



**In the Matter of:**

**ROBERT FARMER,**

**ARB CASE NO. 04-002**

**COMPLAINANT,**

**ALJ CASE NO. 2003-ERA-11**

**v.**

**DATE: December 17, 2004**

**ALASKA DEPARTMENT OF  
TRANSPORTATION AND PUBLIC FACILITIES,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Billie Pirner Garde, Esq., Clifford & Garde, Washington, D.C.**

*For the Respondent:*

**Gregg D. Renkes, Attorney General, Gary W. Gantz, Assistant Attorney General, State of Alaska, Office of the Attorney General, Anchorage, Alaska**

### **FINAL ORDER OF DISMISSAL**

Robert Farmer filed a whistleblower complaint against the Alaska Department of Transportation and Public Facilities (the Department) under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003), and its implementing regulations at 29 C.F.R. Part 24 (2004). He alleged that the Department took adverse employment actions against him in retaliation for raising nuclear safety concerns with management at the Department and with the Nuclear Regulatory Commission (NRC).

A United States Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed the Department on the ground of state sovereign immunity. Order Denying Request to Withdraw from Case Without Prejudice and Recommending Decision and Order Dismissing Complaint (R. D. & O.). Farmer then appealed to the Administrative

Review Board (ARB or Board). For the reasons stated herein, we affirm the dismissal of Farmer's complaint.

## BACKGROUND

Farmer was hired as the Alaska Department's radiation safety officer on October 8, 1998. The Nuclear Regulatory Commission licensed the Department to use and store nuclear materials for the purposes of measurement of construction and other building materials. On December 14, 1998, Farmer reported to his management that nuclear devices were stored too close to members of the public, and on October 16, 2001, he reported to the Nuclear Regulatory Commission that a member of the public may have incurred an "over exposure" to nuclear material. Complaint to Occupational Safety and Health Administration (OSHA), September 19, 2002.

Farmer claims to have suffered a series of adverse employment actions. These actions began with an extension of his probation on September 24, 1999, and continued through a demotion, three unacceptable performance evaluations, a verbal reprimand, a letter of instruction, and a letter of reprimand, and culminated in a meeting (presumably about his employment status) on September 5, 2002. *Id.* Farmer filed a complaint with OSHA on September 19, 2002, contending that the Department had retaliated against him as a consequence of his safety complaints. After an investigation, OSHA issued a report on March 26, 2003, dismissing the complaint for lack of merit. OSHA, Notice of Determination, March 26, 2003. Farmer appealed and requested an evidentiary hearing.

On June 30, 2003, before the evidentiary hearing was due to commence, the ALJ issued an Order to Show Cause why the case against the Department should not be dismissed on the basis that state sovereign immunity bars a federal administrative agency (in this case, the DOL Office of ALJs) from adjudicating a private party's complaint against a non-consenting state (here, the Department, an agency within the State of Alaska). On August 14, 2003, Farmer, appearing pro se at the time, filed a three paragraph letter. Complainant's Response to Order to Show Cause. On September 5, 2003, the State of Alaska submitted a brief response, asserting (for the first time in the case) an immunity defense and saying that Farmer, as a state employee, had an adequate remedy for his whistleblower claim under state statutory law. See State of Alaska's Response to Order to Show Cause. On September 19, 2003, the ALJ issued an order denying Farmer's request to withdraw his pending complaint without prejudice, and recommending dismissal of his complaint with prejudice based upon the Department's immunity from suit. R. D. & O. at 3, 5.

Farmer then exercised his right to appeal to the Board, and, by then represented by counsel, inquired whether the Board would consider remanding the dispute to the ALJ for further consideration of the immunity issue. The Board advised Farmer's counsel that

it would not entertain a motion to remand and therefore established a briefing schedule. Notice of Appeal and Order Establishing Briefing Schedule, October 9, 2003. Both parties have filed briefs. We now consider whether state sovereign immunity bars DOL adjudication of Farmer's ERA whistleblower claim.<sup>1</sup>

## DISCUSSION

### I. The legal standards

The Board has jurisdiction to review the ALJ's recommended decision pursuant to 29 C.F.R. § 24.8 (2004) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (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)).

Because the ALJ considered pleadings in addition to Farmer's complaint, we treat the ALJ's dismissal as a summary decision pursuant to 29 C.F.R. § 18.40, 18.41. See *Demski*, slip op. at 3; *Ewald v. Commonwealth of Va., Dep't of Waste Mgmt.*, ARB No. 02-027, ALJ No. 1989-SDW-1, slip op. at 3, n.6 (ARB Dec. 19, 2003). The standard for

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<sup>1</sup> The ERA provides that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" engages in certain enumerated protected activities, i.e., notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C.A. § 2011 et seq. (West 2003)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions of the ERA or AEA, or commences, causes to be commenced, or testifies, assists, or participates in a proceeding under the ERA or AEA. 42 U.S.C.A. § 5851(a)(1) (emphasis added). A complainant must file a complaint of unlawful discrimination within 180 days of the violation. 42 U.S.C.A. § 5851(b)(1).

To prevail under the ERA, a complainant must prove by a preponderance of the evidence that he was an employee who engaged in protected activity, that the employer knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action the employer took. 42 U.S.C.A. § 5851(b)(3)(C); *Lydia Demski v. Indiana Mich. Power Co.*, ARB No. 02-084, ALJ No. 01-ERA-36, slip op. at 3 (ARB Apr. 9, 2004); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 5-8 (Sept. 30, 2003); *Paynes v. Gulf States Utilities*, ARB No. 98-045, ALJ No. 93-ERA-47, slip op. at 4-5 (ARB Aug. 31, 1999). However, "[r]elief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior [i.e., the protected activity]." 42 U.S.C.A. § 5851(b)(3)(D); *Demski*, slip op. at 4; *Kester*, slip op. at 7. Since this case is decided on state sovereign immunity grounds, we do not reach and have no opinion about the timeliness of Farmer's whistleblower complaint or its underlying merits.

granting summary decision in whistleblower cases is the same as summary judgment under the analogous Fed. R. Civ. P. 56(e). There must be no material issue of fact and the prevailing party must be entitled to judgment as a matter of law. 29 C.F.R. §§ 18.40, 18.41; *Demski*, slip op. at 3. The ARB reviews an ALJ's recommended grant of summary decision de novo. *Demski*, slip op. at 4; *Ewald*, slip op. at 4.

Under the Eleventh Amendment<sup>2</sup> and Supreme Court case law involving sovereign immunity, a private party cannot sue a state in federal court, e.g., *Alden v. Maine*, 527 U.S. 706, 713 (1999), unless Congress has abrogated sovereign immunity under its power to enforce the Fourteenth Amendment, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), or the state has waived its immunity by consenting to suit, e.g., *Clark v. Barnard*, 108 U.S. 436, 447-448 (1883). The intent to abrogate or waive immunity must be unmistakably clear. E.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (abrogation); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (waiver).<sup>3</sup> State sovereign immunity bars a federal administrative agency from adjudicating a private party's complaint against a non-consenting state. *Federal Mar. Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 760 (2002); *Rhode Island Dep't of Envtl. Mgmt. v. U.S.*, 304 F.3d 31 (1st Cir. 2002).

Our decisions discuss the application of the defense of state sovereign immunity to private party whistleblower claims over which the DOL has jurisdiction. In *Cannamela v. State of Ga. Dep't of Natural Res.*, ARB No. 02-106, ALJ No. 2002-SWD-2 (ARB Sept. 30, 2003), the complainant claimed that his employer, the environmental protection division of a state 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). Citing *Federal Mar. Comm'n*, we held that state sovereign immunity barred the adjudication of the complainant's federal environmental whistleblower complaint before a DOL ALJ. *Cannamela*, slip op. at 3.

Likewise, in *Ewald*, the complainant alleged that a state department of waste management fired and blacklisted her because she engaged in activity protected under the whistleblower protection provisions of the CERCLA, the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6971 (West 2003) (RCRA, now also known as the Solid

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<sup>2</sup> “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.” U.S CONST. amend. XI.

<sup>3</sup> Cf. *Nevada Dep't of Human Res. v. Hibbs*, 123 S. Ct 1972, 1976 (2003) (Congress made its intention to abrogate Eleventh Amendment immunity unmistakably clear in language of Family Medical Leave Act of 1993, 29 U.S.C.A. §§ 2601-2654 (West 1999)).

Waste Disposal Act (SWDA)), the Clean Water Act, 33 U.S.C.A. § 1367 (West 2001) (CWA), and the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i) (West 2003) (SDWA). There, we ruled that the employee protection provisions of the environmental statutes at issue did not unmistakably indicate that Congress intended to abrogate state sovereign immunity from whistleblower complaints. Even though CERCLA provides that no “person” shall discriminate against a whistleblower employee and “person” is defined to include a state, we concluded that that was not sufficient to confer a private right of action for discrimination. *Ewald*, slip op. at 6. On the question of waiver, we considered but rejected the complainant’s argument that Congress conditioned the state’s acceptance of federal environmental clean-up money on its waiver of immunity. We reiterated that waiver occurs only “by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.” *Ewald*, slip op. at 8, quoting *Edelman* at 673.

A federal court enjoined the adjudication phase of environmental whistleblower complaints filed with the DOL. *Rhode Island v. United States*, 301 F. Supp. 151 (D. R.I. 2004); see also *Rhode Island v. United States*, 301 F. Supp. 2d 151 (D. R.I. 2004), modified *Rhode Island Dep’t of Envtl. Mgmt. v. United States*, 304 F.3d 31 (1st Cir. 2002). In the course of implementing the order and dismissing the complaints, we noted that a state’s request for a hearing that moved the claim from the investigation to adjudication phase did not constitute a waiver of sovereign immunity, but rather was a necessary step in obtaining an ALJ determination that immunity applied. *Taylor v. Rhode Island Dep’t of Envtl. Mgmt.*, ARB No. 04-166, ALJ No. 2001-SDW-1, slip op at 7-8 (ARB Nov. 29, 2004); accord *Migliori v. Rhode Island Dep’t of Envtl. Mgmt.*, ARB No. 04-156, ALJ No. 2000-SDW-1 (ARB Nov. 30, 2004).

In *Pastor v. Department of Veterans Affairs*, ARB No. 99-071, ALJ No. 99-ERA-11 (ARB May 30, 2003), we considered whether Congress has waived the Federal Government’s sovereign immunity against a claim for monetary damages under the whistleblower protection provision of the ERA. The Department of Veterans Affairs was a Nuclear Regulatory Commission licensee and licensees could not discriminate against whistleblowers. However, we held that the prohibition on discrimination was insufficient to establish that the VA waived sovereign immunity to permit an award of money damages. Slip op. at 13-14. We noted that “employers” were prohibited from discriminating against whistleblowers, but only “persons” who discriminated were subject to the process and remedies for discrimination. *Id.* at 15. And because “persons” was not defined in the ERA to include the Federal Government, there was no unequivocal waiver of sovereign immunity. *Id.* at 19.

## **II. Application**

Against this background, we now consider Farmer’s contention that sovereign immunity does not bar his ERA whistleblower complaint. Before the ALJ, Farmer raised three points in his letter response to the Order to Show Cause, and we consider those first. Farmer asserted that he was not acting as a private citizen, but in furtherance of his official duties as the Department’s radiation safety officer. Complainant’s Response to

Order to Show Cause, at 1. But as the ALJ noted, R. D. & O. at 4, the remedy Farmer sought for alleged retaliation was money damages for himself against the Department, and state sovereign immunity bars such a claim. *Federal Mar. Comm'n; Rhode Island Dep't of Env'tl. Mgmt.*

Next, Farmer noted that his position was federally mandated and that his investigations and activities were funded by the U. S. Department of Transportation, Federal Highway Administration. Complainant's Response to Order to Show Cause, at 1. Therefore, he argued, by accepting federal funding, the State of Alaska "implicitly" agreed to federal jurisdiction, i.e., waived state sovereign immunity. *Id.* at 1-2. Citing *Atascadero*, the ALJ ruled that "mere receipt of federal funds cannot establish that a state has consented to being sued." R. D. & O. at 4. We have held before, and so rule here, that acceptance of federal funds unaccompanied by an express, unambiguous waiver of immunity is insufficient to confer a private right of action for discrimination. *Accord Ewald*, slip op. at 7-9.

Farmer's third argument was that the State of Alaska grants immunity to individuals and indemnification for official actions pursuant to a collective bargaining agreement. "Therefore, the State of Alaska has agreed to act on behalf of individuals and is a real party in interest." Complainant's Response to Order to Show Cause, at 2. The ALJ observed that "[a]n immunity and indemnification agreement is not an explicit waiver of sovereign immunity." R. D. & O. at 4. We agree. The state's election to indemnify employees for official acts does not change the character of Farmer's complaint from one brought by a private party to one brought by the government. Insofar as it is a restatement of his first point, Farmer's third point fails to establish a waiver of immunity.

Now, on appeal to us, Farmer asks us to consider a new argument: Because it is a licensee, the Department has agreed to comply with NRC rules and regulations against discrimination. See Complainant's Request for Review, Reinstatement and Remand, 6-10. As we stated in our order denying the complainant's motion to remand this case for reconsideration of this new argument, "The Board . . . will not consider issues raised for the first time on appeal." Notice of Appeal and Order Establishing Briefing Schedule, October 9, 2003, citing *Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 01-103, ALJ No. 97-SDW-7, slip op. at 9 (May 29, 2003).

Nevertheless, we note that Farmer's argument is not new to this Board. In *Pastor*, we held that the prohibition on discrimination as a condition of an NRC license was not enough to show that the government agency consented to a discrimination suit that included an award of money damages. *Pastor*, slip op. at 13-14. We observed that, to be subject to the process and remedies for discrimination, the employer must be a "person," which was not defined in the ERA itself to include the Federal Government. *Id.* at 15, 19. And in *Ewald*, we said that, even if a state department was a "person" subject to a non-discrimination provision, the intent to confer a private right of action for damages against it must be unmistakable from the "overwhelming implication of the text." *Ewald*, slip op. at 6, 8.

Similarly, Farmer has not pointed to an ERA definition of “person” that includes a state government or agency, such as the Department, or the unmistakable intent to confer a private right of action against the state for money damages; and thus, his new argument would fail.

### **CONCLUSION**

The ALJ properly granted summary decision in favor of the Alaska Department of Transportation and Public Facilities. Because state sovereign immunity was neither abrogated nor waived under the circumstances, Farmer’s ERA whistleblower complaint is **DISMISSED**.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**