



Issue Date: 26 January 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.

HAWTHORNE CENTER OF NORTHVILLE,

Respondent.

DECISION AND ORDER

Yagley I

In 2005, Karen Yagley filed a whistleblower complaint against Hawthorne Center of Northville under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C. § 7622 and the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622. Following an Occupational Safety and Health Administration (“OSHA”) investigation and hearing before an administrative law judge (“ALJ”), the Administrative Review Board (“ARB”) affirmed the ALJ’s ruling that sovereign immunity barred Yagley’s whistleblower complaint against Hawthorne. *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*”). The Board explained:

The Eleventh Amendment to the Constitution prohibits a citizen of one state from bringing suit against another state. *See* U.S. Const. amend. XI. The Supreme Court has held that the Eleventh Amendment also bars a citizen from suing her own State. *See Hans v. Louisiana*, 134 U.S. 1, 10 (1890). Additionally, the Eleventh Amendment also bars adjudication of private complaints against states by a federal administrative agency when such adjudication sufficiently resembles civil litigation in federal court. *See Federal Mar. Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 760 (2002). Following this guidance, our well-established precedent has held that under the doctrine of state sovereign immunity, there is no private right of action for damages against a state or state agency. *See, e.g., Thompson v. University of Ga.*, ARB No. 05-031, 2005-CAA-001 (ARB Jan. 31, 2006); *Powers v. Tennessee Dep't of Env't & Conservation*, ARB Nos. 03-061, 03-125; ALJ Nos. 2003-CAA-008, 2003-CAA-016 (ARB June 30, 2005 (reissued Aug. 16, 2005)) (providing analysis and citing similar federal cases); *Farmer, supra*; *Ewald, supra*; *Cannamela v. Georgia Dep't of Natural Res.*, ARB No. 02-106, ALJ No. 2002-SWD-002 (ARB Sept. 30, 2003).

* * *

Our long-standing jurisprudence has held that the environmental whistleblower statutes do not abrogate a State's sovereign immunity. *See Thompson, supra*; *Powers, supra* (holding that the environmental whistleblower cases "do not provide for private rights of action for money damages against states and state agencies"); *Cannamela, supra* (concluding State of Georgia is immune from whistleblower suit under the environmental whistleblower statutes). Federal courts have also held that Congress did not abrogate states' immunity from whistleblower claims under the environmental statutes. *See Connecticut Dep't of Envtl. Prot. v. OSHA*, 138 F. Supp. 2d 285, 296-97 (D. Conn. 2001)(filing whistleblower claim with OSHA by private party against state agency violated that state's sovereign immunity); *Florida v. United States*, 133 F. Supp. 2d 1280, 1291 (N.D. Fla. 2001)(administrative hearing involving environmental statutes violated state's sovereign immunity); *State of Ohio E.P.A. v. United States Dept. of Labor*, 121 F. Supp. 2d 1155, 1162 (S.D. Ohio 2000)("finding no indication that Congress intended to abrogate the state's sovereign immunity in the promulgation and enactment of the whistleblower environmental statutes"). We can find no federal precedent establishing that Congress abrogated state sovereign immunity in the environmental whistleblower acts.

* * *

[A] state may voluntarily waive sovereign immunity, but waiver occurs only "by the most express language or by such overwhelming

implication from the text as [will] leave no room for any other reasonable construction.'" *Ewald*, slip op. at 8, *quoting Edelman v. Jordan*, 415 U.S. 651, 673 (1974) at 673. Yagley offers no evidence that Michigan has unambiguously waived its sovereign immunity. ... [W]e conclude that there was no waiver in this case.

Yagley I, USDOL/OALJ Reporter at 4-6 (footnote omitted).

Yagley II

On or about July 23, 2008 the Complainants filed a complaint with OSHA under the Clean Air Act, 42 U.S.C. § 7622, the Federal Water Pollution Control Act, 42 U.S.C. § 1367 ("FPWCA"), and the Toxic Substances Control Act, 15 U.S.C. § 2622, alleging that Karen Yagley had recently received warning and threats relating to her 2005 whistleblower complaints. OSHA dismissed the complaint as being barred by state sovereign immunity.

On December 23, 2008, the parties were notified that the Office of Administrative Law Judges ("OALJ") had docketed the Complainants' request for a hearing on the July 2008 complaint. The parties were informed that if the Eleventh Amendment applies, it bars adjudication of the instant complaint by OALJ. Accordingly, a briefing schedule was set to determine as a preliminary matter whether the OALJ has any authority to conduct a hearing in this matter, citing in this regard the ARB decision in *Yagley I*. In response, the Complainants filed a "Motion for Clarification and Motion for Extension of Time and Partial Brief." The Respondent filed a Motion for Summary Decision stating that "Hawthorne Center of Northville is an agency of the State of Michigan and thus comes under the umbrella of the State of Michigan's Eleventh Amendment Immunity." (Respondent's Brief at 2).

The Complainants' brief questions the wisdom of applying sovereign immunity to a state agency, alleges that the ALJ who presided over the 2005 complaint was misinformed about Hawthorne Center's status as a Respondent and therefore the dismissal of that case based on sovereign immunity was in error, and alleges investigatory failures by state and federal OSHA offices. None of the response, however,

addresses the heart of the issue, which is 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. I find that the ARB decision in *Yagley I* controls, and that the United States Department of Labor, Office of Administrative Law Judges is barred by the Eleventh Amendment from adjudicating the Yagley's current complaint.¹

Motions

In their brief, the Complainants sought to make procedural clarifications to the posture of their complaint.

First, they stated that the Respondents in this matter include the "Department of Labor" and the "State of MI and/or their Agencies." But amending the caption to reflect additional state agencies would not change the analysis of the issue of whether state sovereign immunity bars OALJ's authority to conduct an administrative adjudication of the merits of the complaint. To the extent that the Complainants' may be referring to the federal "Department of Labor" as a Respondent, this issue was already decided in *Yagley I* where the ARB held that "Yagley cannot force the Federal Government to be a party by naming the Government as one when it is not the employer." *Yagley I*, USDOL/OALJ Reporter at 5.

The Motion for Clarification also asserts that the complaint filed with DOL in July of 2008 was broken down into several different investigations, several of which have not yet been ruled on, and that the results of those investigations could impact briefing. In support, the Complainants submitted (1) a November 5, 2008 Memorandum from the OSHA Region V office to OSHA's Director of the Directorate of Enforcement Programs referring to the Directorate letters from the Yagleys received by Region V on October 10,

¹ In *Yagley I*, the complaint did not include the FWPCA. However, the ARB ruled in *Thompson v. University of Georgia*, ARB No. 05-031, ALJ No. 2005-CAA-1 (ARB Jan. 31, 2006), that immunity under the 11th Amendment also applies to a whistleblower complaint filed under the FWPCA.

and October 22, 2008; and (2) a November 5, 2008 letter from OSHA's Washington, D.C. office to the Complainants informing them that letters from the Yagleys dated October 18 and 20, 2008 were being forwarded the Chicago Regional office. On their face, the OSHA memorandum and letter refer to October 2008 filings by the Yagleys, and not the July 2008 complaint. Moreover, they do not support the assertion that the July 2008 complaint was broken down into several different investigations by OSHA – they are merely notices of transmittal of filings to other offices. Moreover, the instant hearing request was occasioned by a November 6, 2008 Assistant Secretary's Findings. The Assistant Secretary's findings were issued after the OSHA memorandum and letter, and do not reference other pending investigations.²

Even if OSHA opened several different investigations on the July 2008 complaint, and several of them are still open, the Complainants did not explain why the existence of open investigations might be relevant to their briefing of the sovereign immunity issue. Although the Complainants are proceeding pro se, their assertion that possible open investigations before OSHA might be relevant to their briefing of the sovereign immunity issue is simply too vague to merit delaying a ruling on the issue.

Finally, the Complainants' titled their filing "Motion for Clarification and Motion for Extension of Time and Partial Brief." In paragraph 10, the Complainants relate that Mrs. Yagley has multiple disabilities and limited income. They also state that the weather had made it difficult to "seek assistance with Justice for the disabled Mrs. K. Yagley." I construe this discussion to be a request for an extension of time to file a supplemental brief on the sovereign immunity issue. I deny the motion. In *Yagley I*, the Complainants received almost two years of extensions of time to brief essentially the same issue before the ARB, not to mention the earlier opportunity they had to litigate the issue before the presiding ALJ in that matter. Presently, I provided them with over three weeks to respond to the briefing order. The ARB decision in *Yagley I* clearly and succinctly set forth the legal ruling applying the Eleventh Amendment to whistleblower

² It would not be unusual for OSHA to conduct a separate investigation of a whistleblower complaint under Section 11(c) of the Occupational Safety and Health Act of 1970. The law, however, does not provide for a hearing before the Office of Administrative Law Judges on a Section 11(c) complaint.

proceedings before the Department of Labor. Thus, an extended briefing period on the dispositive issue of state sovereign immunity is not warranted in this matter. OALJ does not have the authority to adjudicate this matter, and further proceedings in this matter would only produce unnecessary costs for the litigants and public coffers.

I find that the Eleventh Amendment bars adjudication of the instant complaint by the Office of Administrative Law Judges. Accordingly, **IT IS ORDERED** that the hearing in the above-captioned matter is hereby **DISMISSED**.

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).