

VT SUPREME COURT
WASHINGTON UNIT
STATE OF VERMONT

SUPERIOR COURT
Washington Unit

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CIVIL DIVISION
Docket No. 698-11-16 Wncv

KATHERINE HEFFERNAN
Plaintiff

FILED

v.

STATE OF VERMONT
Defendant

DECISION

The State's Motion to Dismiss

Plaintiff Katherine Heffernan asserts that the State is liable for a default judgment for \$300,000 against Mr. Tracey Holliman, entered by the Chittenden Civil Division, on a claim that Mr. Holliman, while a State corrections officer at the Chittenden County Correctional Facility (CCCF), sexually abused her while she was an inmate.¹ In the first count in this case, she claims that the State has liability for the default judgment because it failed to defend Mr. Holliman in the Chittenden lawsuit. In the second count, she claims that the State has vicarious liability for the sexual assaults.

The State has filed a motion to dismiss. It argues that: (1) Ms. Heffernan lacks standing to challenge its decision to not defend Mr. Holliman in the underlying action or to indemnify him for the default judgment; (2) the State's decision to not defend Mr. Holliman was not challenged according to statute and thus cannot be revisited here; (3) the State's decisions to not defend or indemnify Mr. Holliman were correct; (4) the State cannot be vicariously liable for the sexual assaults because they occurred outside the scope of his employment; and (5) the State would retain sovereign immunity against any such claim.

Ms. Heffernan maintains that the State was obliged to defend Mr. Holliman in the Chittenden action. Because it failed to do so, she argues, it cannot now contest its obligation to indemnify him and accept responsibility for the default judgment. She also asserts that it thereby also waived any opportunity to rely on sovereign immunity. She argues that the sexual assaults were within the scope of Mr. Holliman's authority, for purposes of vicarious liability, under Restatement (Second) of Agency § 219(2)(d) as interpreted in *Doe v. Forrest*, 176 Vt. 476, 487-504 (2004).

Factual background

Ms. Heffernan sued Mr. Holliman in the Chittenden Civil Division in December 2015. In

¹ Ms. Heffernan alleges that the default judgment was for \$300,000 in the complaint. She asserts that it was for \$200,000 in her opposition to dismissal. For purposes of the State's motion, the amount of the default judgment is immaterial.

the complaint, she alleged that while she was incarcerated at the CCCF, Mr. Holliman, a corrections officer at the time, "used his authority to groom Plaintiff and to bribe [her] in order to obtain sexual favors." She further asserted that he "used his authority to arrange for Plaintiff to be in locations where he could, without being seen, engage in sexual contact." She alleged that sexual contact in fact happened on numerous occasions. She characterized her claims as assault, battery, and "under the United States Constitution and federal law." Mr. Holliman was the only named defendant. She did not sue the State.

Ms. Heffernan alleges that she notified the State of her lawsuit, but it did not provide a defense for Mr. Holliman. She evidently served Mr. Holliman by publication but he never entered an appearance or defended. Default was entered and the case proceeded to a damages hearing where she was awarded \$300,000. See *infra* n.1. She notified the State of the judgment but it declined to satisfy it. She then filed this case to "collect."

Legal background

The issues in this case require an understanding of the State's obligations to defend and indemnify State employees from lawsuits.

The State is generally obligated to defend any employee who is sued for harm "arising from an act or omission to act in the performance of the employee's official duties." 3 V.S.A. § 1101(a). Procedurally, when the employee is sued, the employee is required to notify the Attorney General. 3 V.S.A. § 1102(a). The Attorney General then investigates and "shall determine whether the alleged act or omission occurred within the scope of the employee's official duties." *Id.* If so, then the Attorney General provides a defense. *Id.* § 1102(b). If not, the Attorney General notifies the employee in writing and does not provide a defense. *Id.* § 1102(c). "The employee may appeal the determination of the Attorney General to the State Labor Relations Board [VLRB] in accordance with the rules of the Board, and the decision of the [VLRB] shall be final." *Id.* The VLRB's review is *de novo*. VLRB Rules of Practice § 42.6.

Generally, when a lawsuit is brought against a State employee acting within the scope of his or her employment, the "exclusive right of action shall lie against the state of Vermont; and no such action may be maintained against the employee or the estate of the employee." 12 V.S.A. § 5602(a).

Separately, if the Attorney General defended the State employee and an adverse judgment resulted for "acts or omissions within the scope of his or her employment," the State must indemnify the employee for that judgment. 12 V.S.A. § 5606(a). If the Attorney General concludes that indemnification is available, the Commissioner of Finance and Management pays the judgment. *Id.* § 5606(d). "If the Attorney General believes there is reasonable doubt about whether the officer or employee is eligible for indemnification, the Attorney General shall refer the matter to the Labor Relations Board which may decide the matter. The decision of the Board shall not be subject to appeal." *Id.* The VLRB interprets this provision as giving the employee a right to appeal an adverse decision to the VLRB. VLRB Rules of Practice § 43.1. The statute does not otherwise provide for the possibility of the Attorney General concluding beyond a reasonable doubt that indemnification is not available.

Neither the exclusive-right-of-action provision nor the indemnification provision applies in cases of gross negligence or willful misconduct. 12 V.S.A. §§ 5602(b), 5606(c)(1).

The VLRB has held that the State's obligation to provide a defense is broader than its obligation to provide indemnity. *In re McCue*, 17 VLRB 151, 157 (dated June 23, 1994).

Analysis

The State argues that Ms. Heffernan lacks constitutional standing to claim any rights based on the State's obligations, if any, to defend and indemnify Mr. Holliman because any such obligations were for his benefit rather than hers, and standing doctrine generally does not permit one to assert the rights of others. The State further argues that, even if there is standing, its decisions to deny a defense and indemnity were correct because the alleged sexual assaults did not occur "in the performance of the employee's official duties," 3 V.S.A. § 1101(a), or "within the scope of his or her employment," 12 V.S.A. § 5606(a).

The court declines to address these issues. The statutory scheme contemplates potential indemnification only in cases where the State *did* defend the State employee, whether it did so voluntarily or because the VLRB required it to do so. Here the State did not defend Mr. Holliman. It thus had no potential obligation to indemnify him.

Ms. Heffernan essentially argues that the State failed to defend wrongfully, and thereby waived any right to deny indemnification. However, both statutory regimes designate the VLRB as the tribunal that makes the final determination of the State's obligation to defend and indemnify a State employee. 3 V.S.A. § 1102(c); 12 V.S.A. § 5606(d). No party ever sought a decision from the VLRB on the State's duties of defense and indemnity. It is not clear that these statutes would have permitted Ms. Heffernan to seek those determinations where Mr. Holliman did not. However, those issues (both statutory and constitutional standing), had they been properly raised, were matters for the VLRB to determine. The statutory scheme simply does not contemplate that skipping the procedure to determine the defense obligation should result automatically in indemnity and, in all events, it does not contemplate indemnity where there was no defense. The State is entitled to dismissal of this court.

The State also is entitled to dismissal of the vicarious liability count. The parties briefed the impact of Restatement (Second) of Agency § 219(2)(d), as interpreted in *Doe v. Forrest*, 176 Vt. 476, 487-504 (2004), in detail. However, the court declines to address that issue. Even if Mr. Holliman's conduct could be treated as within the scope of his employment, there is no reasonable way to characterize the allegations of sexual assault in the Chittenden complaint as something other than assault and battery. The State retains sovereign immunity to claims of assault and battery. 12 V.S.A. § 5601(e)(6). Ms. Heffernan's bald assertion that her claim describes negligence is wholly untenable. The allegations of his Chittenden complaint plainly describe intentional torts: assault and battery.

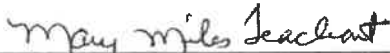
Ms. Heffernan also asserts without explanation that the State somehow waived any ability to invoke sovereign immunity here due to something it did in the course of the Chittenden

litigation. However, the State was entirely uninvolved in the Chittenden litigation. It was neither a party nor did it provide a defense for Mr. Holliman. Nothing in the relevant statutes implies that any decision by the Attorney General on whether to provide a State employee a defense, whether correct or in error, might later prevent the State from otherwise properly invoking the State's sovereign immunity to a tort claim.

ORDER

For the foregoing reasons, the State's motion to dismiss is granted.

Dated at Montpelier, Vermont this 7th day of July 2017.



Mary Miles Teachout,
Superior Judge