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Gallagher Sharp Newsflash: En Banc Proceedings Found Constitutional in Ohio

On October 2, 2008, the Supreme Court of Ohio held that the Ohio Constitution does not prohibit the state's intermediate courts of appeals from convening "en banc" sessions in which all appellate judges in the particular appellate district convene to collectively hear and decide a case when a conflict on an issue of law has developed within that district. The court also held that a court of appeals has discretion to determine whether rulings by two or more three-judge panels in that appellate district are in conflict. If such a conflict is found to exist, an en banc proceeding must be convened to resolve the conflict.

The *McFadden v. Cleveland State Univ.* case arose in January 2006 when Kenneth McFadden filed suit against his former employer, Cleveland State University (CSU), for racial discrimination following McFadden's termination from his position with the CSU athletics department. McFadden appealed from the dismissal of his complaint, which the Ohio Court of Claims had determined was untimely because it had been filed more than two-years after his termination. After the 10th Appellate District affirmed the dismissal, McFadden filed a motion asking the 10th District to convene an en banc proceeding so that all judges in that district could resolve a conflict between the *McFadden* decision and a 1994 decision in which the 10th District had held that discrimination claims brought against the state were subject to a six-year statute of limitations.

The 10th District denied McFadden's motion declaring that, with a total of eight judges sitting in the 10th District, the convening of an en banc proceeding would be unconstitutional because the Ohio Constitution provides that "three judges shall participate in the hearing and disposition of each case."

The Supreme Court agreed to hear McFadden's appeal to decide whether the Ohio Constitution permits or prohibits an appellate court's convening of an en banc proceeding to resolve an intra-district conflict. Holding that en banc proceedings are constitutional, the Supreme Court pointed out that while the use of 3-judge panels was of historical significance in order to form a quorum of judges to hear appeals, "[t]his quorum requirement does not function as a cap on the number of judges who may sit on a panel." The Court also drew support for allowing en banc proceedings from the established practice used in other jurisdictions, including the federal appellate courts, to address conflicts between opinions within the same appellate district or circuit.

Because the 10th District disposed of the en banc issue on constitutional grounds and never fully decided whether to hold an en banc proceeding to resolve the conflict between the two decisions, the case was remanded to the 10th District to determine whether to convene en banc to review the conflict on the statute of limitations issue.

The full opinion can be found at:

<http://www.sconet.state.oh.us/rod/docs/pdf/0/2008/2008-Ohio-4914.pdf>

Gallagher Sharp appellate attorney Timothy J. Fitzgerald briefed and argued the case at the Supreme Court of Ohio on behalf of Kenneth McFadden, who was arguing in favor of the constitutionality of en banc proceedings.

If you have any questions about the *McFadden* case or en banc proceedings, please e-mail or call:

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