

IN THE COURT OF CLAIMS OF OHIO

MATTHEW RIES, Admr., et al... :
Plaintiffs :
v. : Case No. 2010-10335
THE OHIO STATE UNIVERSITY : Judge J. Clark
MEDICAL CENTER :
Defendant :

ORIGINAL

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**DEFENDANT'S POST HEARING REPLY BRIEF REGARDING
IMMUNITY OF SYED HUSAIN, M.D.**

The plaintiff's core argument in this case is that the scope of Dr. Husain's duties as an employee of OSUP should dictate whether or not he is entitled to immunity, especially because the portion of his salary paid directly by OSU is too small to properly compensate him for his services. The argument then bogs down in the details of the financial arrangements between Dr. Husain and OSUP. These argument ignore the 800 pound gorilla: The Supreme Court decided *Theobald* in 2006, and that case dramatically altered the immunity analysis. In fact, when the Franklin County Court of Appeals decided *Theobald*, one of the analytical breakthroughs was to reject adherence to analysis by the so-called "financial factors" that had bogged down the unworkable decision-making process of the previous era. Specifically, the Court of Appeals stated:

Therefore, we conclude that although the financial factors may be relevant to determine if a practitioner is employed by the state, the financial factors generally have little bearing upon whether a practitioner is acting within the scope of his employment.

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Theobald v. University of Cincinnati, 160 Ohio App. 3d 342, 2005-Ohio-1510, ¶ 46.

The Ohio Supreme Court's instruction to this court with regard to making an immunity determination defines a two step process:

Thus, the Court of Claims' analysis of personal immunity has two parts: Was the individual a state employee, and, if so, was the individual acting within the scope of employment when the cause of action arose

...

The Revised Code does not define "scope of employment." The concept generally denotes an agency relationship in which the agent or employee is engaged in an activity that is logically related to the business of the principal or employer. ... For purposes of personal immunity under R.C. 9.86, a state employee acts within the scope of employment if the actions are "in furtherance of the interests of the state." ... Thus, a state employee's duties should define the scope of employment.

Theobald v. University of Cincinnati (2006), 111 Ohio St. 3d 541, 2006-Ohio-6208, ¶ 14-15.

So, applying the Supreme Court's instruction this court first must ask: Was Dr. Husain a state employee? Clearly, the answer is "yes." There is no doubt that in September 2009, when Dr. Husain saw Mr. McNew, he was an employee of the state. In fact, his Letter of Offer from the College of Medicine, specifically states that "this is a full-time offer with 100 percent of your professional efforts being devoted to the Department of Surgery." Exhibit A, p. 3 (emphasis added).

It having been established that Dr. Husain was an "employee," the "financial factors" become less significant as the analysis shifts to scope of employment. Was Dr. Husain acting within the scope of his employment when the cause of action arose? According to Dr. Husain, he was. According to Dr. W. Scott Melvin, the person to whom Dr. Husain

directly reported, he was. According to Vice Dean Robert Bornstein, who testified that he is totally familiar with the duties and responsibilities of the medical faculty, he was. Under *Theobald* the inquiry should end there. Everything else that the plaintiff argues is part of an outdated analysis. Dual employment by Ohio State and OSUP? It does not matter. The amount of salary paid to Dr. Husain paid by OSUP? Not relevant. Who approves bonuses for OSUP? Not material.

What really matters in this case is whether Dr. Husain was acting within the scope of his employment, and all of the evidence at the hearing says that treating patients at the colorectal clinic at OSU East on September 15, 2009, was within the scope of his duties as a faculty physician at Ohio State. Dr. Husain was assigned to staff the clinic by Dr. Melvin. Dr. Melvin testified that no physician other than an Ohio State faculty physician is permitted to staff that clinic. Dr. Husain's contract with Ohio State required him to devote 100% of his time to the Department of Surgery. His Letter of Offer provides: "Participation in the College Central Practice Group is a requirement of employment." Exhibit A, p. 1. Dr. Husain's letter of offer, Exhibit A, p. 2, sets forth his duties as a member of the faculty including teaching, research, and service. Dr. Melvin testified that "service" is a term of art in academic medicine that includes clinical service taking care of patients. Deposition of Dr. W. Scott Melvin, pp. 41-42.

The legal authority to hire employees of The Ohio State University, and to define their duties, originates with the Board of Trustees. R.C. 3335.09. Dr. Husain's duties and authority to act on behalf of the University also originates there. A 2002 Resolution of the Ohio State University Board of Trustees, established a "Practice Plan" that specifically

recognized that “the provision of patient care services by the regular and auxiliary faculty through the [College Central Practice Group] CCPG is an essential and critical part of their employment at OSU.” Exhibit D, p. 1. That resolution also provides that “[a]s a condition of employment, all regular ... faculty ... will be required to join and remain members of the CCPG.” Exhibit D, p. 5. Dr. Husain was required by Ohio State to sign a contract with OSUP. Ohio State created OSUP. The express terms of Dr. Husain’s contract OSUP includes the following provision: “compensation paid hereunder is approved by the Senior Vice president for Health Sciences [of OSU]. Services performed and compensation received by Employee under this Agreement are specifically recognized as being in fulfillment of obligations which are part of a concurrent faculty appointment and employment by [The Ohio State University College of Medicine and Public Health] COMPH.” (Emphasis added.) It also states that “OSUP hereby employs employee to render professional medical services . . . pursuant to the practice plan ... under the authority of the Board of Trustees.” Exhibit B, p. 1. Plaintiff argues and insinuates that somehow the “financial factors” should be interpreted to deny Dr. Husain his immunity as a university employee. However, there was no evidence, none at all, to suggest that Dr. Husain’s duties as a member of the faculty did not include patient care at that clinic on that day. It really is simple. If Dr. Husain were not hired by Ohio State to the regular medical faculty he would not have been at the clinic that day, and he could not have been Mr. McNew’s physician.

This case fits neatly within the analytical framework of *Theobald*. Dr. Husain was an employee. His duties as an employee included taking care of patients at the clinic. Mr. McNew came to the clinic. His claim against Dr. Husain arises out of that treatment.

Therefore, the claim arises out Dr. Husain's performance of his duties as an employee of Ohio State University. Under R.C. 9.86, he is entitled to immunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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