

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX AT KINGSHILL

FLORENCIO ORTIZ

Plaintiff

vs.

GOVERNMENT OF THE VIRGIN
ISLANDS

Defendant

CIVIL NO. 758/1983

ACTION FOR DAMAGES

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FINCH, Judge

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This matter is before the Court on the defendant's motion to dismiss. The basic question raised by the motion is whether plaintiff has standing to bring this law suit? The defendant contends that plaintiff's suit is barred by the immunity provision of 23 V.I.C. 1553(a), and by the exclusivity provision of the Workmen's Compensation Act, 24 V.I.C. 284. This Court finds that plaintiff has failed to pursue the

exclusive remedies available to him under the Workmen's Compensation Act and will dismiss his suit.

II. FACTS

On February 24, 1980, plaintiff was transferred from Martin National Guard Station in Alabama, by order of the Governor, to the Virgin Islands National Guard for a two year period. The transfer was authorized by 32 U.S.C.A. 503, which provides for the participation of members of the National Guard in field exercises. The Adjutant General commands the National Guard of the Virgin Islands, and is subordinate only to the Governor of the Virgin Islands.

Plaintiff was injured on September 22, 1981, while working under the instructions of his superior officer. At the time of injury, he was serving on Acting Guard Reserve. Plaintiff incurred medical and travel expenses, and lost time from work as a result of his injury. He brings this tort action for damages alleging negligence on the part of defendant (Government of the Virgin Islands). The Virgin Islands National Guard unit was not ordered into federal active duty at the time of plaintiff's injury. Plaintiff has not applied for workmen's compensation.

III. DISCUSSION

(A) Immunity Provision

The Government contends that plaintiff's suit is barred by 23 V.I.C. 1553(a). That section states in part that:

"No member... of the National Guard of the Virgin Islands shall be liable,..., for any... injury to any person,... caused by him or by his order, while performing any military duty..."

23 V.I.C. 1553(a). This section immunizes plaintiff's superior from liability. Thus, the Government argues, under traditional master servant principles, the Government (master) cannot be sued if the servant (plaintiff's superior) is not liable. This apparently impressive argument is without merit. The very section upon which the Government relies, concludes with the phrase, "except as otherwise provided by section 3408 of Title 33 of this Code." 23 V.I.C. 1553(a). Section 3408 states in part that:

"The Government of the Virgin Islands hereby waives its immunity from liability... and hereby assumes liability with respect to injury... caused by the negligence or wrongful act or omission of an employee of the Government of the Virgin Islands while acting within the scope of his office ; or employment."

33 V.I.C. 3408. The type of liability waived by the Government (i.e. employee negligence) is precisely the sort

claimed by plaintiff. Sections 1553(a) and 3408, read in pari materia, immunizes National Guard employees from liability but permits tort actions against the Government for injuries caused by the negligence of such employees. Thus plaintiff generally would have standing under 33 V.I.C. 3408 to bring a tort action against the Government. However, that standing will shatter and fall if the exclusivity provision of the Workmen's Compensation Act applies. The Court now turns to that subject.

(B) Exclusivity Provision

The Workmen's Compensation law has been in force in the Virgin Islands for over 30 years. Its purpose is "to provide compulsory Government insurance for the protection of all employees cover by the Act." Carmona v. DeJongh, 157 F. Supp. 540, 542, 3 V.I.C. 281 (D.C.V.I. 1958). All employees of the Virgin Islands Government are covered by the Act. 24 V.I.C. 251(a). Any employee who suffers an injury arising in the course of his employment is entitled to compensation. 24 V.I.C. 252 and 254. The right to obtain compensation under the Act is an employee's sole remedy against his employer. 24 V.I.C. 284. Thus, an employee who is entitled¹ to receive workmen's compensation cannot bring a separate tort action against the Government. The real issue then, is whether

plaintiff had a right to obtain workmen's compensation for his injury? The basic prerequisites for obtaining workmen's compensation are: (1) The injury must arise out of and in the course of employment; (2) The injury must fit within the statutory definition of "injury"; and (3) The injured party must be an employee of an employer covered by the Act. The first two requirements are easily satisfied. Paragraph 5 of plaintiff's complaint alleges that the injury occurred during the course of employment. As such this requirement is satisfied. Injury is defined in 24 V.I.C. 251(a) as "any harmful change in the human organism..." Plaintiff's complaint alleges that plaintiff sustained extensive laceration of the scalp, lost time from work, and continually suffers from severe dizzy spells as a result of the injury. (See complaint paragraph 7). Accordingly, the injury complained of fits within the statutory definition of "injury".

The issue upon which this entire case rests requires some discussion. The pivotal question is whether plaintiff is an employee of the Government of the Virgin Islands? If plaintiff is an employee of the federal government, he would not be entitled to workmen's compensation since his employer is not covered by the Workmen's Compensation Act of the Virgin Islands. Plaintiff's standing to bring a tort action against the Government would then be on firm ground. However, shatter

it will, if plaintiff is considered as an employee of the Virgin Islands Government. The Supreme Court and several circuits have ruled on this issue.

The National Guard is the modern militia reserved to the states by Article I, Section 8, Cl.15 and 16 of the Constitution. It is hybrid in nature. That is to say, the National Guard is of a very "unusual 'hybrid' status as an agent with both federal and state characteristics". Johnson v. Orr, 780 F.2d 386, 388 (3d Cir. 1986). Ulus Jorden, Jr. v. National Guard Bureau, et al, _____ F.2d _____ (3d Cir. 1986), (filed August 27, 1986) succinctly set out the structure of the National Guard.

The Guard is the modern successor to the state militia. See Engblom v. Carey, 522 F.Supp. 57, 65 (S.D.N.Y. 1981), and all fifty states, and Puerto Rico have their own guard. Article 1, Section 8, Clause 16 of the Constitution places the power of appointing personnel to the state militia in the hands of the state. Guard members are called out for roughly two weeks a year for military training. In addition, governors may call out their state guard at anytime for state emergencies such as riots and floods. However, there is a federal component to the guard as well. The National Guard Bureau, an adjunct of the United States Department of Army and Air Force gives guard personnel federal recognition as part of either the Army National Guard of the United States or the Air National Guard of the United States ("ANGUS"). In addition, the President may call the Guard into national service, 10 U.S.C. §3495 (1982).

The Governor is in charge of the Guard unless the unit is called into active federal duty due to national necessity. 32 U.S.C.A. 102; Maryland v. United States, 85 S.Ct. 1293, 1297 (1965).¹ Federal Active duty means "full time duty in the active military service of the United States." 32 U.S.C.A 101 (12); 23 V.I.C. 1502(g).

In Maryland, supra, the petitioners filed suit against the United States under the Federal Tort Claims Act. The suit grew out of a mid-air collision of a federally owned plane piloted by a Maryland Air National Guard rated pilot who was also a civilian maintenance technician. The petitioners alleged negligence on the part of the pilot. The key issue in the case was whether the pilot was an "employee" of the United States for purposes of the Federal Tort Claims Act when his unit was not in active federal service? The court below stated that,

"the appellate courts have uniformly held that federally recognized members of National Guard units not in active federal service are not employees of the United States within the meaning of the said Act. It has been held

¹/ "Members of the Army National Guard of the United States are not in active federal service except when ordered thereto under law." 10 U.S.C.A 3495. In cases of emergency, the President may call National Guard members into active federal service. 10 U.S.C.A 3500.

that they are employees of their respective states."²

State of Maryland v. United States, 329 F.2d 722, 726 (3d Cir. 1964). Affirming the Third Circuit, the Supreme Court stated that "the appointment of National Guard military members by state authorities and the immediate control exercised over them by the States make it apparent that they are employees of the States." Maryland, supra, at 1298. Guard members are thus state employees even if they are federally recognized, compensated with federal funds, or in possession and control of a federally owned vehicle. State of Maryland, supra, at 727.

Plaintiff alleges that he was a federal employee on active duty at the time of his injury. Concededly, plaintiff was on active National Guard duty pursuant to an order by the Governor of Alabama.³ However, the Virgin Islands National

^{2/} See also Storer Broadcasting Co. v. United States, 251 F.2d 268, 269 (5th Cir. 1958) stating that "all located decisions on the state and federal militia relationship hold that National Guardsmen of the several states are employees of the state except when in actual service of the United States."

^{3/} Full-time National Guard duty is defined as "training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the in the member's status as a member of the National Guard of a State or Territory,... under section... 503 of this title..." 32 U.S.C.A 101(19). Plaintiff was transferred under 32 U.S.C.A 503.

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Guard was not called into active duty at the time of plaintiff's injury. Thus plaintiff must be considered as an employee of the Virgin Islands Government.

In conclusion, plaintiff meets all the prerequisites, and thus had a right to receive workmen's compensation for his injury. Nevertheless, he failed to pursue that exclusive remedy. Accordingly, plaintiff is without standing to maintain this suit.

DATED:

October 7, 1986


Raymond L. Finch, Judge