

Alabama High Court Reaffirms Immunity Defense

On numerous occasions the Alabama Supreme Court has declared that the defense of sovereign immunity contained in Section Fourteen of the Alabama Constitution remains nearly impenetrable. The Court has recently decided two cases that emphasize that the Court means exactly what it has often said.

In the first case, Hugh McInnish sued Governor Bentley and other state officials challenging the constitutionality of the community-services grant-making process set forth in § 29-2-123 *Alabama Code* (1975). The Alabama Supreme Court agreed with McInnish that the statute was unconstitutional. See *McInnish v. Riley*, 925 So.2d 174 (Ala. 2005). McInnish then asked the Circuit Court of Montgomery County to award him attorney's fees based upon his claim to have saved the State several million dollars by having the statute declared unconstitutional. The Circuit Court agreed and awarded him attorney's fees in the amount of \$196,625. The Governor and other state officials subsequently sought to have the Alabama Supreme Court vacate the award of attorney's fees. The Supreme Court agreed and vacated the award, citing the now familiar refrain that "the wall of immunity erected by § 14 is nearly impregnable." *Ex parte Bentley*, No. 1110321, 2012 Ala. LEXIS 106 (Aug. 24, 2012), at 5-6. In response to McInnish's argument that the award of attorney's fees was good public policy because it encouraged citizens and attorneys to pursue cases in which the state had enacted an unconstitutional statute, the Alabama Supreme Court stated that "public policy is primarily declared by the people in their constitution and statutes." *Id.* at 5.

The second case involved Felisa Owens' employment with Alabama State University. She sued William Harris, the ASU President, and the members of ASU's Board of Trustees, all in their official capacities, for due process violations in connection with her termination. Owens claimed that ASU had not followed the provisions of its staff handbook in terminating her. The Circuit Court of Montgomery County agreed with Owens and ordered her reinstated with full back pay and benefits. The Alabama Supreme Court vacated the portion of the Circuit Court's judgment that awarded any monetary relief, in the form of back pay and benefits, on the grounds that any claims for monetary damages against the defendants, in their official capacities, were barred by sovereign immunity. The language of the case is not crystal clear, but it appears that the Supreme Court left standing that part of the Circuit Court's judgment that ordered that Ms. Owens be reinstated to her prior position at ASU. *Harris v. Owens*, No. 1110421, 2012 Ala. LEXIS 126 (Sept. 21, 2012).

These two cases do not declare new law in the State of Alabama. They do reaffirm that state institutions, including the state's institutions of higher education, and its officials in their official capacity enjoy a large measure of protection from litigation claiming monetary damages due to the doctrine of sovereign immunity. State officials can be sued for mandamus, requiring the officials to do their legal duty, and for declaratory judgments, seeking prospective, non-monetary relief. State officials have some vulnerability to suits for monetary damages, in their official capacity and individual capacity, but only if it can be shown that the officials have acted "fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of law." *Harris v. Owens* at 11. Most plaintiffs will make these allegations and some trial courts may be

sympathetic to such claims. The Alabama Supreme Court has generally been much less sympathetic.

Though ASU was ultimately successful in the *Harris* case, it should be noted that the litigation process took several years before vindication was achieved. Owens was terminated in late 2009 and the Alabama Supreme Court's decision was in late 2012, which means that the ASU defendants were in litigation for three years. University officials sometimes have to make unpopular decisions and to take actions which are likely to be opposed, at least by someone. When faced with this difficult and unpleasant duty, they should make sure that they are on solid legal ground before acting, in hopes of avoiding protracted litigation.