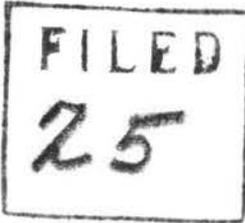


OCCUPATIONAL DISEASES: It is not the intent of Section 292.300, RSMo
MUNICIPALITIES: 1949, to require municipal governments who
FIRE DEPARTMENTS: operate and maintain fire departments that em-
ployees in that department come within its pro-
visions.



August 5, 1957

Honorable L. L. Duncan
Director
Division of Industrial Inspection
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"On numerous occasions this department has been called upon to interpret the above mentioned section as it would or would not relate to municipal governments.

"Is it the intent of this section to require municipal governments who operate and maintain fire departments to provide fire fighters with the necessary equipment to protect them from contracting an illness or disease? I have in mind equipment such as respirators, gas masks and other safety devices.

"In the above mentioned section would the municipality be required to furnish free of charge the necessary equipment for the prevention of illness, disease, or injury. It is my understanding that firemen are required to supply the equipment."

All references to statutes are to Revised Statutes of Missouri, 1949.

The occupational disease statute is Section 292.300, which reads:

"That every employer of labor in this state engaged in carrying on any work, trade or process which may produce any illness or disease peculiar to the work or process carried on, or which subjects the employee to the danger of illness or disease incident to such work, trade or process, to which employees are exposed,

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shall for the protection of all employees engaged in such work, trade or process, adopt and provide approved and effective devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work, trade or process."

The section to which you allude is Section 292.320, which reads:

Every employer in this state to which sections 292.300 to 292.440 applies shall provide for and place at the disposal of the employees so engaged, and shall maintain in good condition without cost to the employees, working clothes to be kept and used exclusively by such employees while at work and all employees therein shall be required at all times while they are at work to use and wear such clothing; and in all processes of manufacture or labor referred to in this section which are productive of noxious or poisonous dusts, adequate and approved respirators shall be furnished and maintained by the employer in good condition and without cost to the employees, and such employees shall use such respirators at all times while engaged in any work productive of noxious or poisonous dusts."

We would first note that a municipal corporation functions in two capacities, i.e., a proprietary or private corporate, and a governmental.

In Yokley on Municipal Corporations, page 110, Section 56, we note the following in regard to the private corporate activities of a municipality:

"The private duties of a municipality are said to be those which are municipal or corporate duties as distinguished from governmental duties. A governmental entity, functioning in a proprietary capacity, should be permitted to perform such function in a manner as efficiently as would a private person.

"It is a well established principle that a municipal corporation owning and operating a water system and selling water to individuals, although engaged in a public service, does so in its business or proprietary capacity, and not in any governmental capacity, and no distinction is to be drawn between such business

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whether engaged in by a municipality or by a private corporation.

"A municipality, in operating and constructing an electric plant, functions as a private or business corporation."

In regard to the governmental functions of a municipality, we note Section 55, page 109, of the same work, which reads:

"In its public or governmental capacity, the municipality partakes of the sovereignty of the state. It acts as a kind of arm of the state, and as such it exercises the limited governmental powers granted to it by the state. Among typical governmental functions of a municipality may be mentioned: the levy of property authorized taxes, the assessment and collection of its proportion of the state tax, police regulations, suppression of crime, protection of the public health, the exercise of eminent domain, the operation of a fire department and the administration of justice."

We call particular attention to the case of Lockhart v. Kansas City, 175 S.W. 2d 814. In this case, the City employed in its water purification plant a person who contracted an occupational disease by reason of inhaling excessive quantities of poison dust. The court held that this man was employed by the city in its private corporate capacity, and that therefore, he came within the occupational disease statute.

The strong implication of the case was that if this employee had been functioning in a governmental capacity that the occupational disease statute would not have applied. At l.c. 817, the court stated:

"The view that a municipality's business operations, in its private corporate capacity, does come under such employer's liability acts seems to be almost universally accepted. * * *."

At l.c. 819, the court stated:

"* * * We, therefore, hold that a municipality engaged in furnishing public utility services in its private corporate capacity is subject to the statutes relied on by plaintiff herein, and that plaintiff was entitled to instructions based on the standards therein provided. * * *."

Honorable L. L. Duncan

CONCLUSION

It is the opinion of this department that the provisions of Section 292.300, RSMo 1949, requiring protective devices against occupational diseases are not operative as to a municipal government's operation and maintenance of a fire department.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

By

Robert R. Welborn
Assistant Attorney General

HPW/bi