



Lisa Sandberg

Final Analysis
Legislative Service Commission

Sub. H.B. 25

126th General Assembly
(As Passed by the General Assembly)

Reps. Wagner, J. Stewart, Hartnett, Carano, Otterman, Latta, Widener, Aslanides, S. Patton, Buehrer, Wolpert, Combs, Kearns, Webster, McGregor, Reidelbach, Law, Core, Schaffer, Faber, Chandler, Cassell, Hagan, Wagner, Martin, Gilb, Allen, Barrett, Blessing, Book, Carmichael, Coley, Collier, Daniels, DeBose, Dolan, Domenick, C. Evans, Fessler, Flowers, Gibbs, Harwood, Hughes, Key, Mason, Miller, Perry, Schneider, Seaver, Seitz, D. Stewart, Strahorn, Taylor, Walcher, Willamowski, Williams, Yates, Yuko

Effective date: August 4, 2005; certain provisions effective November 3, 2005

ACT SUMMARY

- Permits a state officer or employee to participate in the immunity determination proceeding in the Court of Claims to determine whether the officer or employee is entitled to personal immunity from civil liability under continuing law.
- Provides that when an individual is elected to fill the vacant office of an active or retired employee member of a state retirement board, the successor member holds office until the first day of the new term that follows the next board election that occurs not less than 90 days after the successor member's election.
- Specifies that the additional members to a state retirement board that are appointed by the Governor pursuant to Section 5 of Sub. S.B. 133 of the 125th General Assembly hold office until the first day of the new term that follows the next board election that occurs not less than 90 days after the successor member's election.

CONTENT AND OPERATION

Court of Claims proceedings

Under the continuing Court of Claims Law, a civil action against an officer or employee, as defined in R.C. 109.36 (see **COMMENT 1**), that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner must first be filed against the state in the Court of Claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under R.C. 9.86, as described below, and whether the courts of common pleas have jurisdiction over the civil action.

In the recent Ohio Supreme Court decision in *Johns v. Univ. of Cincinnati Med. Assoc., Inc.*, *infra*, the Court held that excluding a state employee from participating in the immunity-determination proceedings does not violate the employee's due process rights or deny the employee access to Ohio's courts. (See **COMMENT 2**.)

The act specifically permits an officer or employee to participate in the immunity determination proceeding in the Court of Claims to determine whether the officer or employee is entitled to personal immunity under R.C. 9.86. (R.C. 2743.02(F).)

Personal immunity of officer or employee

Continuing law, not affected by the act, generally grants an officer or employee immunity from liability in any civil action that arises under the law of this state for damage or injury caused in the performance of the officer's or employee's duties, unless the officer's or employee's actions were manifestly outside the scope of the officer's or employee's employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner. Excluded from this provision are civil actions arising out of the operation of a motor vehicle and civil actions in which the state is a plaintiff. The provision does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law and does not affect the liability of the state in an action filed against the state in the Court of Claims pursuant to R.C. Chapter 2743. (R.C. 9.86--not in the act.)

Successor members of a state retirement board

Prior law required a successor member of the Public Employees Retirement Board, the Ohio Police and Fire Pension Fund Board, the State Teachers Retirement Board, the School Employees Retirement Board, or the State Highway Patrol Retirement Board to serve on the respective board until the next board election that occurs not less than 90 days after the successor member's election. The act provides that when an individual is elected to fill the vacant office of an active or retired employee member of one of the boards, the successor member holds office until the first day of the new term that follows the next board election that occurs not less than 90 days after the successor member's election. (R.C. 145.06, 742.05, 3307.06, 3309.06, and 5505.042.)

Governor's appointment of additional members to a state retirement board

Section 5 of Sub. S.B. 133 of the 125th General Assembly required the Governor to appoint additional members to the Public Employees Retirement Board, State Teachers Retirement Board, School Employees Retirement Board, and State Highway Patrol Retirement Board. Under prior law, these individuals served on the respective board until the next board election that occurred not less than 90 days after the individual's appointment. The act specifies that these individuals hold office until the first day of the new term that follows the next board election that occurs not less than 90 days after the successor member's election. The act also provides that the retirant member of the School Employees Retirement Board must hold office through June 30, 2005, as directed in Section 6 of Am. H.B. 10 of the 126th General Assembly. (Section 5.)

COMMENT

1. R.C. 109.36 includes the following relevant definitions:

(A)(1) "Officer or employee" means any of the following:

(a) A person who, at the time a cause of action against the person arises, is serving in an elected or appointed office or position with the state or is employed by the state.

(b) A person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services

contract or purchased service contract with a department, agency, or institution of the state.

(c) A person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering peer review, utilization review, or drug utilization review services in relation to medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state.

(d) A person who, at the time a cause of action against the person arises, is rendering medical services to patients in a state institution operated by the department of mental health, is a member of the institution's staff, and is performing the services pursuant to an agreement between the state institution and a board of alcohol, drug addiction, and mental health services described in section 340.021 of the Revised Code.

(2) "Officer or employee" does not include any person elected, appointed, or employed by any political subdivision of the state.

(B) "State" means the state of Ohio, including but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

2. In *Johns v. Univ. of Cincinnati Med. Assoc., Inc.* (2004), 101 Ohio St.3d 234, the Ohio Supreme Court held that the Court of Claims has exclusive jurisdiction to determine whether a state employee is immune from liability and excluding a state employee from participating in the immunity-determination proceedings does not violate the employee's due process rights or deny the employee access to Ohio's courts. The Court stated the following:

State employees have no constitutional right to the defense of immunity. The defense of immunity enjoyed by today's state employees is statutory.

Therefore, as with any other statutory defense, the General Assembly may define how immunity is determined and when it is available. If the immunity-determination proceedings were an employee's only opportunity to defend against a plaintiff's allegations, then excluding him or her from this process would raise constitutional concerns. That is not the situation; a determination of immunity is not a determination of liability. Rather, it is an initial step in litigation to determine whether the state will be liable for any damages caused its employee's actions. If the Court of Claims determines that that the employee is immune from personal liability, then the state has agreed to accept liability for that employee's actions.

Conversely, if the Court of Claims determines that the employee is not immune, then the employee will be subject to personal liability in the court of common pleas. There the employee, the same as any other civil defendant, has the opportunity to raise all defenses pertinent to plaintiff's allegations.

Because a state employee ultimately has his or her day in court to defend against the plaintiff's allegations, excluding a state employee from the immunity-determination proceedings does not impede a state employee's due process rights or access to the courts. [FN4] Accordingly, we hold that R.C. 2743.02(F) is not unconstitutional. (At pp. 240-241, footnote 3 and citation omitted.)

In footnote 4 of the opinion quoted below, the Court suggested that the General Assembly consider amending R.C. 2743.02:

{a} While excluding state employees from participating in the immunity-determination proceedings does not violate constitutional protections, we suggest that the General Assembly consider amending R.C. 2743.02 to *permit* state employees to participate.

{b} Amicus curiae, the Ohio Attorney General, points out that excluding state employees from immunity-determination proceedings relieves the

employees of the burden of participating in the initial stages of litigation. Nevertheless, there may be some employees who prefer to advocate their own position regarding immunity.

{c} Moreover, employee participation would help ensure the integrity of the immunity determination. Without participation of the employee in the hearing, it would be easier for the plaintiff to argue that an employee acted beyond the scope of his or her employment so as to shift liability to the employee personally in order to reach his or her personal insurance coverage or to permit the plaintiff to present the case to a jury, as opposed to a judge.

{d} In this case, Johns and the state stipulated that Dr. Horton was outside the scope of his employment at the time of the surgery and the Court of Claims accepted that stipulation. Yet, a separate tribunal found that Dr. Horton was within the scope of his employment. While no evidence of collusion has been presented in this case, these conflicting findings highlight the value of permitting employee participation. (At p. 241.)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-26-05	p. 90
Reported, H. Judiciary	03-08-05	p. 301
Passed House (96-0)	04-06-05	pp. 374-375
Reported, S. Judiciary on Civil Justice	04-26-05	p. 440
Passed Senate (28-4)	04-26-05	pp. 442-444
House concurred in Senate amendments (98-0)	04-27-05	pp. 716-717

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