

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-179134

DATE: January 2, 1976

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MATTER OF: Homer W. Battles - Witness Travel Expenses

DIGEST: Employee on sick leave pending disability retirement may be paid transportation and per diem expenses in connection with travel from his retirement home in Florida to his permanent duty station in Detroit to give testimony in connection with a Federal Tort Claims Act proceeding in view of the 5 U.S.C. § 6322(b) which provides that an employee is performing official duty during the period he is assigned by his agency to testify on behalf of the United States.

An accounting and finance officer of the Defense Supply Agency (DSA) has requested an opinion as to whether Mr. Homer W. Battles may be reimbursed expenses which he incurred in traveling from Florida to Michigan to serve as a witness on the Government's behalf in a Federal Tort Claims Act proceeding.

The DSA submission letter gives the following account of the circumstances surrounding Mr. Battles' travel:

"a. On 30 March 1972, Homer W. Battles, Quality Assurance Specialist, GS-11, was involved in an automobile collision in the City of Madison Heights, Michigan. A passenger in the other vehicle started suit in a state court against the government employee. A determination was made that the employee was acting within the scope of his employment at the time of the collision, and the U.S. Attorney filed a petition for removal. After removal, the suit was dismissed, and the plaintiff filed an administrative claim under the Federal Tort Claims Act. The parties were unable to reach a settlement, and the plaintiff commenced a new action in the Federal District Court for the Eastern District of Michigan, Southern Division, said suit being Civil Action No. 39509.

"b. On the 17th of May 1974, Homer W. Battles', Supervisory Quality Assurance Specialist, GS-12, application for a disability retirement was approved.

As authorized by FPM Supplement 831-1 and CSC Bulletin 831-56, Mr. Battles elected to remain in pay status on sick leave to be separated as of the date his sick leave expired. Sick leave for this employee commenced on 20 May 1974 and expires on or about 19 May 1975. Shortly thereafter, in June of 1974, Mr. Battles moved from Michigan to his current address at 17 Colonial Club Drive, Apartment 104, Boynton Beach, Florida 33435.

"c. In August 1974, the U. S. Attorney contacted the DCASR, Detroit Counsel Office. The case was docketed for trial on 19 September 1974. At the request of the U. S. Attorney, DCASR Counsel placed a call to Mr. Battles. The government employee agreed to attend the trial on the 19th and requested travel orders. Mr. Battles proposed to drive from Florida to Michigan. Counsel pointed out that if the attorney for either side, or the plaintiff herself, became ill or unable to attend for any good reason, the trial would be adjourned to a later date. Since the U. S. Attorney expected an adjournment request, Counsel asked Mr. Battles to submit his travel payment voucher after the trip was completed. Then, in the event of a last minute postponement of the trial, Counsel could, by telephone, delay Mr. Battles' departure without the necessity of voiding and writing new travel orders.

"d. Counsel made several telephone contacts with the Office of the U.S. Attorney. The last such call was made on or about the 15th or 16th of September. It appeared the case would be tried on the 19th. Accordingly, Mr. Battles was asked to attend by telephone request from the Office of Counsel. Counsel Office received no further information from the U.S. Attorney. Mr. Battles visited the Office of Counsel while in Detroit and reported the case had been adjourned. It was at this point in time that the Office of Counsel discovered the special nature of Mr. Battles' retirement, i.e., on extended sick leave pending disability retirement."

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After his return to Florida, Mr. Battles submitted a claim for the expenses he incurred in traveling to and from Detroit. The claim was administratively disallowed based, in part, on the fact that Mr. Battles was in a sick leave status while performing the travel in question. In this connection DSA cited our decision B-179134, January 14, 1974. The disallowance was otherwise predicated on the fact that the travel involved was between Mr. Battles' retirement home and his official duty station.

In general, the entitlement of an employee to travel expenses in connection with a scheduled court appearance depends upon whether that appearance is sufficiently in the interest of the United States to be regarded as official business within the meaning of 5 U.S.C. § 6322(b) (1970). That subsection reads as follows:

"(b) An employee as defined by section 2105 of this title (except an individual whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives) or an individual employed by the government of the District of Columbia is performing official duty during the period with respect to which he is summoned, or assigned by his agency, to—

"(1) testify or produce official records on behalf of the United States or the District of Columbia; or

"(2) testify in his official capacity or produce official records on behalf of a party other than the United States or the District of Columbia."

By virtue of chapter 171 of title 28, United States Code (1970), the Federal Tort Claims Act, the United States is liable for the tort claims of persons injured by the negligent or wrongful acts of Government employees while acting within the scope of office or employment. Also, 28 U.S.C. § 2679 provides that the injured party's remedy is exclusively against the United States. Because of the Government's potential liability for damages to the injured party we have recognized that an employee who has been involved in an automobile accident while acting within the scope of his employment may be regarded as performing official business while appearing in defense of a suit brought as a result of the accident.

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In 53 Comp. Gen. 214 (1973) we allowed the travel expenses of an employee who was summoned to appear in a judicial proceeding arising out of an accident which occurred while she was performing official duty. In that case we stated the following:

"Inasmuch as the United States is subject to suit and potentially liable for all the damages sustained by the plaintiff, as a result of the employee's negligent operation of his vehicle while in the scope of his employment, it therefore follows that the United States would have a direct interest in the disposition of the traffic charge from which liability might result. Consequently, we believe the appearance of the employee at the judicial proceeding to which she was summoned may be regarded as the performance of official duty within the meaning of 5 U.S.C. 6322(b)(2), cf. 44 Comp. Gen. 188 (1964)."

The fact that Mr. Battles was in a sick leave status gives rise to part of DSA's doubt as to his entitlement. In B-179134, January 14, 1974, cited by DSA, we considered the claim of an employee for travel expenses incident to a temporary duty assignment prior to and after which she was in a sick leave or leave without pay status pending approval of her application for disability retirement. In disallowing that claim we indicated that as a general rule an employee who has been officially placed in a nonduty status such as sick leave or leave without pay due to his physical inability to perform his official duties would not be entitled to reimbursement for travel expenses he incurred while in a nonduty status because he could not be regarded as performing travel essential to the transaction of official business.

However, our holding in B-179134 does not necessarily preclude payment of travel expenses incurred during the period that an employee's leave status is interrupted by his agency's request that he perform official duty. Rather, the claim in that case was disallowed because there was no determination by the appropriate agency official that the employee was physically capable of performing and in fact performed the official duties required by the temporary duty assignment. In the instant case we believe the fact that Mr. Battles traveled to Detroit to appear on the Government's behalf is sufficient indication in this case of his ability to act as a witness.

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In B-123200, April 22, 1955, we considered the case of an employee on annual leave at a location other than his headquarters who was required to travel to testify in court on behalf of the Government. In that case we held that the employee who complied with the summons and then returned to the point of annual leave was entitled to the additional expenses occasioned by such travel. That decision is in accordance with cases holding that where an employee is required to temporarily interrupt his annual leave to return to his duty station he may be reimbursed the additional expense of traveling to his headquarters location and of returning to continue his annual leave. B-168415, December 9, 1969, B-177106, December 26, 1972.

In view of the above, Mr. Battles may be reimbursed the transportation and per diem expenses in question.

PAUL G. DEMELING

Acting Comptroller General
of the United States