



## Alabama Supreme Court to Review Sovereign Immunity of State Dental Board

State licensing boards, if qualified as arms of the state, are entitled to sovereign immunity under the 11th Amendment and typically under their state constitution. With sovereign immunity, state boards cannot be sued. Determining whether a state agency qualifies as an arm of the state is a matter for state and federal courts. Currently, two lawsuits in Alabama — one a breach-of-contract action and the other a claim under the Fair Labor Standards Act — are testing the sovereign immunity of the Board of Dental Examiners of Alabama, the licensing board for dentists practicing in the state.

In the most recent development in *Wilkinson v. Board of Dental Examiners of Alabama*, the Alabama Supreme Court granted on Sept. 16, 2011, a petition for writ of certiorari to the Court of Civil Appeals, which had ruled in April that the board was not an arm of the state and therefore not entitled to sovereign immunity. The decision by the Court of Civil Appeals is counter to the position of the FSMB and its member boards that state medical boards are entitled to sovereign immunity and cannot be sued.

### In the state courts: *Wilkinson v. Board of Dental Examiners of Alabama*

The board employed Mary Ann Wilkinson for several years until she was terminated in 2009. After an audit by the Alabama Department of Examiners of Public Accounts, the plaintiff claimed she had not been properly compensated and sued the board. The Jefferson County Circuit ruled the board was immune from suit under the Alabama Constitution. Wilkinson appealed to the Alabama Court of Civil Appeals, which found the board was not entitled to immunity. The court applied the “treasury factor” as one of, if not the determinative factor in its decision, writing:

“The money collected by the Board is never placed in the State treasury. The Board, from all that appears in the record, is fully self-supporting, and no actual appropriation of funds to the Board from

the State appears to be required in order for it to perform its functions.”

The court also noted there is no oversight of the board by the state and that the statute creating the board did not characterize it as a state agency. The board appealed the Court of Civil Appeals’ decision.

### In the federal courts: *Versiglio v. Board of Dental Examiners of Alabama*

Following the Court of Civil Appeals ruling in the *Wilkinson* case, the U.S. Eleventh Circuit Court of Appeals was asked to rule on the case of *Versiglio vs. Board of Dental Examiners of Alabama*. Natalie Versiglio filed a claim against the board under the Fair Labor Standards Act. The district court denied the board sovereign immunity and the board appealed to the Eleventh Circuit Court.

In its decision, the Eleventh Circuit applied a four-part test to determine if the board was entitled to sovereign immunity. The test came from the 2000 Eleventh Circuit ruling in *Miccosukee Tribe of Indians v. Florida State Athletic Commission*. In applying this test, the court noted the result weighed toward applying sovereign immunity. However, given the decision of the Court of Civil Appeals in the *Wilkinson* case to deny sovereign immunity, the Eleventh Circuit found that it would be improper to determine the board was an arm of the state, writing:

“Finding the Board is entitled to sovereign immunity would require this court to interpret Alabama law in a way that is diametrically opposed to the findings of the highest state court to consider the issue. Such a ruling would also create the incongruous result of having a ‘state agency’ that is immune from suit under federal law but not under state law.”

As a result, the Eleventh Circuit affirmed the district court’s finding that the dental board is not entitled to sovereign immunity protection as an arm of the state of Alabama. It has subsequently been notified of the Alabama Supreme Court’s decision to grant certiorari in the *Wilkinson* case. ■

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