

The Impact of the Arkansas
Supreme Court's Ruling in
Board of Trustees of the University
of Arkansas v. Andrews
on the Adequacy Process

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Arkansas Constitution, Article 5, § 20

The State of Arkansas shall never
be made defendant in any of
her courts.

When looking at state constitutions, Arkansas' provision is fairly unique:


- ▶ 24 state constitutions do not address sovereign immunity
- ▶ 23 state constitutions address sovereign immunity by providing in various forms that the legislature may provide for suit against the state
- ▶ Three states (Arkansas, Alabama, West Virginia) provide that the state shall never be made a defendant in its courts.

The facts of Andrews:

- ▶ Rich Mountain Community College employed Andrews as a bookstore manager from November 15, 2010 through May 9, 2013.
- ▶ When Andrews began working for RMCC he received overtime compensation - in 2011 he was classified as exempt from the overtime requirements under the federal Fair Labor Standards Act and the Arkansas Minimum Wage Act.
- ▶ In 2013, Andrews filed a complaint against RMCC for failing to compensate him for overtime under the Arkansas Minimum Wage Act. He sought a variety of relief, including damages for unpaid overtime compensation, prejudgement interest, attorney's fees, and costs.

Andrews brought his action consistent with the Arkansas Minimum Wage Act, which provides at § 11-4-218(e):

An employee may bring an action for equitable and monetary relief against an employer, including the State of Arkansas or a political subdivision of the state, if the employer pays the employee less than the minimum wages, including overtime wages, to which the employee is entitled under or by virtue of this subchapter.

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- ▶ The court noted two separate lines of thought on sovereign immunity – pre-1996 (a more strict interpretation) and post-1996 (a more permissive interpretation). The court concluded that the more strict pre-1996 cases were the correct precedent for the court to follow in its conclusion that the General Assembly cannot waive the State's sovereign immunity under Article 5, § 20. To the extent cases conflicted with this holding, they were overruled.
 - ▶ The court noted that suits subjecting the state to financial liability are barred by sovereign immunity and are properly brought before the Arkansas Claims Commission.

Cases subsequent to Andrews –

- ▶ Walther v. Flis Enterprises, 2018 Ark. 64 (2018) – sovereign immunity is an affirmative defense (which must be invoked at the beginning of a lawsuit) as opposed to a matter of subject-matter jurisdiction (which can be raised by a court at any time and on its own volition).
- ▶ Arkansas Community Correction v. Barnes, 2018 Ark. 122 (2018) – an action brought by a dismissed state employee under the Arkansas Whistle-Blower Act was prohibited by Article 5, Section 20 of the Arkansas Constitution as the General Assembly clearly intended to subject the state to liability.



The Takeaway from
Andrews —

More Questions than
Answers

Three things we know for sure:

- ▶ Arkansas Code § 11-4-218(e) is unconstitutional and an employee cannot bring an action against the State of Arkansas under the Arkansas Minimum Wage Act.
- ▶ Arkansas Code §§ 21-1-601 et seq. are unconstitutional and an employee cannot bring an action against the State of Arkansas under the Arkansas Whistle-Blower Act.
- ▶ Sovereign immunity is an affirmative defense and the state needs to plead it to ensure its applicability.

It's probably safe to assume that the holding applies to other legislative waivers of sovereign immunity. The question is what exactly those are.

- ▶ The Administrative Procedure Act provides that persons who consider themselves injured by final agency action are entitled to judicial review – there are a growing number of APA appeals that have been dismissed at the circuit court level.
- ▶ The Religious Freedom Restoration Act provides that a person may assert a violation in a judicial proceeding and obtain relief against a government - the Supreme Court alleged in a brief that the General Assembly could not authorize suit in state court in RFRA matters.
- ▶ The Freedom of Information Act allows persons denied rights to appeal to Pulaski County Circuit Court - is this section affected?

Is the decision limited to monetary damages?

- ▶ The dissent suggests this, but the majority opinion in Andrews does not seem to focus on that issue.
- ▶ The court found § 11-4-218(e) unconstitutional, which allowed actions for equitable and monetary relief. The court did not draw a distinction between equitable and monetary relief. Barnes produced a similar result, as the action under the Whistleblower Act sought monetary damages and reinstatement.
- ▶ In a brief, the Supreme Court suggested that the state could not authorize suit in state court under the Religious Freedom Restoration Act. Relief under that act would often be equitable relief.

If the decision is not limited to monetary damages, how expansive is it?

- ▶ The decision says that "we interpret the constitutional provision 'The State of Arkansas shall never be made a defendant in any of her courts' precisely as it reads" and that certain cited cases are the correct precedent to follow in its conclusion that the General Assembly cannot waive the State's immunity.
- ▶ Two of those cases note some exceptions to sovereign immunity, specifically actions to compel agencies to perform ministerial acts and voluntary waivers of sovereign immunity by state agencies. Under these cases, "never" did not mean "never".
- ▶ Similar provisions in Alabama and West Virginia have been interpreted to allow multiple exceptions.
- ▶ Does this mean the holding is limited to waivers of sovereign immunity by the General Assembly?

What are the implications of Andrews on the Lake View decision?

Specific questions:

- ▶ Is Lake View still good law?
- ▶ How will Andrews affect future cases like Lake View, which sought to compel the state to comply with the Arkansas Constitution?
- ▶ Will Andrews prevent the State from being sued for making changes to the school funding formula?

Is Lake View still good law?

Based on what we currently know,
probably yes.

- ▶ Andrews expressly overruled cases in which the General Assembly waived sovereign immunity by statute, but Lake View was premised on the school funding system being unconstitutional under the Education Article (Article 14, § 1) and the Equality provisions (Article 2, §§ 2, 3, and 18) of the Arkansas Constitution. This is a substantive difference between the two cases and Andrews would presumably not have tacitly overruled Lake View.
- ▶ The Arkansas Supreme Court issued a mandate in the Lake View case – the recall or abolishment of that mandate would seemingly take additional legal steps.

How will Andrews affect future cases like Lake View, which sought to compel the state to comply with the Arkansas Constitution? The answer is not yet clear.

- ▶ Is there a distinction between actions brought against the state under the Arkansas Constitution (such as illegal exaction suits under Article 16 of the Arkansas Constitution and education actions under Article 14) and actions permitted by statute?
- ▶ A lawsuit associated with the new medical marijuana amendment touched on the issue of whether the state was immune on the issue – a circuit court held that a claim of sovereign immunity may be surmounted where a state agency is acting illegally, so the case could be heard as it sought injunctive relief. It's not clear if this opinion sheds any light on future outcomes.

Will Andrews prevent the state from being sued for making changes to the school funding formula?
Again, the answer is not yet clear.

- ▶ Presuming that future challenges are filed on the same constitutional grounds, it is not clear whether the Andrews decision has an impact on that type of suit.

In short, the impact of the Andrews decision on future educational challenges is not yet clear.

- ▶ Future precedent from the Arkansas Supreme Court appears likely and will provide more guidance.
- ▶ Key questions in this context are how the court feels Article 5, § 20 interacts with other provisions of the Arkansas Constitution and the impact of the Andrews decision on actions seeking non-monetary, equitable relief.

Questions?