



**Issue Date: 22 June 2020**

Case No.: 2019-NTS-00002  
OSHA Case Nos. 3-0050-19-013

*In the Matter of:*

**MILDRED WOOD,**  
*Complainant,*

v.

**WASHINGTON METROPOLITAN AREA  
TRANSIT AUTHORITY,**  
*Respondent.*

**DECISION AND ORDER DENYING COMPLAINT  
AND ORDER CANCELLING HEARING**

This matter arises under the National Transit Systems Security Act of 2007 (“NTSSA”), 6 U.S.C. § 1142, and the applicable regulations issued thereunder at 29 C.F.R. Part 1982. This matter is currently set to be heard on August 5, 2020, at 9:00 a.m. in Washington, D.C.

On September 30, 2019, when this matter was assigned to former Department of Labor Administrative Law Judge Jennifer Whang, Respondent Washington Metropolitan Area Transit Authority (“Respondent” or “WMATA”) filed its 29 C.F.R. §§ 18.33 & 18.70(c) Motion to Dismiss (the “Motion”) and its Memorandum of Points and Authorities in Support of WMATA’s Motion to Dismiss (the “Memorandum”). On November 4, 2019, Complainant Mildred Wood (“Complainant”) filed her timely Response and Memorandum of Points and Authorities in Opposition to Respondent’s Motion to Dismiss (the “Response”).

On April 30, 2019, I issued a Notice of Assignment, Order Granting Leave for Respondent to File Reply Brief, Notice of Hearing, and Pre-Hearing Order. That order granted Respondent 15 days to file a reply brief. As of June 19, 2020, a review of the Office of Administrative Law Judges’ Case Tracking System indicates that Respondent has not filed a reply brief.

As will be explained further below, WMATA enjoys sovereign immunity and thus this tribunal lacks subject matter jurisdiction to adjudicate this matter. Accordingly, the Motion is

**GRANTED**, the Complaint in this matter is **DENIED**, and the hearing of this matter currently set for August 5, 2020, at 9:00 a.m. in Washington, D.C., is **CANCELLED**.

*Applicable Standards*

NTSSA proceedings before the Office of Administrative Law Judges (“OALJ”) are conducted pursuant to OALJ’s Rules of Practice and Procedure. 20 C.F.R. § 1982.107(a). The rule governing motions to dismiss states that:

A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as a lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.

29 C.F.R. § 18.70(c). In this case, WMATA moves to dismiss this case based on WMATA’s sovereign immunity. Motion at 1; Memorandum at 1-9.

In *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986), the D.C. Circuit stated the rule concerning sovereign immunity and applied it to WMATA:

WMATA’s sovereign immunity exists because the signatories have successfully conferred their respective sovereign immunities upon it. Congress has power to legislate for the District of Columbia and to create an instrumentality that is immune from suit. Maryland and Virginia have immunity under the eleventh amendment and each can confer that immunity upon instrumentalities of the state. It is clear that each of the three signatories attempted to confer its sovereign immunity upon WMATA. We think they succeeded and that the partial waiver of that immunity in the Compact does not extend to this case. We address the question of waiver first.

Section 80 of the WMATA Compact provides in pertinent part:

The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function.

80 Stat. 1350. The threshold question is whether WMATA’s operation of the Transit Police Force constitutes a governmental or a proprietary function within the terms of the Compact. This is a question of federal law since “congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States.” *Cuyler v. Adams*, 449 U.S. 433, 438, 101 S.Ct. 703, 66 L.Ed.2d 641 (1980).

*Id.*, 781 F.2d at 219-220.

In *Jones v. WMATA*, 205 F.3d 428 (D.C. Cir. 2000), the D.C. Circuit stated the rule concerning Eleventh Amendment immunity and explicitly described the types of functions that are covered by WMATA's governmental function immunity:

Under the Eleventh Amendment, “ ‘an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.’ ” *Morris v. WMATA*, 781 F.2d 218, 222–23 (D.C.Cir.1986) (quoting *Edelman v. Jordan*, 415 U.S. 651, 662–63, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)). “Moreover, though the immunity is that of the state, ‘some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself.’ ” *Id.* at 223 (quoting *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400–01, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979)). WMATA was created by a compact enacted by the Congress and to which the Commonwealth of Virginia, the State of Maryland and the District of Columbia are signatories. We have consistently recognized that in signing the WMATA Compact, Virginia and Maryland each conferred its immunity upon WMATA, which therefore enjoys, to the same extent as each state, immunity from suit in federal court based on its performance of governmental functions. *See, e.g., Morris v. WMATA, supra; Souders v. WMATA*, 48 F.3d 546, 548 (D.C.Cir.1995); *Beebe v. WMATA*, 129 F.3d 1283, 1287 (D.C.Cir.1997); *see also Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 52, 50 n. 20, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) (noting “decision in *Morris* is compatible with our approach” to determining multi-state authority’s Eleventh Amendment immunity *vel non*). We have also held that WMATA’s “governmental function” immunity encompasses “the hiring, training, and supervision of WMATA personnel,” which is the kind of conduct for which Jones seeks to hold WMATA liable under the ADEA. *See Burkhart v. WMATA*, 112 F.3d 1207, 1217 (D.C.Cir.1997); *accord Beebe v. WMATA, supra.*

*Id.*, 205 F.3d at 432 (footnotes omitted).

In *Peck v. Nuclear Reg. Comm.*, No. 2017-0062, ALJ No. 2017-ERA-00005, 2019WL7285749 (ARB Dec. 19, 2019) (en banc), the Administrative Review Board stated the general rule concerning the federal government’s sovereign immunity:

Sovereign immunity shields the federal government and its agencies from suit absent a waiver by the government. The extent of the federal government’s waiver of sovereign immunity and the types of damages allowable are authorized and defined by the language of the waiver, and that language is to be narrowly construed. Moreover, the waiver must be established by the statute itself. Waivers of sovereign immunity must be “unequivocally expressed” and are strictly construed in favor of the United States. The immunity applies in administrative adjudications as well as adjudications in the federal courts.

*Id.*, 2019WL7285749 at \*4 (footnotes omitted).

In *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Supreme Court explained what is necessary for Congress to abrogate a State’s Eleventh Amendment immunity:

For over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72–73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669–670, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Hans v. Louisiana*, 134 U.S. 1, 15, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. See *Garrett, supra*, at 363, 121 S.Ct. 955; *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) (citing *Dellmuth v. Muth*, 491 U.S. 223, 228, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989)).

*Id.* at 726.

#### *Undisputed Facts*

I find that the following material facts are undisputed:

1. On December 4, 2015, Complainant filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that WMATA retaliated against her in violation of the NTSSA. December 4, 2015 Complaint.
2. On April 9, 2019, OSHA dismissed the complaint. April 9, 2019 Secretary’s Findings.
3. On May 8, 2019, Complainant objected to the Secretary’s Findings and requested a hearing before an Administrative Law Judge.
4. WMATA was created by the WMATA Compact, signed by Maryland, Virginia, and the District of Columbia. Memorandum at 2. Sections 2 and 4 of the WMATA Compact provide that WMATA is an interstate compact agency and instrumentality of each of these signatories – Maryland, Virginia, and the District of Columbia. Memorandum at 4 (citing D.C. Code § 9-1107.01(2) and (4)). See also *Jones*, 205 F.3d at 432.
5. Section 80 of the WMATA Compact contains the following language:

The Authority [WMATA] shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent[s] committed in the conduct

of any proprietary function, in accordance with the law of the applicable Signatory (including rules on conflict of laws), *but shall not be liable for any torts occurring in the performance of a governmental function.* The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.

Memorandum at 6 (citing D.C. Code § 9-1107.01(80); emphasis added). *See also Morris*, 781 F.2d at 219-220.

#### *WMATA's Position*

WMATA argues that “[a]s an interstate compact agency, ... [it] possesses the sovereign immunity conferred upon it by Maryland, Virginia, and Congress on behalf of the District of Columbia.” Memorandum at 4.

WMATA also argues that the Eleventh Amendment bars this proceeding:

The Supreme Court has consistently held that the Eleventh Amendment bars suits against a State and a state agency by its own citizens, as well as by citizens of another State without the State’s consent. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). In addition, private complaints against states and state agencies by a federal administrative agency are also barred by Eleventh Amendment immunity especially in “court-like administrative tribunals” such as this proceeding. *Federal Mar. Comm’n v. South Carolina Ports Auth.*, 535 U.S. 743, 760-61 (2002).

Memorandum at 7.

Finally, WMATA argues that the NTSSA does not abrogate WMATA’s sovereign immunity:

There is no clear abrogation of state sovereign immunity by Congress in the language of the NTSSA’s whistleblower provisions. See 6 U.S.C. § 1142. The NTSSA does define a “public transportation agency” as “a publicly owned operator of public transportation eligible to receive Federal assistance under chapter 53 of Title 49.”<sup>[b]</sup> 6 U.S.C. § 1131(5); 29 C.F.R. § 1982.101(i). However, there is no clear and plain language in the Act that includes a State as an entity against which complaints can be filed ... and there is no language in the Act specifically waiving a States’ [sic] sovereign immunity; therefore, Congress failed to unequivocally express any intention to abrogate state sovereign immunity under the NTSSA. *Curran v. State of Maine*, Case No. 2015-NTS-00005 (ALJ Dec. 21, 2017) (McGrath).

Memorandum at 8.

Finally, WMATA argues that even if there were clear language in the NTSSA expressing Congressional intent to abrogate state sovereign immunity, as Congress enacted the NTSSA under its Commerce Clause power and not its power under the Fourteenth Amendment, any such statutory language would “not [be] a valid exercise of Congressional power.” Memorandum at 8.

### *Complainant’s Position*

Complainant argues that all of the authorities cited by Respondent are distinguishable on their facts:

Although Respondent offers a litany of cases regarding state sovereign immunity, all of the cases are misapplied with respect to Complainant’s claim under the NTSSA. Not a single one of the cases provided by Respondent involves WMATA and the NTSSA.

Response at 2.

Complainant argues that “[a] review of cases before [OALJ or the Department of Labor] involving the NTSSA and WMATA reveals that WMATA is not immune from NTSSA retaliation claims that are within the administrative process.” *Id.* Complainant cites to three cases in support of this proposition: *Ndzerre v. WMATA*, 174 F. Supp. 3d 58 (D.D.C. 2016); *Duncan v. WMATA*, 174 F. Supp. 3d 123 (D.D.C. 2016); and *Azmi v. WMATA*, No. 2012-NTS-00002 (ALJ Decision and Order Approving Settlement January 15, 2014). Response at 2-3. Citing to these three cases, Complainant states that “Respondent’s argument of sovereign immunity ignores that the doctrine does not apply against WMATA for NTSSA violations during the DOL administrative process.” Response at 4.

### *Discussion*

After considering the above applicable standards, undisputed facts, and the positions of the parties, I reach the following conclusions.

First, WMATA is entitled to sovereign immunity. It has the sovereign immunity each of the signatories to the WMATA Compact conferred upon it – that conferred by Congress, that conferred by Maryland, and that conferred by Virginia. *Morris* compels this conclusion.

Second, the limited waiver of sovereign immunity contained in the WMATA Compact does not cover the allegations contained in the complaint. The D.C. Circuit held in *Jones* that “WMATA’s ‘governmental function’ immunity encompasses ‘the hiring, training, and supervision of WMATA personnel,’ which is the kind of conduct for which Jones seeks to hold WMATA liable under the ADEA.” *Jones*, 205 F.3d at 432. That quote applies equally to this case if one were to substitute “Complainant” for “Jones” and “NTSSA” for “ADEA.” *Jones* thus compels this conclusion, as does *Peck*.

Third, Congress did not abrogate WMATA's Eleventh Amendment immunity in the language of the NTSSA. There simply is no language in the NTSSA that either specifically waives a State's sovereign immunity or that specifically includes a State as an entity against which a complaint under the NTSSA can be filed.

The whistleblower provision of the NTSSA states:

A public transportation agency, a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's . . . [whistleblowing activities].

6 U.S.C. § 1142(a). As stated above, the NTSSA and its regulations define "public transportation agency" as "a publicly owned operator of public transportation eligible to receive Federal assistance under chapter 53 of Title 49." 6 U.S.C. §1131(5); 29 C.F.R. § 1982.101(i).

The Act further states: "[a] person who believes that he or she has been discharged or otherwise discriminated against by any *person* . . . may . . . file a complaint with the Secretary of Labor alleging such discharge or discrimination." 6 U.S.C. § 1142(c)(1) (emphasis added). This use of "person" is consistent through the Act and its regulations. *See* 6 U.S.C. § 1142(c)(3)(B); 29 C.F.R. 1982.102(c). In fact, the regulations further clarify: "Respondent means the *person* alleged to have violated NTSSA." 29 C.F.R. 1982.102(c) (emphasis added). Nevertheless, the NTSSA and its regulations fail to provide a definition of "person." While the word "person" is not defined, the use of the word "person" when discussing the respondent is significant. In other statutory constructions, the Supreme Court has held that "person" does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it. *See Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979); *United States v. Mine Workers*, 330 U.S. 258, 275 (1947). Upon reviewing the plain language of the NTSSA, Congress did not make "unmistakably clear" its intent to abrogate the States' sovereign immunity. *Hibbs* thus compels a conclusion that Congress in the NTSSA did not abrogate Maryland's or Virginia's Eleventh Amendment immunity.

I note that the three cases cited by Complainant for the proposition that NTSSA cases against WMATA may be brought in the Department of Labor's administrative process do not appear to have involved assertions of sovereign immunity. Specifically, *Amzi* involved an administrative law judge's approval of a settlement agreement; there is no indication that WMATA asserted sovereign immunity in that case. *Duncan* involved a federal district court noting that the complainant had pursued an administrative action before the Department of Labor but had subsequently removed the case to federal court, and that after the removal the Department of Labor issued a decision; there is no indication that WMATA asserted sovereign immunity in that case. *Ndzerre* involved a federal district court noting that the Department of Labor closed an investigation of the complainant's NTSSA complaint due to a settlement; there is no indication that WMATA asserted sovereign immunity in that case. Accordingly, I find these three cases inapposite because there is no indication that the adjudicators in those cases considered a claim of sovereign immunity as asserted by WMATA in this case.

## **ORDER**

For the foregoing reasons, Respondent's Motion to Dismiss is **GRANTED**. The complaint in this matter is **DENIED** and the hearing of this matter currently set for August 5, 2020, in Washington, D.C. is **CANCELLED**.

**SO ORDERED.**

**PAUL R. ALMANZA**

Associate Chief Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. 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](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions

or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

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. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).