

## OHIO CASE SUMMARIES

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**Ohio case summaries will be provided on a continuing basis every Wednesday and Friday of each week (excluding holidays). Summaries include brief descriptions of cases decided in the past week by the Ohio Supreme Court and lower appellate courts on issues related to insurance law. To discontinue receiving this service, please call Travis Vieux at 937-224-3333 or email Travis at [tjvieux@green-law.com](mailto:tjvieux@green-law.com).**

Court of Appeals: Ohio Supreme Court

Case Name: Ohio Government Risk Management Plan v. Harrison  
(2007-Ohio-4948)

Decided: September 27, 2007 (Posted September 27, 2007)

Issue: Duty to Defend and Scope of Employment

Summary of Opinion: The Supreme Court found that the Plan has a duty to defend when the allegations state a claim that potentially or arguably falls within the insurance coverage.

Plaintiff Kohler filed a federal suit against the city of Wapakoneta and the former chief of police of Wapakoneta, Harrison, alleging hostile work environment sex discrimination, violation of her constitutional right to privacy, statutory sex-discrimination under R.C. 4112.02, invasion of privacy and intentional infliction of emotional distress. Kohler was an employee of the Wapakoneta Police Department and alleged that Harrison had used the department's computers to display and distribute pornographic images and emails and that he also used hidden electronic devices to audio record female employees while they were in the police department restroom.

The Ohio Government Risk Management Plan (Plan) provided liability coverage to

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Wapakoneta and to Harrison as the chief of police. The Plan brought a declaratory judgement action seeking a determination that it had no duty to provide coverage or a defense to Harrison. The trial court granted the Plan summary judgement and Harrison appealed. The Court of Appeals for Auglaize County determined that because plaintiff's claims arose from her employment; and because she alleged that Harrison's actions were taken in the course of his duties that the Plan; and that the policy specifically provided that the Plan would defend against "any suit for a wrongful act even if the complaint were groundless or false" and specifically defend suits for "misfeasance, malfeasance, nonfeasance, civil rights violations and discrimination" that the Plan had a duty to defend. The Plan appealed to the Ohio Supreme Court.

The Plan urged the court to create a bright line rule that all conduct involving sexual harassment and sexually deviant behavior to be outside the scope of employment as a matter of law. The court declined to do so following federal case law and finding that the question of whether an employee is acting within the scope of employment is a question of fact to be decided by the jury.

Turning then to the policy itself, the court found ambiguity in the policy as to the types of acts covered where the policy expanded the coverage to include "any matter claimed against an insured solely by reason of their having served or acted in an official capacity." Because Kohler alleged that Harrison was acting in his official capacity, ambiguity was construed against the Plan in favor of a duty to defend. The court noted that the duty to defend is broader when the insurer expressly states that it will defend claims that are groundless, false, or fraudulent.

Further, the court found ambiguity as to the persons insured by the coverage. The policy defined an "insured" as "any employee while acting on behalf of or in the interest of the employer." The court focused on the disjunctive "or" and looked to the contract as a whole. As other sections limited coverage for employees acting "within the scope of their duties," the court construed the ambiguity as who is insured against the Plan and in favor of coverage.

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