U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 February 2019

Case No.: 2018-LCA-00030

In the Matter of:

JUAN JOSE ARNAIZ COT,

Prosecuting Party,

v.

UNIVERSITY OF SOUTH CAROLINA,

Respondent.

DECISION AND ORDER DISMISSING CASE AND CANCELING HEARING

This case arises under the H-1B visa program of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C.A. § 1101 *et seq.*, as amended, and its implementing regulations found at 20 C.F.R. Part 655, Subparts H and I. It was docketed with OALJ on August 1, 2018, following the Administrator's determination dated June 29, 2018, and Dr. Cot's request for a hearing which was untimely made and received on August 1, 2018. On August 13, 2018, the Administrator rescinded the June 29, 2018 determination letter and replaced it with an August 13, 2018 determination letter. The content of the two letters is largely the same, except that the August 13 letter reflects that the Respondent had paid the back wage assessment of $2,584.71 in full. On August 16, 2018, Dr. Cot requested a hearing in relation to the August 13, 2018 determination letter.

As recounted in more detail below, Dr. Cot is pursuing alleged violations not found by the Administrator, and therefore he is the prosecuting party in this case. The Respondent is the University of South Carolina. On January 14, 2019, Respondent filed a Motion for Judgment on the Pleadings Under the Eleventh Amendment, seeking dismissal of this action on grounds that the University of South Carolina is entitled to Eleventh Amendment immunity. Dr. Cot has not filed a response to the motion; therefore, pursuant to 29 C.F.R. § 18.70(c), I consider Respondent's motion to be unopposed.[1]

[1] Respondent's motion was filed on January 14, 2019. Under the *Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges* (29 C.F.R. Part 18, Subpart A), an opposition or other response to a motion is due within 14 days after the motion is served. 29 C.F.R. § 18.33(d). When service is made by mail (as it was with this motion), three days are added to the response period. 29 C.F.R. § 18.32(c). Accordingly, Dr. Cot's response to Respondent's motion was due by January 31, 2019. No response was received by the due date. "Failure to file an opposition or response within 14 days after the motion is served may

Facts and Procedural History

Dr. Cot, through counsel, originally sought review in this matter to challenge the Administrator's calculation of the amount of back wages owed on the violation found by the Administrator. Dr. Cot's request for review dated August 16, 2018, stated that he requested review by OALJ because, "[d]espite the award of *some* back wages, Dr. Cot believes that the amount is incorrect and was based, at least in part, on the perjuries of multiple witnesses." Dr. Cot also requested review of the following: "Dr. Cot would also like to address at the hearing issues related to his Visa status and the misuse of government funds regarding his employment." Dr. Cot's attorney subsequently withdrew as counsel. I ordered Dr. Cot to make his allegations more definite and certain. On September 28, 2018, Dr. Cot filed his response to my order, listing 18 numbered allegations and two unnumbered allegations under the INA. The amount of the back wages for nonproductive time, as determined by the Administrator in the Determination Letter, was not listed as one of the allegations. Dr. Cot made the following allegations in his response filed September 28, 2018:

(1-2) Dr. Cot was assigned duties outside the scope of his H-1B visa;

(3) Respondent withheld resources Dr. Cot needed to perform his duties;

(4) Dr. Cot was prevented from accessing the lab and his project was terminated;

(5) Dr. Cot alleges that an inappropriate relationship developed between Dr. Morad and Dr. Zhang, which created "considerable tension" in the lab, and which led to Dr. Zhang also preventing Dr. Cot from accessing materials he needed to perform his duties;

(6) No actions were taken after reports of poor working conditions were made to various departments within Respondent USC (including Human Resources and the Equal Opportunity Program); the EOP office determined Dr. Cot did not suffer any discrimination or harassment but would not produce its internal findings to him; Respondent began paying Dr. Cot from a different account;

(7-8) After Dr. Cot's complaint was closed, another employee (Lars Cleeman) wrote to Dr. Morad and presented a separate complaint about the working conditions in the lab;

(9) Dr. Cot was denied credentials to access the lab due to Dr. Morad's negligence and the need to undergo a second TB skin test;

(10-12) Dr. Zhang was promoted to laboratory supervisor and used her position and her relationship with Dr. Morad to discriminate against and verbally attack other foreign national researchers; Dr. Zhang harassed and undermined several staff members without consequence; Dr. Zhang's harassment caused two postdoctoral fellows and three student technicians to leave;

(13) Dr. Zhang misused her supervisory position to prevent Dr. Cot from having access to materials he needed to perform his research;

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result in the requested relief being granted." 29 C.F.R. § 18.33(d); *see also* 29 C.F.R. § 18.70(c) ("If the opposing party fails to respond" to a motion to dismiss, "the judge may consider the motion unopposed.").

(14) Dr. Morad did not intervene after Dr. Cot asked him to;
(15) When Dr. Cot contacted Respondent's Human Resources department, the department offered no assistance other than the advice to record conversations;
(16) No action was taken by Respondent even after reports and allegations of poor working conditions were made to Human Resources, the Equal Opportunity Program (EOP), the ombudsman, the director of the Department at USC, and the President of the University;
(17) Dr. Morad and Dr. Zhang made false statements to the police that caused Dr. Cot to be detained and questioned, and Dr. Morad asked other individuals to write letters "against" Dr. Cot;
(18) Respondent did not take action after Lars Cleeman intervened; a meeting was held on May 19, 2016, with Dr. Cot, Mr. Cleeman, a representative of the EOP office, the Associate Dean for Research and Graduate Studies, and the Chief of Staff for the Associate Dean for Administration and Finance); prior to this meeting, there had been discussions about how to fire Dr. Cot;
(19) When Dr. Cot was renewing his H-1B visa while in Spain, Respondent required that he pay the fee while abroad and did not reimburse him for the expense;
(20) Respondent violated 20 C.F.R. § 655.732 regarding working conditions.

Based on Dr. Cot's response to the order to make his allegations more definite and certain—which showed that Dr. Cot was no longer seeking review of the Administrator's determination regarding wages for nonproductive time, and instead was seeking review of various other allegations not found by the Administrator—I determined that Dr. Cot is the prosecuting party in this matter under Section 655.820(b)(1). I also denied Respondent's motion to dismiss based on a service error. I issued an *Order Denying Respondent's Motion to Dismiss and Determination of Prosecuting Party* on October 2, 2018.

Following my determination that Dr. Cot is the prosecuting party on these allegations, because they do not represent violations found by the Administrator, Respondent filed a letter requesting "dismissal or limitation of the pending review" on four grounds. Dr. Cot filed a response on October 11, 2018. I found that Respondent could not prevail on the arguments for dismissal, and that the proceeding should be limited to issues arising under 20 C.F.R. 655.805 and 655.815. I struck several of Dr. Cot's allegations as beyond the scope of this proceeding. I issued an *Order Denying Respondent's Motion to Dismiss and Granting Respondent's Motion to Limit and Discovery Order* on November 21, 2018. On November 27, 2018, I issued a *Notice of Hearing and Scheduling Order* setting this matter for formal hearing on February 4 and 5, 2019, in Columbia, South Carolina.

On December 3, 2018, Dr. Cot moved for reconsideration of my November 21, 2018 Order limiting the issues to those arising under Sections 655.805 and 655.815. On January 4, 2019, I issued an *Order Denying Prosecuting Party's Motion for Reconsideration*. Thereafter, on January 7, 2019, Dr. Cot moved to amend his complaint to include the allegations made in his

motion for reconsideration.[2] I denied that request as untimely in an *Order Denying Prosecuting Party's Motion to Amend Complaint* issued January 8, 2019.

In the meantime, Respondent requested a continuance of the hearing because Dr. Morad, the director of the laboratory and a critical witness in this proceeding, was scheduled to be out of state February 4 and 5, 2019. On January 4, 2019, I granted the continuance and rescheduled the hearing for February 21 and 22, 2019, in Columbia, South Carolina.

On January 14, 2019, Respondent filed the instant Motion for Judgment on the Pleadings Under the Eleventh Amendment.[3] As discussed above, Dr. Cot has not filed a response.

Discussion

The issue presented is whether Respondent, the University of South Carolina, is entitled to immunity from suit in this matter under the Eleventh Amendment to the U.S. Constitution.

The Eleventh Amendment restricts the ability of individuals to bring suit against states in federal court. It 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.

In *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002), the United States Supreme Court held that the sovereign immunity enjoyed by States applies to adjudications conducted by the Federal Maritime Commission (FMC), an administrative agency. That is, the Court held that the reference to "judicial power" in the Eleventh Amendment did not limit applicability of the Amendment to federal courts, and the States' immunity also applied to adjudications in federal administrative agencies. In reaching that conclusion, the Court determined that the role of an ALJ is functionally comparable to that of a trial judge; that administrative adjudications and judicial proceedings share numerous common features, such as adversarial proceedings, a neutral fact-finder, the presentation of oral and documentary evidence, the preparation of a transcript and the pleadings to constitute the exclusive record for decision, and the requirement for findings and conclusions on all issues presented on the record; and that FMC adjudications specifically are similar to trial court proceedings, with rules of practice and procedure similar to the Federal Rules of Civil Procedure, discovery that "largely mirrors" discovery in federal civil litigation (with depositions, interrogatories, and requests for production of documents, among other aspects), and a presiding ALJ whose role at the hearing is similar to that of an Article III judge. *Id.* at 756-60. In light of the "overwhelming" similarities between an agency adjudication before FMC and a federal judicial proceeding, the Court held "state

[2] Dr. Cot's filing also included a motion to compel a response to his request for production of documents propounded on December 18, 2018. Respondent filed a response in opposition to the motion to compel on January 22, 2019. In light of my ruling that this case must be dismissed, I do not address the motion to compel discovery, which is now moot.

[3] Respondent subsequently filed a Motion for Summary Judgment on January 22, 2019. In light of my ruling that this case must be dismissed due to Eleventh Amendment immunity, I do not address the arguments raised in the motion for summary judgment.

sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State." *Id.* at 760.

I find that the Court's reasoning applies with equal force to administrative proceedings before the Department of Labor (DOL). Like the FMC, DOL employs ALJs whose roles are functionally comparable to that of a trial judge; administrative adjudications before DOL share the same common features with judicial proceedings that the Court discussed with regard to FMC; DOL adjudications are subject to rules of practice and procedure that are similar to the FRCP; and DOL adjudications involve similar discovery, hearing proceedings, and decision requirements as the FMC and federal courts. Because administrative proceedings before FMC and DOL operate in a strikingly similar manner, the holding of *Federal Maritime Comm'n v. South Carolina State Ports Auth.* compels the conclusion that state sovereign immunity bars DOL from adjudicating complaints filed by a private party against a nonconsenting state. *See, In the Matter of Yagley v. Hawthorn Ctr. of Northville Twp.*, 2010 WL 1776981 at *3 (DOL ARB Apr. 30, 2010) (applying Eleventh Amendment sovereign immunity to a private complaint against a state pending before DOL, and citing cases in support of such application).

The complaint at issue in this matter is Dr. Cot's complaint; the violation found by the Administrator is not at issue here (having been abandoned by Dr. Cot earlier in this proceeding), and the Administrator is not the prosecuting party in this case (which involves the allegations raised in Dr. Cot's September 28, 2018 response to the order to make his allegations more definite and certain). Thus, this matter involves a complaint filed by a private party who is a citizen or subject of a foreign state.

The next question is whether the University of South Carolina is a "nonconsenting state." Respondent asserts that "[a]s a statutorily created state university (S.C. Code § 59-101-10) '[t]he University [of South Carolina] is an arm of the State of South Carolina.'" Motion for Judgment on the Pleadings at 3. Dr. Cot has not disputed the assertion by Respondent that it is a state entity. In *DeCecco v. University of South Carolina*, 918 F.Supp.2d 471, 496 (D.S.C. 2013), the United States District Court for the District of South Carolina held that USC is an arm of the State of South Carolina. This determination is unsurprising: "Numerous courts have decided whether public state universities are 'arms of the state.' Almost universally, the answer has been in the affirmative." *Maryland Stadium Auth. v. Ellerbe Becket, Inc.*, 407 F.3d 255, 262 (4th Cir. 2005) (citing cases). Accordingly, I find that the University of South Carolina is an arm of the state of South Carolina, and as such is entitled to immunity under the Eleventh Amendment.

Dr. Cot has not shown that South Carolina expressly waived its sovereign immunity,[4] or that Congress abrogated it.[5] Accordingly, South Carolina is a nonconsenting state.

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[4] Respondent asserts that South Carolina has not consented to being sued in federal court (citing S.C. Code § 15-78-20(e)), and Dr. Cot has not offered any evidence or argument that South Carolina has waived its sovereign immunity.

[5] "Congress has the power to abrogate Eleventh Amendment immunity in federal court, but to do so Congress must use unmistakably clear language in the statute." *In the Matter of Robert Thompson v. University of Georgia*, 2006 WL 282119 at *4 (DOL ARB Jan. 31, 2006) (citing *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003)).

A state's sovereign immunity "applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. at 765. Sovereign immunity is not merely a defense to monetary liability; "[r]ather, it provides an immunity from suit." *Id.* at 766.

Based upon the foregoing, I conclude that the University of South Carolina (Respondent) is an arm of the state of South Carolina and thus entitled to sovereign immunity under the Eleventh Amendment, and that its sovereign immunity applies to this administrative proceeding. Therefore, this action by Dr. Cot is barred, and the case must be dismissed.

ORDER

Based upon the foregoing, IT IS ORDERED:

1. Respondent University of South Carolina's motion to dismiss based on Eleventh Amendment immunity is **GRANTED**;
2. The hearing scheduled to commence at 9:00 a.m. on February 21 and 22, 2019, in Columbia, South Carolina, is **CANCELED**; and
3. This case is **DISMISSED**.

MONICA MARKLEY
Administrative Law Judge

MM/jcb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file

any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition only one copy need be uploaded.

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. See 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.