

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 February 2009

OALJ Case No.: 2009-CAA-00002
OSHA Case No.: 5-2700-08-029

In the Matter of:

KAREN YAGLEY
and
CHRISTOPHER YAGLEY,

Complainants,

v.

HAWTHORN CENTER OF NORTHVILLE,¹

Respondent.

DECISION AND ORDER

BACKGROUND

Dismissal of State Agencies Based on State Sovereign Immunity

This matter arises from a July 25, 2008 complaint filed by the Complainants charging that Ms. Yagley had been retaliated against in violation of the Clean Air Act (“CAA”), 42 U.S.C. § 7622, the Federal Water Pollution Control Act, 42 U.S.C. § 1367 (“FWPCA”), and the Toxic Substances Control Act, 15 U.S.C. § 2622 (“TSCA”). The Occupational Safety and Health Administration (“OSHA”) declined to investigate the

¹ The State of Michigan web site indicates that the correct title the named Respondent is Hawthorn Center rather than Hawthorne Center. www.michigan.gov/mdch/0,1607,7-132-2941_4868_4896-70281--,00.html (visited Feb. 2, 2009). Accordingly, the caption has been corrected.

complaint because it charged an agency of the State of Michigan with retaliatory conduct in violation of employee protection provisions the CAA, FWPCA and TSCA. In this regard, OSHA cited to the Administrative Review Board decision in *Yagley v. Hawthorne Center of Northville*, ARB No. 06-042, ALJ No. 2005-TSC-3 (ARB May 29, 2008) (pending on appeal before the Sixth Circuit, *Yagley v. United States Dept. of Labor*, No. 08-3922) (“*Yagley I*”), in which the ARB found that an earlier complaint filed by Ms. Yagley against the Hawthorn Center was barred pursuant to state sovereign immunity. Upon docketing the Complainants’ request for a hearing, I issued on December 23, 2008, a Notice of Docketing and Preliminary Order directing the parties to brief the issue of whether state sovereign immunity barred adjudication of the complaint before the Office of Administrative Law Judges.

On January 26, 2009, I issued a Decision and Order finding that the Eleventh Amendment to the United States Constitution bars adjudication of the above-captioned matter by the Office of Administrative Law Judges (“OALJ”). In that Decision and Order, I found that the Complainants’ responsive brief only questioned the wisdom of applying sovereign immunity to a state agency, alleged that the ALJ who presided over the 2005 complaint was misinformed about Hawthorn Center’s status as a Respondent, and alleged investigatory failures by state and federal OSHA offices, but failed to address the issue of whether Congress abrogated a state’s Eleventh Amendment immunity from a whistleblower claim under the TSCA, FWPCA and CAA, or whether Michigan waived that immunity.

Reopening of Complaint Based on Possibility that Complaint Also Named Non-State Actors as Respondents

Shortly after issuance of the January 26, 2009 Decision and Order, it was determined that the Complainants had faxed several documents to OALJ dated January 20, 2009, of which I was not aware when the Decision and Order was issued. These additional filings were submitted after the due date for briefing the Eleventh Amendment issue. However, because the additional filing possibly put a different light on the nature

of the complaint insofar as they suggested that the complaint was not against Hawthorn Center but other apparently non-governmental entities, I directed OSHA to provide a copy of the original complaint in order to enable me to determine whether that complaint could reasonably be construed as naming non-government parties as persons or entities that violated the whistleblower laws within the jurisdiction of this office.² I also issued an order re-designating the January 26, 2009 Decision and Order as a Partial Order of Dismissal (i.e., an interlocutory order rather than an appealable final decision).

OSHA has provided a copy of the Complainants' July 25, 2009 complaint. It consists of a two-page letter dated July 25, 2008 from the Complainant to former Secretary of Labor Elaine S. Chao. The complaint does not name a particular Respondent, but is grounded in a charge of "continued retaliation, discrimination and/or harassment ... since [Ms. Yagley's] previous ... complaints filed with [OSHA]" which included *Yagley v. Hawthorne Center of Northville*, ARB No. 06-042, ALJ No. 2005-TSC-3. (emphasis added). The complaint states three times that it concerns "continued" or "continuous" retaliation.³

I have already dismissed any proceedings in this matter in regard to the State of Michigan and its agencies based on sovereign immunity. This matter is now ripe for a determination of whether the complaint reasonably could be construed as naming as respondents persons who, or entities which, are not entitled to sovereign immunity.

² The record before an ALJ when whistleblower proceedings are initiated before OALJ usually consist solely of the Secretary's Findings and a party's request for a hearing. The record at that stage often does not include the original complaint.

³ The complaint also references a "CASPA" complaint, OPSAHA No. 5-2700-05-014(1309137). OALJ, however, does not have jurisdiction over such a complaint.

DISCUSSION

For purposes of this discussion, I will refer to *Yagley v. Hawthorne Center of Northville*, ARB No. 06-042, ALJ No. 2005-TSC-3 as “*Yagley I.*”

The July 25, 2009 complaint clearly alleged continued retaliation related to Ms. Yagley’s earlier whistleblower complaint against the Hawthorn Center in *Yagley I.* The complaint was exceedingly vague about the nature of the allegedly discriminatory conduct, and did not identify that it was being made against entities not involved in *Yagley I.* The Complainants’ January 14, 2009 response to my December 23, 2008 Notice of Docketing and Preliminary Order (i.e., the response that was timely filed under the briefing order) did not clearly⁴ articulate that the Complainants’ position was that Hawthorn Center was not the properly named Respondent, but rather is grounded in disbelief that state agencies are immune from suit under the whistleblower laws at issue. In other words, the Complainants’ January 14, 2009 filing attacks applying sovereign immunity to Hawthorn Center rather than clearly articulating that Hawthorn Center is not the Respondent or that there are other non-government entities which were the proper Respondents. Moreover, the January 14, 2009 response requested only that the named Respondents be amended to include “1) The Department of Labor ; 2) State of MI and /or their Agencies.” But as I ruled in my January 26, 2009 decision, amendment of the complaint to include other state agencies would not change the application of state sovereign immunity to this complaint. I also found that the ARB had previously ruled in

⁴ The filing argued that the presiding ALJ from *Yagley I* should have been aware that Hawthorn Center was never a Respondent. This is possibly an attempt by the Complainants to express a contention that the present complaint was also not directed against the Hawthorn Center. If so, it is an obtuse way to present an argument that would have required the adjudicator to extrapolate the meaning of the reference to the earlier case. As noted in the text above, the July 25, 2009 complaint clearly states that it is grounded on continued retaliation, and it was reasonable for OSHA to have interpreted this as a charge against Hawthorn Center. The Complainants’ January 14, 2009 brief seems to be grounded in an argument that Hawthorn Center should not be immune from suit, which is inconsistent with a contention that the Complainants were never seeking to pursue a complaint against that agency. Moreover, upon review of both the ALJ and ARB decisions in *Yagley I* it is evident that the issue being litigated was whether sovereign immunity applied to the Hawthorn Center. There is no discussion in either of the ALJ or ARB decisions of an argument by Ms. Yagley that DOL was adjudicating the case against the wrong Respondent in *Yagley I.*

Yagley I that the federal Department of Labor could not be forced to be a Respondent merely by naming it when it was not her employer.

Thus, up until the January 20, 2009 filings by the Complainants, the Complainants had not filed a complaint that named respondents other than those involved in *Yagley I*, and had not presented an argument on briefing of the sovereign immunity issue that respondents not eligible for sovereign immunity were named as part of the complaint. Although I reopened the complaint based on the January 20, 2009 filings to ensure that I had not misunderstood the Complainants' complaint, now that I have reviewed the July 25, 2008 complaint, I find that the July 25, 2008 complaint cannot be construed as having named respondents other than those involved in *Yagley I*. See generally *Ewald v. Commonwealth of Virginia, Dept. of Waste Management*, ARB No. 02-027, ALJ No. 1989-SDW-1 (ARB Dec. 19, 2003) (ALJs may deny Rule 18.5(e) motions to amend whistleblower retaliation complaints to add respondents who lacked notice at the outset or who only participated in the proceedings long before the complainant attempted to amend the complaint).

I have taken note of the fact that the Yagleys are pro se, and should not be held to the same pleading standards as attorneys. It is clear that on or around January 20, 2009, they started filing documents seeking to name entities that may not be eligible for sovereign immunity protection (Citizens Management, Inc., CORE, or Broadspire, or other unnamed parties).⁵ However, the hearing stage is not a forum for complainants to go on a fishing expedition seeking to find a respondent to charge with retaliation in violation of the whistleblower laws. The Complainants had an opportunity to argue that their complaint was not against Hawthorn or other State entities prior to the briefing deadline of January 16, 2009. They did not do, and I find that the original complaint

⁵ In a January 29, 2009 "Order Denying Post-Decision Motions" I denied the Complainants' January 26, 2009 filing seeking to name "Citizens Management, Inc., among other yet to be named pending clarification of issues." I found that the motion failed to explain why Citizens Management, Inc. or other unnamed parties may be related to the Complainants' whistleblower complaint, and that the motion was too vague a basis for permitting joinder of an additional party. Moreover, I found that the motion to amend to name additional respondents and was not timely filed, having been submitted after the Respondent had filed a motion for summary decision, and after I had already issued a Decision and Order dismissing the action against the State Respondents.

cannot be reasonably read to have included charges against Citizens Management, Inc., CORE, or Broadspire, or other unnamed parties. The attempt to amend the complaint after the deadline for filing a response to my briefing order, and after the State of Michigan had filed a motion for summary decision, was untimely.

Accordingly, I deny the motions to amend the complaint to name additional respondents not protected by sovereign immunity because charges against them were not reasonably within the scope of the Complainants' July 24, 2008 complaint, and because the motions to amend were not timely filed.

SUMMARY

The State of Michigan and its agencies are immune from suit in this forum. The Complainants' July 24, 2008 complaint cannot be reasonably construed as naming parties other than those involved in *Yagley I* as respondents in this matter. The filings made by the Complainants after the briefing deadline on the sovereign immunity issue and after the date that the Respondent had filed a motion for summary decision, seeking to amend the complaint to name several new respondents and for leave to find additional unnamed respondents were untimely, and did not name parties reasonably within the scope of the original complaint.

Accordingly, I hereby enter my final decision in this matter **DISMISSING** the complaint.

SO ORDERED.

A

JOHN M. VITTON
Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is:

Administrative Review Board
U.S. Department of Labor
Suite S-5220
200 Constitution Ave., NW.
Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110 (2008).