

## State Agent Immunity

It is well known that the University is protected from civil liability by the defense of sovereign immunity, based on Article I, § 14 of the Alabama Constitution. Its employees are, in most cases, also protected from personal civil liability by “state agent” immunity, similarly derived from § 14. This latter immunity applies when the claim is based upon any of the following activities of the employee: formulating plans, policies, or designs; exercising judgment in the administration of a department; discharging duties imposed by law in the manner prescribed by law; and exercising judgment in the discharge of duties imposed by law regarding educating students. However, a University employee does not enjoy the protection of state agency immunity if he/she has acted in a wrongful way. More specifically, if the employee’s conduct was contrary to law; was willful, malicious, or fraudulent; was done in bad faith; exceeded his or her authority; or was undertaken under a mistaken interpretation of the law, the state agent immunity is lost.

The application of state agent immunity in a particular case is determined by a “burden shifting” process. The defendant-public employee must first demonstrate that the plaintiff’s claims arise from a function that would entitle him/her to immunity as a “state agent.” If the employee makes such a showing, the burden shifts to the plaintiff to show that the agent acted wrongfully, as described above. A public employee acts “beyond authority” if he/she fails to discharge duties pursuant to detailed rules or regulations, such as those stated in a checklist.

Two recent Alabama Supreme Court decisions demonstrate the application of state agent immunity in a university setting. The first case arose at The University of Alabama at Birmingham (UAB) and involved a suit by a former faculty member (Stream) against his department chair (Slack). In this case, Stream and a co-author submitted an article for publication that was rejected based on a reviewer’s finding of several instances of plagiarism in the manuscript. Within weeks of that rejection, Stream left UAB to join the faculty at the University of Nevada. Slack wrote a letter of reprimand to Stream based on the plagiarism and sent copies of that letter to the university from which Stream received his Ph.D. and to the editors of at least eight scholarly journals. In addition, Slack telephoned Stream’s new department chair to ask if the chair knew he was hiring a plagiarist and subsequently faxed a copy of the letter of reprimand and other materials to him.

All of Slack’s actions were taken without compliance with UAB’s policy regarding investigation of suspected plagiarism. Slack claimed to be unaware of this policy. UAB ultimately conducted an investigation consistent with that policy and concluded that there were mitigating circumstances for Stream’s plagiarism. It further determined that Slack should have known about the policy, that he should have complied with that policy before writing a letter of reprimand, and that Slack had acted inappropriately in circulating the letter of reprimand to uninterested parties.

Stream filed suit against Slack in state court for defamation, invasion of privacy, and intentional interference with a business contract. The jury ruled in favor of Stream, awarding him \$662,000 in compensatory and punitive damages. On appeal, Slack argued that he was

entitled to state agent immunity. In support of this argument, he contended that he was formulating a plan or policy for handling charges of plagiarism against Stream and that he was exercising his judgment in the administration of a UAB department. The Alabama Supreme Court assumed that Slack had met his burden of initially demonstrating the claims against him arose from his performing a “state agent” function but then held that the immunity was lost because he acted “beyond his authority.” UAB had a policy regarding allegations of plagiarism that contained a checklist for the person investigating such allegations, and Stream failed to follow the stipulated procedures. Stream’s claimed ignorance of these procedures was not sufficient to “reinstate” the immunity. In addition, the Court noted that Slack’s forwarding of the letter of reprimand to uninterested parties was outside the scope of his authority. Finally, the Court found that Slack acted willfully and maliciously in an effort to see that Stream never worked in academia again. The judgment against Slack was affirmed. *Slack v. Stream*, 988 So.2d 516 (Ala. 2008)

The second case arose at Auburn University. The Auburn President and the Interim Director (Smith) of the University-affiliated Alabama Cooperative Extension Systems (ACES) were sued individually by a group of faculty members hired originally as “Schedule A” ACES employees. As such the plaintiffs were eligible to participate in the federal Civil Services Retirement System. Incident to a university reorganization, the plaintiffs became Auburn faculty members and were no longer considered ACES employees. Faculty with 12-month appointments, other than former Schedule A appointees such as the plaintiffs, were allowed to convert to a 9-month appointment that would allow them to supplement their salaries during the summer months. Smith denied the plaintiffs’ request to “convert,” incorrectly stating that the conversion was prohibited by federal regulations and that he could abolish their positions to allow them to re-apply for new employment status, if they wished (they did not).

In the plaintiffs’ lawsuit asserting fraud and age discrimination, the Court found that Smith, as interim director of ACES, made these statements as an exercise of his judgment in the administration of that agency. This function would entitle him to state agent immunity unless the plaintiffs showed that he acted willfully, maliciously, fraudulently, in bad faith, or beyond his authority. The Court found that an innocent misrepresentation in the discharge of a state agent’s responsibilities does not result in forfeiture of the immunity protection. *Ex parte Auburn University*, No. 1070174 (Ala. Oct. 3, 2008).

UAHuntsville employees enjoy the benefit of state agent immunity in carrying out their typical functions. The UAB case demonstrates, however, the necessity for University officials to be fully aware of and to strictly comply with institutional rules and policies that pertain to their responsibilities. Failure to do so may subject them to personal liability. Under the Auburn case, a misstatement of fact, as long as it is unknowing and made without the intent to harm, will not disqualify a public employee from immunity protection. Even here officials should exercise care, however, because an egregious misrepresentation that causes harm may be regarded by the courts as beyond the official’s authority, exposing the official to personal liability. State agent immunity offers significant protection when a University employee is sued, but it is important to remember that the protection is not absolute.