U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

BARDEN CANNAMELA, **ARB CASE NO. 02-106**

COMPLAINANT, **ALJ CASE NO. 2002-SWD-2**

v. **DATE: September 30, 2003**

STATE OF GEORGIA,
DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL PROTECTION DIVISION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Curtis G. Shoemaker, Esq., *Watkinsville, Georgia*

***For the Respondent*:**
Annette M. Cowart, Esq., Assistant Attorney General, Bryan K. Webb, Esq., Senior Assistant Attorney General, Dennis R. Dunn, Esq., Deputy Attorney General, Thurbert E. Baker, Esq., Attorney General, *Atlanta, Georgia*

FINAL DECISION AND ORDER

Barden Cannamela claimed that his employer, Respondent Environmental Protection Division of the State of Georgia's Department of Natural Resources, violated the employee protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.A. §§ 9610-9675 (West 1995) and the Solid Waste Disposal Act (SWDA), 42 U.S.C.A. §§ 6901-6992 (West 1995). The Respondent, a political subdivision of the State of Georgia, filed a Motion to Dismiss, asserting that it was immune from

prosecution by Cannamela, a private citizen, under U.S CONST. amend. XI.[1] By Recommended Decision and Order dated July 26, 2002 (R. D. & O.), an Administrative Law Judge (ALJ) granted the Respondent's Motion to Dismiss. For reasons stated below, we affirm.

BACKGROUND[2]

The Complainant was an employee of the State of Georgia's Department of Natural Resources. He raised concerns with his employer regarding alleged waste and misuse of funds under the Georgia Scrap Tire Program and the Solid Waste Trust Fund. Cannamela claimed that his employer involuntarily transferred him, denied him pay raises and committed other acts of harassment and discrimination as a result of his allegations.

On October 3, 2001, Cannamela filed a complaint with the Secretary of Labor under the employee protection provisions of the CERCLA and the SWDA. In accordance with normal procedures, Cannamela's complaint was forwarded to the Occupational Safety and Health Administration (OSHA) for investigation. In a report dated April 5, 2002, OSHA found that Cannamela had not engaged in protected activity because the Georgia Scrap Tire Program and the Solid Waste Trust Fund were State programs not mandated nor regulated by the implicated federal statutes. Cannamela requested a formal hearing before a Department of Labor (DOL) ALJ.

Prior to the hearing, the ALJ conducted a phone conference with the parties to determine whether the Respondent would be claiming immunity under the Eleventh Amendment. On May 28, 2002, the Supreme Court issued its decision in the case of *Federal Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743 (2002) (sovereign immunity applies to administrative proceedings). On May 31, 2002, the ALJ issued an Order canceling the scheduled hearing and directing the parties to file any motions or briefs addressing the impact of the Supreme Court's decision.

The Respondent filed a Motion to Dismiss pursuant to 29 C.F.R. § 18.40 (2002) (Motion for Summary Decision) claiming sovereign immunity under the Eleventh Amendment. Cannamela filed a response arguing that the holding in *Federal Maritime Comm'n* was not applicable to the instant proceeding because the proceeding was investigative and not adjudicatory.

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[1] U.S CONST. amend. XI provides in part: "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 . . .."

[2] For facts that do not appear in the ALJ's R. D. & O. and the briefs of the parties, we rely on OSHA's April 5, 2002 decision letter and Cannamela's October 3, 2001 complaint, which are in the record, and construe those facts in the light most favorable to Cannamela as the non-moving party.

The ALJ found that Cannamela was a private citizen, that the Respondent, by filing its Motion for Summary Decision, had clearly not consented to being sued and that the Department of Labor had not elected to prosecute the matter. R. D. & O. at 2. In light of these findings and the fact that the formal hearing process was adjudicatory, the ALJ recommended dismissing Cannamela's complaint with prejudice on the ground of sovereign immunity. R. D. & O. at 3. The Complainant then filed a timely appeal with this Board.

ISSUE PRESENTED

We consider whether the ALJ correctly dismissed the Complainant's private federal claims against the Respondent State of Georgia Department of Natural Resources based upon sovereign immunity.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's recommended decision pursuant to 29 C.F.R. § 24.8 (2002) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases under the statutes listed in 29 C.F.R. § 24.1(a), including, inter alia, 42 U.S.C.A. § 6971 and 42 U.S.C.A. § 9610, the whistleblower protection provisions of the SWDA and the CERCLA).

The Board reviews an ALJ's recommended grant of summary decision de novo, i.e., the same standard that the ALJ applies in initially evaluating a motion for summary judgment governs our review. *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB March 25, 2003). Accordingly, the Board will affirm an ALJ's recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-moving party, we conclude that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law.

DISCUSSION

1. Sovereign immunity bars Cannamela's complaint.

We hold that state sovereign immunity bars the adjudication of the Complainant's federal environmental whistleblower complaint before a DOL ALJ.

States enjoy sovereign immunity from prosecution in federal courts under the Eleventh Amendment as well as the Constitution's structure, history and the general body of Supreme Court case law. *Alden v. Maine,* 527 U.S. 706, 713 (1999). This immunity from prosecution extends to state-court suits as well. *Id.* at 733. Congress lacks the power to abrogate the states' sovereign immunity under Article I of the Constitution. *Seminole Tribes of Fla. v. Florida,* 517 U.S. 44 (1996). However, Congress may abrogate such immunity if it acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment and makes its intention to abrogate

unmistakably clear in the language of the statute. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976).

States may also voluntarily waive their immunity. For example, where Congress unambiguously conditions waiver of Eleventh Amendment immunity upon the receipt of federal funds, and a state continues to receive such funds, the state has waived its immunity. *Garrett v. University of Ala.,* Nos. 02-16078, 02-16186, 02-16408, 02-16455, 2003 WL 22097772 *3 (11th Cir. Sept. 11, 2003). *See also C & L Enter., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.,* 532 U.S. 411 (2001) (by entering into a contract with binding arbitration clause Indian tribe waived its sovereign immunity).

Recently, the Supreme Court has clarified that states also enjoy sovereign immunity in administrative proceedings that sufficiently resemble civil litigation in federal courts. *Compare Federal Maritime Comm'n v. South Carolina Ports Auth.,* 535 U.S. 743 (2002) (similarities between FMC's proceedings and federal civil litigation overwhelming) *with Tennessee v. United States Dep't of Transp.,* 326 F.3d 729 (6th Cir. 2003) (proceeding was informal rule-making rather than adjudication and therefore did not violate amend. XI). *See also Rhode Island Dep't of Envtl. Mgmt. v. U.S.,* 304 F.3d 31 (1st Cir. 2002) (state's immunity from suit extends to adversarial administrative proceedings prosecuted against state by private party); *Connecticut Dep't of Envtl. Prot. v. OSHA,* 138 F. Supp. 2d 285, 296-97 (D. Conn. 2001) (filing with OSHA of a whistleblower complaint by a private party against a state agency violated that state's sovereign immunity); *Florida v. United States,* 133 F. Supp. 2d 1280 (N.D. Fla. 2001) (administrative hearing under CERCLA and SWDA whistleblower provisions, among others, violated state's sovereign immunity); *Ohio Envtl. Prot. Agency v. United States Dep't of Labor,* 121 F. Supp. 2d. 1155 (S.D. Ohio 2000) (CERCLA and SWDA whistleblower complaint proceedings before ALJ and Administrative Review Board violated state's sovereign immunity).

In their pleadings before this Board, the parties reiterate the arguments in their briefs before the ALJ.

Cannamela argues that the Supreme Court's holding in *Federal Maritime Comm'n.* is relevant solely for administrative adjudications. He claims that the instant case is not an adjudication but is an investigation because, under the scheme laid out under the CERCLA and SWDA and the implementing regulations, "[t]he Administrative Law Judge is simply performing an investigative function which results in a report to the Secretary of Labor." Complainant's Brief at 1-2. Cannamela claims that "the ALJ does not make the finding of whether or not a violation has occurred nor does he order relief of any sort. Those decisions are made by the Secretary of Labor in her executive capacity." *Id.* at 2. Cannamela asserts that it is only after the Secretary of Labor makes her findings of fact and orders action that judicial review, which involves considerations of sovereign immunity, enters the statutory scheme. *Id.*

The Respondent disputes Canamella's statutory interpretations, claiming they are "overly literal and disregard the authority of the Secretary of Labor, as an arm of the Executive branch of the federal government, to delegate statutory authority within the Department, *e.g.*, to its ALJs."

Brief of Respondent at 2-3. The Respondent notes that both the CERCLA and the SWDA specify that the term "Secretary" shall mean the Secretary of Labor or his or her designee. *Id.* at 3. The Respondent argues that these designees, acting throughout the investigation and adjudication of whistleblower complaints under the procedures set forth at 29 C.F.R. § 24, perform adjudications within the meaning of the Supreme Court's holding in *Federal Maritime Comm'n*. *Id.*

The earlier-cited principles and cases make it clear that the ALJ hearing on the Complainant's whistleblower complaint is adjudicatory, not investigative. Cannamela cites no contradictory case law. We therefore reject Cannamela's contention that the Respondent is not protected by sovereign immunity.[3]

2. Summary decision is appropriate.

Because the Complainant, as non-moving party, failed to raise any disputed issues of material fact, the Respondent is entitled to summary decision as a matter of law.

The Rules for Practice and Procedure for Administrative Law Judges, 29 C.F.R. § 18.40, permit an ALJ to enter a summary decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." *Id.* Moreover, "[w]hen a motion for summary decision is made and supported as provided in [§ 18.40] a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). In deciding a motion for summary decision, we view the factual evidence in the light most favorable to the nonmoving party. *Johnsen v. Houston Nana, Inc., JV,* ALJ No. 99-TSC-4, ARB No. 00-064, slip op. at 4 (ARB Feb. 10, 2003) ("[I]n ruling on a motion for summary decision we . . . do not weigh the evidence or determine the truth of the matters asserted. Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact.") (internal citation and quotation marks omitted); *Stauffer v. Wal-Mart Stores, Inc.*, ALJ No. 99-STA-21, ARB No. 99-107 (ARB Nov. 30, 1999).

However, if the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial," there is no genuine issue of material fact and the proponent is entitled to summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2550 (1986). *See Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42, slip op. at 5-6 (Sec'y July 4, 1995).

In the present case the ALJ found: "it is not disputed that the Complainant in this case is

[3] At the conclusion of its investigation, OSHA rejected Cannamela's complaint. The DOL has declined to participate further in Cannamela's case.

a private citizen and that the Respondent is an agency of the State of Georgia. Further, by filing its motion to dismiss, the State of Georgia has clearly indicated that it does not consent to being sued in this forum." R. D. & O. at 2. In deciding this case on a Motion for Summary Decision, the ALJ assumed without evidence in the record that the State of Georgia's Department of Natural Resources had not previously voluntarily waived its sovereign immunity. Nevertheless, the burden fell upon Cannamela to establish through affidavits or otherwise a genuine issue of material fact. In his response, the Complainant never suggested that sovereign immunity had been voluntarily waived. In the absence of a genuine issue of material fact, entry of judgment for the State via summary decision was proper.

CONCLUSION

The Respondent's sovereign immunity bars Cannamela, as a private citizen, from prosecuting his whistleblower complaint. We **DISMISS** Cannamela's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge