

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 August 2004

Case No.: 2001-SWD-1

In the Matter of:

Joan Taylor,
Complainant

v.

Rhode Island Department of
Environmental Management,
Respondent

RECOMMENDED ORDER OF DISMISSAL

On June 30, 2004, I issued an Order to Show Cause as to why this matter should not be dismissed pursuant to the decision of the First Circuit Court of Appeals in *Rhode Island Department of Environmental Management v. United States*, 304 F.3d 31 (1st Cir. 2002). On July 13, 2004, the Complainant filed her Response to Order to Show Cause. On July 20, 2004, the Respondent filed its objection to the Complainant's Response.

In her Response, the Complainant set out her allegations in her original complaint to OSHA, as well as the procedural history of her claim. The Complainant essentially argued that the employee protection provisions of the Solid Waste Disposal Act are mandatory, and require that the Secretary of Labor **must** provide the Complainant with the opportunity for hearing and issue a decision. According to the Complainant, the Secretary has only two options in this case – she may award the relief as determined by OSHA in its investigation, or she may proceed with a hearing. According to the Complainant, the Secretary cannot dismiss the complaint without providing a hearing.

In its response, the Respondent noted that the First Circuit Court of Appeals and the United States District Court for the District of Rhode Island have made it clear that this action is barred by the doctrine of sovereign immunity, absent intervention by the Secretary of Labor. *See, Rhode Island v. United States*, 304 F.3d 31 (1st Cir. 2003); *Rhode Island v. United States*, 301 F.Supp. 2d 151 (D.R.I. January 2004), *appeal withdrawn*.

The Respondent also pointed out that the statute cited by the Complainant as divesting the Secretary of any discretion in reviewing her claim, 42 U.S.C. §6971(b), applies to the Office

of Administrative Law Judges, not the Secretary as a party to an action; it does not divest the Secretary of discretion in reviewing a claim.

The Respondent argued that the Secretary cannot be compelled to perform an administrative action regardless of its merit. The First Circuit did not order the Secretary to intervene in this matter, but modified its order enjoining the administrative proceedings to allow the Secretary, at her discretion, to intervene in the proceedings before the Administrative Law Judge.

DISCUSSION

The Complainant's response to my Order to Show Cause fails to address the determinative issues in this claim. The Complainant has conveniently ignored the determinations of the First Circuit District Court and Court of Appeals, that the doctrine of sovereign immunity, as embodied in the Eleventh Amendment to the Constitution, bars the adjudication of this matter unless the Secretary intervenes while the matter is before the Office of Administrative Law Judges. Nothing in the decision of the First Circuit District Court or Court of Appeals can be read to even remotely suggest that the Secretary is **required** to intervene in these matters.

Nor has the Complainant provided any support for the suggestion that I have the authority to order the Secretary to intervene, despite her determination that she will not do so, and to further order the Secretary to provide the Complainant with a hearing. My determination in this matter is a recommendation to the Secretary, and thus the Complainant is asking that I recommend that the Secretary order herself to intervene, and that I further recommend that the Secretary compel herself to order me to conduct a hearing. I do not have any such authority.

The Secretary has determined that she will not intervene in this matter. Thus, this claim must be dismissed pursuant to the decision of the First Circuit Court of Appeals in *Rhode Island Department of Environmental Management v. United States, supra*, as it is barred by the doctrine of sovereign immunity.

RECOMMENDED ORDER

Based upon the foregoing, I recommend that an Order be entered dismissing the Complainant's claim.

A

LINDA S. CHAPMAN
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.