CIVIL DEFENSE: Volunteer workers in civil defense not "employees" within meaning of Workmen's
WORKMEN'S COMPENSATION: Compensation law.

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May 7, 1956

Mr. Marvin W. Smith
Director, Civil Defense Agency
Jefferson Building
Jefferson City, Missouri

Dear Mr. Smith:

This is in response to your letter of March 6, 1956, wherein you have requested assistance in answering certain questions submitted to you by Capt. Henry C. Barnes, Commander, 4715th Ground Observer Squadron, Joplin Air Defense Filter Center.

Capt. Barnes' letter, which you have enclosed, is primarily concerned with the Missouri Workmen's Compensation Act and its application to volunteer workers at the Filter Center. We deem it necessary for this office to answer only the following two questions contained therein:

> "2. Are the volunteer workers of the Civil Defense Agency of Missouri at the Joplin Filter Center and the Ground Observation Posts considered to be 'employees' of the Civil Defense Agency within the meaning of the Missouri Workmen's Compensation Act?
>
> "3. Are such employees covered employees to whom the Act does apply?"

The word "employee" is defined in the Workmen's Compensation law as follows:

> "The word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election. * * *"

We have not been able to find any Missouri cases passing directly upon this precise question. The best discussion of this problem generally, however, is found in Larson's Workmen's Compensation Law, Volume 1, Sections 47.10, 47.41, 47.41(a), pages 687 and 696, as follows:

> Sec. 47.10.
> "Up to this point, the discussion of status has shown that the compensation 'employee' concept has expanded beyond the common-law 'servant' concept in its actual application. There is, however, one respect in which the compensation concept is narrower than that of the common law; most acts insist upon the existence of a 'contract of hire, express or implied,' as an essential feature of the employment relation. At common law, it is perfectly possible to strike up a master-servant relation without a contract, so far as vicarious liability is concerned. An infant, a prisoner, a slave, a helpful house guest - all might impose vicarious liability on one who accepted their services performed subject to the master's control.
>
> "The reason for the difference between the two concepts is readily explained by the difference between the nature of the two liabilities involved. The end product of a vicarious liability case is not an adjustment of rights between employer and employee on the strength of their mutual arrangement, but a unilateral liability of the master to a strainger. The sole concern of the vicarious liability rule, then, is with the master: did he accept and control the service that led to the stranger's injury? If he did, it is of no particular importance between him and the stranger whether the servant enjoyed any reciprocal or contractual rights vis-a-vis the master. Accordingly, the Restatement of Agency says plainly that the master must consent to the service, but nowhere requires that the servant consent to serve the master or even know who he is.
>
> "Compensation law, however, is a mutual arrangement between the employer and employee under

which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship. To thrust upon a worker an employee status to which he has never consented would not ordinarily harm him in a vicarious liability suit by a stranger against his employer, but it might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common-law damages.

"There is also a sound reason for the requirement that the employment be 'for hire'. In a vicarious liability suit, payment is not a requisite of servant status, since the stranger's rights against the master could not possibly be affected by the presence or absence of financial arrangements between the master and servant. But in a compensation case, the entire philosophy of the legislation assumes that the worker is in a gainful occupation at the time of injury. The essence of compensation protection is the restoration of a part of the loss of wages which are assumed to have existed. Merely as a practical matter, it would be impossible to calculate compensation benefits for a purely gratuitous worker, since benefits are ordinarily calculated on the basis of earnings.

"These, then, are the underlying reasons why compensation acts usually insist upon a contract of hire. They should be borne in mind during the consideration of the particular applications of the contract requirement which follow, with a view to distinguishing legitimate uses of the requirement from purely technical applications having nothing to do with the reason or spirit of the rule."

Sec. 47.41.
"The word 'hire' connotes payment of some kind. By contrast with the common law of master and servant, which recognized the possibility of having a gratuitous servant, the

compensation decisions uniformly exclude from the definition of 'employee' workers who neither receive nor expect to receive any kind of pay for their services.

"Although, as the next sub-paragraph will show, the performance and acceptance of valuable service normally raises an implication that payment for the services is expected, this implication does not arise when the circumstances negative such an expectation. This occurs in at least three common situations."

Sec. 47.41(a)
"The performance of voluntary patriotic or charitable duties ordinarily leads to no presumption of expected payment. A professional dancer and radio artist volunteered to act as a hostess at a service men's canteen. An irrepressible marine, with whom she had consented to dance, took a firm grip on her arm, in the process of unfolding a complex jitterbug routine, and threw her spinning through the air, evidently expecting to catch her. He omitted to do so, however, having himself in the meantime hit a table, and the hostess fell to the floor, sustaining injuries. The court, in an opinion containing a good collection of the authorities in the field, held that she was not an employee under the Compensation Act, and was therefore not barred by the exclusive remedy clause of the Act from bringing a damage suit against the Canteen based on its failure to protect her from boisterous and disorderly persons. A similar result has been reached as to a carpenter injured while donating his services to the Red Cross, a person volunteering to act as a guard during a liberty bond drive, a school teacher assisting in the issuance of war ration books, a member donating his services in the construction of a grange hall, and a person voluntarily participating in a carnival for prospective students of a university."

Based upon the reasoning in the above text authority, we are therefore of the opinion that volunteer workers of the Civil

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Defense Agency of Missouri in the Joplin Filter Center and the Ground Observation Posts are not "employees" of the Civil Defense Agency within the meaning of the Workmen's Compensation law and, hence, are not included within its coverage.

CONCLUSION

It is the opinion of this office that volunteer workers of the Civil Defense Agency of the State of Missouri at the Joplin Filter Center and the Ground Observation Posts are not "employees" of the Civil Defense Agency within the meaning of the Workmen's Compensation law and, hence, are not included within its coverage.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Yours very truly,

JOHN M. DALTON
Attorney General

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