



## Austin v. State Industrial Insurance System

939 F.2d 676 (1991) | Cited 147 times | Ninth Circuit | April 11, 1991

### MEMORANDUM

Plaintiff Austin, d.b.a. Austin Roofing, appeals the dismissal of his 42 U.S.C. § 1983 action against the Nevada State Industrial Insurance System ("SIIS") and Laury Lewis, General Manager of SIIS. The district court dismissed Austin's action on the grounds that SIIS is a state agency immune from suit under the eleventh amendment and that Lewis, sued in his official capacity, shares in that immunity. We affirm.

### FACTS

Austin is a Nevada citizen who operated a sole proprietorship licensed by the state of Nevada as a roofing subcontractor. In September 1981, as required by Nev. Rev. Stat. § 616.285, Austin obtained workers' compensation insurance from the Nevada Industrial Commission, the forerunner of SIIS. In 1987, the Nevada legislature amended the workers' compensation law to treat sole proprietors and partners of licensed construction subcontractors as employees with imputed wages of \$500 per month and to require that they pay workers' compensation premiums on that amount. See Nev. Rev. Stat. § 616.085(2). Austin refused to pay the additional premiums. According to Austin, SIIS responded by deducting \$106.72 from his advance premium account to cover the additional premiums from April through October of 1988. At the end of October SIIS cancelled his policy, and on November 9 it issued Austin an order to cease business operations for failure to maintain the required workers' compensation insurance premium deposit and payments.

On August 10, 1989, Austin filed a pro se complaint pursuant to 42 U.S.C. § 1983, alleging that SIIS had violated his rights under the takings clause of the fifth amendment and the due process and equal protection clauses of the fourteenth amendment by misappropriating premiums from his advance premium account and by ordering him to cease business. The complaint sought \$595,000 in general damages and \$5.94 million in compensatory and punitive damages.

Without filing an answer, SIIS and Lewis filed a motion to dismiss based on several grounds, including eleventh amendment immunity. The district court, after an initial hearing and supplemental briefing, granted the motion on the basis of the defendants' immunity from suit. Austin filed a timely appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291. Our review is de novo. See *Price v. Hawaii*, 921 F.2d 950, 954 (1990).

### Discussion



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### I. SIIS

The eleventh amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Though its language suggests otherwise, the eleventh amendment has been interpreted to bar from federal court a suit brought against a state even by one of its own citizens. See *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). A state may consent to suit, but absent such consent the eleventh amendment bars actions against the state and its agencies and departments. *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Nevada explicitly has retained its full eleventh amendment immunity. Nev. Rev. Stat. § 41.031(3); *O'Connor v. Nevada*, 686 F.2d 749, 750 (9th Cir.), cert. denied, 459 U.S. 1071 (1982).

The central issue in this appeal is whether SIIS is part of the state of Nevada and therefore entitled to eleventh amendment immunity. Our circuit has identified several factors as relevant to this inquiry. A central concern is whether a judgment against the entity named as a defendant would impact the state treasury. *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982); *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir. 1981). We also consider such factors as the nature of the entity's functions, powers, and responsibilities; its relation to and control by other units of government; its corporate status, its ability to sue or be sued, and its power to hold property in its own name or that of the state. See *Jackson*, 682 F.2d at 1350; *Johnson v. University of Nevada*, 596 F. Supp. 175, 177-78 (D. Nev. 1984). In evaluating the force of these factors in a particular case, we look to state law's treatment of the entity. *Jackson*, 682 F.2d at 1350.

In the present case we are aided by a recent decision of the Nevada Supreme Court that deals with the very same entity, SIIS. In *Northern Nevada Association of Injured Workers v. Nevada State Industrial Insurance System*, P.2d , 1991 WL 31237, No. 20704 (Nev. Mar. 7, 1991), plaintiffs brought suit against SIIS and several individual defendants, including Lewis, asserting both state tort claims and federal civil rights claims under 42 U.S.C. §§ 1983 & 1985. The Nevada trial court dismissed the action. It found the state claims barred by Nev. Rev. Stat. § 41.032, which precludes an action against a state agency or employee for the performance of or failure to perform a discretionary act. The court dismissed the federal claims on the ground that SIIS is a state agency, and that it and its employees, when acting in their official capacities, are therefore not "persons" within the meaning of section 1983 and section 1985. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) (section 1983); *Santiago v. New York State Dept. of Correctional Services*, 725 F. Supp. 780 (S.D.N.Y. 1989) (section 1985).

The Nevada Supreme Court upheld the dismissal of the federal claims, but reinstated the state claims



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on the sole ground that some of the defendants' acts were not discretionary. The court agreed with the trial court that SIIS is a state agency:

SIIS is clearly a state agency for the following reasons: (1) it is subject to the approval and control of the Governor, the legislature, and other agencies of the government; (2) it is treated as the State or a state agency throughout the Nevada Revised Statutes; and (3) it possesses certain powers of a sovereign authority.

Northern Nevada, slip op. at 5-6 (footnotes, including citations, omitted). In affirming the trial court's dismissal of the federal claims on the basis of Will, the Nevada Supreme Court reiterated its holding that SIIS is a state agency. Id. at 8.

While Northern Nevada specifically addressed Nevada's state law of immunity and not the eleventh amendment, its conclusion that SIIS is a state agency applies with equal force in the latter context for two reasons. First, as noted earlier, we give substantial deference to the Nevada Supreme Court's conclusion that SIIS is a state agency. See Jackson, 682 F.2d at 1350. Second, the Nevada Revised Statutes supply a wealth of support for that conclusion. Northern Nevada identified numerous statutory provisions that subject SIIS to the control and review of the Governor, the legislature, and other government agencies. See id. at 5 n.7. The Nevada legislature's view that SIIS is a state agency is unmistakable. See id. at 6 n.8. Northern Nevada also enumerates the many governmental powers statutorily vested in SIIS, including the powers to conduct administrative hearings and adjudications and to issue regulations carrying the force of law. See id. at 6 n.9.

Additional statutory provisions, not catalogued in the footnotes of Northern Nevada, further support the conclusion that SIIS is a state agency. For example, the board of directors that supervises SIIS is appointed by Nevada's governor. Nev. Rev. Stat. § 616.1703(1). Prior to each legislative session the board of directors must report to the governor and the legislature on the operation of SIIS and submit recommendations for any appropriate legislation. Id. § 616.1709(8). Both of these provisions indicate how Nevada's executive and legislative branches review and to some extent control SIIS. Another provision entitles SIIS "to use any services provided to state agencies," and requires it to "use the services of the purchasing division of the department of general services." Id. § 616.1701(3). The same provision designates employees of SIIS, with some exceptions, as members of the "classified service" of Nevada. Id.

Finally, we note that several statutory provisions suggest that judgments against SIIS could impact the state treasury. As the district court pointed out, even though the funds collected by SIIS consist of the premiums of policyholders and other private payments, the funds are held in trust by the state treasurer. Id. § 616.423. If the Nevada legislature were to repeal SIIS's organic statute, the legislature would control disposition of those funds. Id. § 616.495. Perhaps most importantly, the state has ultimate responsibility for the state insurance fund. Id. § 616.435(1) ("The State of Nevada . . . is responsible for the safety and preservation of the state insurance fund."). Taken together, these



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provisions impose responsibility on the state and its treasurer for the integrity and solvency of the Nevada state insurance fund. The district court correctly inferred that monetary judgments against SIIS could impact Nevada's treasury.

Austin places much emphasis on the power of SIIS to sue and be sued in its own name. See Nev. Rev. Stat. § 616.1725(3). Although this is relevant to the inquiry, it is but one of several factors. Here it is overwhelmed by both the Nevada Supreme Court's determination in Northern Nevada that SIIS is a state agency and the additional supporting evidence discussed above. We conclude that the eleventh amendment protection enjoyed by the state of Nevada extends to SIIS as well.

### II. LEWIS

To the extent that Austin is suing Lewis in his official capacity as general manager of SIIS, his claim effectively is directed at SIIS itself. See *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Lewis therefore enjoys the same eleventh amendment immunity that protects SIIS. *Id.* at 167; *Jackson*, 682 F.2d at 1350. In contrast, a suit against Lewis in his personal capacity would avoid the obstacle posed by the eleventh amendment. *Graham*, 473 U.S. at 166-67. Austin's complaint makes no allegations about Lewis; it is not clear what part he may have played in the actions to which Austin objects. The district court construed Austin's claim against Lewis as one against him in his official capacity, and we agree with that construction. Austin's suit focuses on SIIS's enforcement of Nevada law. Specifically, he contends that it violated his fifth and fourteenth amendment rights by, first, appropriating funds from his advance premium account to cover the premiums that Nevada law required Austin to pay on his own imputed wages, and second, by ordering him to cease his business operations for failure to maintain his workers' compensation insurance. Even if Lewis took part in these actions, and even if they were inappropriate in Austin's particular case, Lewis was acting in his official capacity as general manager of SIIS. The district court did not err in so construing the claims against Lewis and dismissing them as barred by the eleventh amendment.

The district court's dismissal is **AFFIRMED**.

**\*\*** April 8, 1991, Submitted, San Francisco, California; The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Circuit Rule 34-4.

