed is the attached opinion per your request. Please let us know if you have any further questions. As always, we appreciate your assistance and cooperation.

Sincerely,

A handwritten signature in black ink that reads "Herbert H. Slattery III".

HERBERT H. SLATERY III
Attorney General and Reporter

Enclosure

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

January 6, 2015

Opinion No. 15-01

Healthy Workplace Act of 2014

QUESTIONS

1. Does the Healthy Workplace Act of 2014 create a new cause of action against state or local employers for abusive conduct in the workplace?

2. Does this Act create a new cause of action against state or local employees for abusive conduct in the workplace?

3. Would adoption of the model policy or policy conforming to Tenn. Code Ann. § 50-1-503(b) create immunity for the State or its local governments beyond that provided elsewhere, including that provided by the Governmental Tort Liability Act (GTLA), Tenn. Code Ann. § 29-20-101 *et seq.*, and Tenn. Code Ann. § 9-8-307?

4. If a governmental entity does not adopt such a policy, under what conditions and to what extent would that entity be liable for an employee's abusive conduct? Would it be protected from liability by the GTLA or Tenn. Code Ann. § 9-8-307?

5. Does the Healthy Workplace Act extend to quasi-governmental entities such as housing authorities, utility districts, and development districts?

6. Who has the authority to adopt such a policy in a county government or city government?

OPINIONS

1. No.

2. No.

3. It appears that when a state or local government complies with the policy-adoption requirement of Tenn. Code Ann. § 50-1-503(b), that entity would, under certain circumstances, acquire a specific supplement to the immunity already applicable under the Governmental Tort Liability Act (GTLA), Tenn. Code Ann. § 29-

20-102, *et seq.*, and the Tennessee Claims Commission Act, Tenn. Code Ann. § 9-8-301 through 310.

4. The immunities and legal defenses available to governmental entities pursuant to the GTLA and the Claims Commission Act would remain available to those entities that did not adopt a policy as contemplated by Tenn. Code Ann. § 50-1-503(b).

5. Yes. "Employer" is defined in the Act as any agency, county, metropolitan government, municipality, or other political subdivision of the state. The definition of "agency" in the Act includes all boards, offices, and other agencies of the executive, legislative, or judicial branches of government.

6. Each "employer" may adopt such a policy. When the employer is a local governmental entity, such as a county or a municipality, the question of who has authority within that local governmental entity to adopt such a policy is a matter of local law and will depend in each case on the particular charter of the local government, its ordinances, rules, and regulations. This Office is not statutorily authorized to render an opinion on matters of local law on the interpretation of local charters, ordinances, rules, and regulations.

ANALYSIS

The Healthy Workplace Act ("the Act"), Chapter 997 of the Public Acts of 2014, codified at Tenn. Code Ann. §§ 50-1-501 through 50-1-504, is intended to help prevent "abusive conduct" in the workplace in the state and local governments in Tennessee. In furtherance of this goal, the Act provides certain limited immunity from suit for public "employers" who adopt a prescribed form of a policy designed to prevent abusive conduct in the workplace.

"Abusive conduct," "Agency," and "Employer" are defined as follows for purposes of the Act:

(1) "Abusive conduct" means acts or omissions that would cause a reasonable person, based on the severity, nature, and frequency of the conduct, to believe that an employee was subject to an abusive work environment, such as:

(A) Repeated verbal abuse in the workplace, including derogatory remarks, insults, and epithets;

(B) Verbal, nonverbal, or physical conduct of a threatening, intimidating, or humiliating nature in the workplace; or

(C) The sabotage or undermining of an employee's work performance in the workplace.

(2) "Agency" means any department, commission, board, office or other agency of the executive, legislative or judicial branch of state government; and

(3) "Employer" means any agency, county, metropolitan government, municipality, or other political subdivision of this state.

Tenn. Code Ann. § 50-1-502.

The Act requires the creation of a model policy for the use of public employers:

(a) No later than March 1, 2015, the Tennessee advisory commission on intergovernmental relations (TACIR) shall create a model policy for employers to prevent abusive conduct in the workplace. The model policy shall be developed in consultation with the department of human resources and interested municipal and county organizations including, but not limited to, the Tennessee municipal league, the Tennessee county services association, the municipal technical advisory service (MTAS), and the county technical assistance service (CTAS).

(b) The model policy created pursuant to subsection (a) shall:

(1) Assist employers in recognizing and responding to abusive conduct in the workplace; and

(2) Prevent retaliation against any employee who has reported abusive conduct in the workplace.

(c) Each employer may adopt the policy created pursuant to subsection (a) as a policy to address abusive conduct in the workplace.

Tenn. Code Ann. § 50-1-503.

Notwithstanding § 29-20-205,¹ if an employer adopts the model policy created by TACIR pursuant to subsection (a) or adopts a policy that conforms to the requirements set out in subsection (b), then the employer shall be immune from suit for any employee's abusive conduct that results in negligent or intentional infliction of mental anguish.

¹ Tennessee Code Annotated § 29-20-205 is the portion of the Governmental Tort Liability Act dealing with removal of governmental immunity for injury caused by the negligence of public-sector employees.

Nothing in this section shall be construed to limit the personal liability of an employee for any abusive conduct in the workplace.

Tenn. Code Ann. § 50-1-504.

1 and 2. You have asked (1) whether the Act creates a new cause of action against state or local employers for abusive conduct in the workplace, and (2) whether the Act creates a new cause of action against state or local employees for abusive conduct in the workplace. The Act does not create any such new cause of action against either employers or employees.

Tennessee Code Annotated § 1-3-119 addresses this issue. It provides, in pertinent part, that "for legislation enacted by the general assembly to create or confer a private right of action, the legislation must contain express language creating or conferring the right." Absent such express language,² "no court of this state, licensing board, or administrative agency shall construe or interpret a statute to implicitly create or confer a private right of action except as otherwise provided in this section." Tenn. Code Ann. § 1-3-119(a) and (b).

No provision of the Healthy Workplace Act expressly creates or confers (or even indirectly refers to) a new private cause of action for abusive conduct. Accordingly, the Act creates no new cause of action for abusive conduct against either state or local employers or state or local employees.

3. You have also asked whether adoption of the model policy or a policy conforming to Tenn. Code Ann. § 50-1-503(b) creates immunity for state or local governments beyond that provided elsewhere, including immunity for local governments under the Governmental Tort Liability Act (GTLA) and for the State pursuant to Tenn. Code Ann. § 9-8-307, which defines the jurisdiction of the Tennessee Claims Commission.

² Examples of the required "express" language can be found in Tenn. Code Ann. § 64-7-207(a)(5) ("In addition to any criminal penalty provided by law for a violation of subdivision (a)(2) or (a)(3), there is created a separate civil cause of action for the cost of any damage resulting from such prohibited action.") (emphasis added), in Tenn. Code Ann. § 4-21-701(a) ("There is hereby created a civil cause of action for malicious harassment.") (emphasis added), and in Tenn. Code Ann. § 49-6-4006(a) ("In addition to criminal penalties provided by law, there is created a civil cause of action for an intentional assault, personal injury or injury to the personal property of students or school employees when the assault appears during school hours, on school property, or during school functions, including travel to and from school or school buses.") (emphasis added).

Both the GTLA (with regard to local governmental bodies that come within its ambit)¹ and the Claims Commission Act (with regard to claims against the State),² provide immunity for employees of governmental entities when those employees have acted negligently, and simultaneously remove the immunity belonging to governmental entities arising from such claims. Both the Claims Commission Act and the GTLA, however, specifically provide that there is no immunity for employees acting willfully, maliciously, criminally, or for personal gain,³ and both preserve the immunity of governmental entities in such instances of intentional wrongdoing by employees.

The Healthy Workplace Act, Tenn. Code Ann. § 50-1-504, states that upon adoption of either the model policy or a policy that conforms to the requirements set forth in Tenn. Code Ann. § 50-1-503(b), "... the employer shall be immune from suit for any employee's abusive conduct that results in negligent or intentional infliction of mental anguish." While the GTLA and the Claims Commission Act already provide immunity to governmental entities from claims arising from their employees' intentional acts, § 50-1-504 appears to supplement that immunity by adding a specific immunity for negligent infliction of mental anguish. That is, whereas the GTLA and the Claims Commission Act permit plaintiffs to sue state and local governments for most negligent acts of their employees, the Healthy Workplace Act carves out a specific type of negligence—negligent infliction of emotional anguish—for which plaintiffs cannot bring suit against governmental entities, provided those entities have adopted a policy conforming to the requirements of Tenn. Code Ann. § 50-1-504.

4. Your fourth question concerns the legal ramifications of a governmental entity's failure to adopt a policy under Tenn. Code Ann. § 50-1-504.

To begin with, the Act does not require an employer to adopt either the model policy or a policy that conforms to the model policy requirements or, for that matter, any policy. The Act simply provides that if an employer adopts the model policy or a policy that conforms to the model policy requirements, "then the employer shall be immune from suit for any employee's abusive conduct that results in negligent or intentional infliction of mental anguish."⁴ Thus, the clearest consequence of the employer's failure to adopt such a policy is lack of immunity from suit for an employee's abusive conduct resulting in negligent or intentional infliction of mental anguish.

Second, the Act contains no language expressly repealing or modifying any governmental immunity that pre-existed the Act. Nor is there anything in the Act

¹ See Tenn. Code Ann. § 29-20-102(c).

² See Tenn. Code Ann. § 9-8-307(b).

³ See Tenn. Code Ann. §§ 29-20-310(c) (GTLA) and 9-8-307(d) and (b) (Claims Commission).

that could be construed to repeal or modify existing governmental immunity by implication.

As we stated in a previous opinion,

Courts require as a rule of statutory construction that statutes on the same subject should be construed together so they do not conflict. *In re Akins*, 87 S.W.3d 488, 498 (Tenn. 2002). The General Assembly is presumed to be aware of other statutes relating to the same subject matter. *Shorts v. Bartholomew*, 278 S.W.3d 268, 277 (Tenn. 2009). Thus, unless a more recent statute expressly repeals or amends an older one, "the new provision is presumed to be in accord with the same policy embodied in the prior statute." *Id.* Repeals by implication are not favored in Tennessee and will be recognized "only when no fair and reasonable construction will permit the statutes to stand together." *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995). A court will hold a later statute to have repealed an earlier statute by implication only when the conflict between the statutes is irreconcilable. *Id.* See also *Hayes v. Gibson County*, 288 S.W.3d 334, 337-38 (Tenn. 2009).

Op. Tenn. Att'y Gen. No. 13-40 (May 23, 2013).

We find no provision in the Healthy Workplace Act that conflicts with earlier statutory language regarding governmental immunity, except perhaps to the extent that the Act slightly expands governmental immunity to cover claims for *negligent* infliction of emotional anguish. But that does not create a conflict, since the new provision may be read in harmony with pre-existing Tennessee law and in accord with the same policies embodied in the prior statutes. It therefore appears that the immunities and legal defenses available to governmental entities pursuant to the GTLA and the Claims Commission Act remain available to those entities that do not adopt a policy as contemplated by Tenn. Code Ann. § 50-1-503(b).

5. You have asked whether the Act extends to quasi-governmental entities such as housing authorities, utility districts, and development districts. The Act applies to "employers" and defines "employer" as "any agency, county, metropolitan government, municipality, or other subdivision of this state." "Agency" is defined broadly to include "any department, commission, board, office or other agency of the executive, legislative or judicial branch of state government." Tenn. Code Ann. § 50-1-502(2) and (3).

This Office has previously opined that

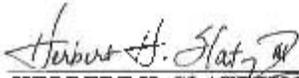
[h]ousing authorities may be established by either a municipality, or a county, or two or more contiguous counties may form a regional housing authority. Tenn. Code Ann. §§ 13-20-402, 13-20-501, and 13-20-502. The Tennessee Supreme Court held, under the predecessor statute to the current Housing Authorities Act, that a housing authority created by a municipality is to be treated as an instrumentality of the municipality. *Knoxville Housing Authority, Inc. v. City of Knoxville*, 123 S.W.2d 1085 (1939). Since many of the factors relied upon by the court still exist under the current act, this Office has consistently opined that a city housing authority is an instrumentality of the creating municipality and that a county or regional housing authority is an instrumentality of the creating county or counties. See Op. Tenn. Att'y Gen. 99-013 (January 25, 1999); Op. Tenn. Att'y Gen. 89-102 (August 16, 1989); Op. Tenn. Att'y Gen. 89-62 (April 24, 1989).

Op. Tenn. Att'y Gen. No. 05-170 (Nov. 21, 2005). Consequently, a housing authority would appear to be an "employer" under Tenn. Code Ann. § 50-1-502(3).

This Office opined in Op. Tenn. Att'y Gen. 03-17 (Feb. 19, 2003) that, pursuant to Tenn. Code Ann. § 7-82-801(a)(1), a utility district, once incorporated, is a municipality or public corporation. See also, Op. Tenn. Att'y Gen. 14-65 (June 25, 2014). A utility district would therefore also fall within the Act's definition of "employer."

This Office has also opined that development districts created pursuant to Tenn. Code Ann. §§ 13-14-101, *et seq.*, are public bodies and arms or instrumentalities of the counties and municipalities that such districts encompass. See Op. Tenn. Att'y Gen. 09-126 (July 22, 2009); Op. Tenn. Att'y Gen. 80-95 (Feb. 14, 1980); Op. Tenn. Att'y Gen. 77-185A (Apr. 27, 1977); Op. Tenn. Att'y Gen. 77-102 (Apr. 5, 1977). Development districts are encompassed within the terms "county," "municipality," and "other subdivision," that appear in the Act's definition of "employer."

6. Finally, you have asked who in a county or city government has the authority to adopt such a policy. This is a question of local law, the answer to which would involve an interpretation of the particular charter provisions, ordinances and other laws, rules, and regulations of any local government to which the Act applies. Since this Office is not authorized to opine on matters of local law, we decline to respond to this question.


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