

**FACULTY HANDBOOK****LIABILITY OF STATE UNIVERSITY EMPLOYEES**

Except for "discretionary acts,"<sup>1</sup> State employees are liable for injury caused by their act or omission in the same way as are private persons. (Government Code Section 820, 820.2) However, a State employee is entitled to request the public entity to defend the employee against a claim or action "for any injury arising out of an act or omission occurring within the scope of his employment as an employee." If this request is made at least ten days before the trial, and the employee reasonably cooperates in good faith in the defense of the claim or action (Section 825), the State (Section 811.2) is obligated to pay any judgment which may be rendered against the employee, as well as any compromise or settlement to which the entity agrees. (Government Code Section 825)

Upon request, the State also is obliged to defend the action brought against its employees. The only exceptions to this obligation are in cases where the State determines that the act or omission involved was not within the employee's scope of employment; or that it was based upon actual fraud, corruption or malice; or that the providing of such defense would involve a conflict in interest. (Government Code Section 995 and 995.2)

In the event the State should decline or fail to defend the employee and he or she retains his or her own counsel to defend the action, the employee is entitled to recover from the State such reasonable attorney's fees and expenses as are incurred necessarily (if the action arose out of an act or omission in the scope of employment), unless the State establishes that the employee acted or failed to act because of fraud, corruption, or actual malice, or unless the action is brought against the employee by the State (Sections 995.4; 996.4).

In practice, all actions brought against an employee of the California State University involving some act or omission by the employee in his or her official capacity are referred to the Chancellor's Office of General Counsel, and following its review, possibly to the Office of the Attorney General. The Office of the General Counsel or the Attorney General may take the case under a "reservation of right" by which the issue of scope of employment is preserved. In that event, the State sustains the cost of conducting the defense, but if it is determined that the employee's actions were outside the course and scope of his or her public employment (Sections 825, 825.6), the State may recover any payment it had to make from the employee. If no such "reservation by right" is taken, then both the expense of the trial and the judgment, if any, are paid by the State, unless the employee willfully failed or refused to reasonably cooperate in good faith in the defense conducted by the public entity (Section 825.6). The purpose of the law on this subject is to free public employees from the anxiety which litigation and the threat of litigation brings. The law recognizes not only the burden of an adverse judgment, but also the considerable cost of conducting a legal defense. It is based on the premise that it would not be fair to impose the burden of defense and possible judgment on employees who act in good faith, but also that to do so would inhibit the actions of all but the most careless.

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<sup>1</sup> The "discretionary acts" doctrine had been construed by the California Supreme Court in *Johnson v. California*, 69 Cal.2nd 782 (1968). The court held that it was not every act which one might deem discretionary which would immunize the State from liability. Rather it found that the type of discretionary acts for which the Legislature intended to provide immunity were those decisions which consisted of "responsibility for basic policy decisions" and established a distinction between the planning and operational levels of decision making. The court further stated that an individual finding must take place in each instance to determine whether the doctrine would apply. The court stated at p. 794: "it requires us to find and isolate those areas of quasi legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision."

## APPENDIX L

Different rules exist for judgments that are based on punitive or exemplary damages. In these rare cases, campus legal counsel should be consulted.