



Issue Date: 30 December 2005

Case No.: 2005-TSC-00003

In the Matter of:

KAREN YAGLEY

Complainant

v.

HAWTHORNE CENTER OF NORTHVILLE

Respondent

**RECOMMENDED ORDER DISMISSING
COMPLAINT ON SUMMARY DECISION**

Complainant, Karen Yagley, filed a complaint against Respondent, Hawthorne Center of Northville under the whistleblower 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. Complainant alleges that Respondent terminated her total disability benefits after she filed complaints alleging Respondent was violating various environmental concerns. Complainant maintains she is entitled to damages. Complainant originally filed her complaint with OSHA who found it lacked merit. On April 25, 2005, Complainant appealed to the Office of Administrative Law Judges. A formal hearing was scheduled for January 10, 2006. On November 25, 2005, Respondent filed a Motion for Summary Decision. Complainant was given twenty days to file a response. Complainant then called the Office of Administrative Law Judges and asked for a ten-day extension which was granted. Complainant has never filed a response to the Motion for Summary Decision. Instead Complainant filed a Motion to Stay the Proceedings.

I have carefully considered the parties’ arguments, and I shall address the motions in turn.

Findings of fact and conclusions of law

The Rules of Practice and Procedure for administrative hearings are set forth at 29 C.F.R. Part 18. Summary Judgment can be granted “if the pleadings, affidavits, material obtained by discovery...or matters officially noticed show that there is no genuine issue as to any material fact.” 29 C.F.R. § 18.40(d). Respondent as the moving party has the burden to prove Complainant’s case lacks evidence to support her claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The Court must look at the record as a whole and determine whether the fact finder could rule in Complainant’s favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The evidence must be construed in favor of Complainant. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

Respondent alleges in its motion that the Office of Administrative Law Judges lacks subject matter jurisdiction over Complainant's complaint under the doctrine of sovereign immunity. The Eleventh Amendment provides, "[t]he 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." U.S. Const. amend. XI. *See also Hans v. Louisiana*, 134 U.S. 1 (1890). The Constitution does not provide the federal judiciary jurisdiction over suits against non-consenting states. *Id.* The Supreme Court has expanded this concept and stated that state sovereign immunity extends to adjudications before administrative law judges. *Fed. Mar. Comm'n v. SC State Ports Auth. et. al.*, 535 U.S. 743, 760 (2002), *see also Seminole Tribe of Fla. V. Florida*, 517 U.S. 44 (1996). "The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court." *Id.*

Respondent, Hawthorne Center of Northville is a state-operated psychiatric facility for children. The facility is owned and operated by the Michigan Department of Health. As a state agency, Respondent is protected by the doctrine of sovereign immunity. However, sovereign immunity is not an absolute right. *College Savings Bank v. Fla. Prepaid Postsecondary Edu. Expense Bd.*, 527 U.S. 666, 670 (1999). There are two exceptions to the doctrine of sovereign immunity. *Id.* First, a state can waive its rights to sovereign immunity. *Id.* However, a state can only waive its right by making a "clear declaration" of waiver or by voluntarily invoking federal jurisdiction. *Id.* at 675-6. There is no evidence in this case to prove Respondent has waived its rights to sovereign immunity.

Second, Congress can expressly abrogate the right of sovereign immunity. However, "Congress may abrogate the States' Constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Kimel v. Fla. Bd. Regents*, 528 U.S. 62, 73 (2000), *citing Dellmuth v. Muth*, 491 U.S. 223 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)). Congress must also have the power to abrogate under the Constitution. *Id.* Congress does not expressly abrogate State sovereign immunity under 42 U.S.C. § 7622 of the CAA or 15 U.S.C. § 2622 of the TSCA. Although the CAA and TSCA require states to conform to their regulatory provisions, the acts do not provide for private rights of action against state agencies for monetary damages. *Powers v. Tenn. Dept. of Env't & Conservation & Tenn. Military Dept.*, ARB Nos. 03-061 and 03-125, ALJ Nos. 2003-CAA-8 and 16 (ARB Aug. 16, 2005). In *Powers*, the Administrative Review Board held that,

[P]ursuant to TSCA, an "employer" is prohibited from discriminating against whistleblowers, but only a "person" who discriminated is subject to the process and remedies for discrimination. 15 U.S.C.A. § 2622(a)-(b)(1). Because "person" is not defined in TSCA to include a state, there was no unequivocal abrogation of sovereign immunity. Under CAA, an "employer" is prohibited from discriminating against whistleblowers, 42 U.S.C.A. § 7622(a), but only a "person" who discriminated is subject to the process and remedies for discrimination. § 7622(b). Although "person" is defined in CAA to include states, § 7602(e), "employer" is not defined to include states. There is thus no unequivocal abrogation of sovereign immunity. In addition, § 7604 permits citizen suits for enforcement, but only "to the extent permitted by the Eleventh Amendment." § 7604(a)(1)(ii).

Id. at 7.

Therefore, Respondent has the right of state sovereign immunity in this case. The state has neither waived its right to immunity nor has Congress expressly and unequivocally abrogated the right. Since I have held that Congress did not intend to abrogate state sovereign immunity under 42 U.S.C. § 7622 of the CAA or 15 U.S.C. § 2622 of the TSCA, I do not need to address whether the Constitution gave Congress the power to abrogate the right.

Furthermore, Complainant's complaint does not fall under the statutory "lead-based paint" exception to sovereign immunity. Although Complainant made environmental complaints regarding lead-based paint at Respondent, Section 2688 of the Toxic Substances Control Act, providing a waiver of sovereign immunity in relation to lead-based paint enforcement requirements, does not apply to this case. Complainant filed her complaint under Section 2622. In *Stephenson v. NASA et. al.*, 94-TSC-00005, Sec. Dec. and Ord. of Rem., July 3, 1995, the Secretary of Labor held that the lead-based paint exception to sovereign immunity does not apply to the whistleblower protection provisions of the Toxic Substances Control Act.

Therefore, Respondent's Motion for Summary Decision is hereby GRANTED and Complainant's Motion for a Stay of the Proceedings is moot. Complainant's complaint is recommended to be DISMISSED with prejudice. Accordingly, the hearing scheduled for January 10, 2006 is canceled.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).

